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GUARANTEES OF CONSTITUTIONAL ADJUDICATION: SPECIFIC ASPECTS OF THE JUDICIAL INDEPENDENCE IN HUNGARY, GERMANY, POLAND, AND MYANMAR

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Declaration for Plagiarism

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SUPERVISOR'S RECOMMENDATION

For doctoral dissertation "Guarantees of Constitutional Adjudication: Specific Aspects of the Judicial Independence in Hungary, Germany, Poland, and Myanmar" written by Nge Nge Aung

Issues related to constitutional justice, the rule of law and guarantees of legal certainty are gaining ground today. Today, the functioning of the Member States of the European Union and any democratic state governed by the rule of law is inconceivable without constitutional review. The rise of the constitutional judiciary is also increasingly aimed at enforcing the norms of international law. The starting point of the doctoral dissertation is the presentation of the concept of constitutional justice and the international and European aspects of the independence of the judiciary. In her dissertation, the author presents the issue of constitutional justice using a descriptive-analytical and comparative method.

The doctoral candidate places the analysis and evaluation of the independence of the Hungarian, Polish and Myanmar judicial systems in one of her research focuses. The author specifically addresses the issue of the system of separation of powers, presents in detail the process of the formation of constitutional justice, examines the constitutional regulations of the states concerned, clarifies the issues of competence, and also presents specific cases.

The main backbone of the dissertation is the examination by the German Federal Constitutional Court. The author approaches the issue from two directions. On the one hand, it presents in detail the powers of the Federal Constitutional Court, separates the constitutional judiciary of the member states from the federal level, and explains the issue of the interpretation of the Basic Law. It examines in detail the issue of the appearance of human rights in the constitutional judiciary. On the other hand, the doctoral candidate examines the issue of German federal constitutional justice from the perspective of the norms and standards of the European Union. The doctoral candidate's research covers in detail the fundamental legal values of the European Union, the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, the fundamental values of German constitutional law, subsidiarity and proportionality, the principles of transfer and legal certainty. The author presents the research question with aspects of international law, systematically from a practical and dogmatic point of view, with a logically well-structured line of thought.

The actual research's objective of the dissertation is for the author's home country, Myanmar. Because Myanmar is trying to implement democracy and tranquillity. So, her studies of the establishment of constitutional courts in Hungary, Poland and Germany are reasonable. Although Hungary and Poland did not obey some regulations of the European Union, there are several landmark decisions that are sampled for the legal justice.

The author's profound proficiency is confirmed by the fact that her dissertation is interdisciplinary, she has carried out her research with sufficient thoroughness, she also

examines concepts and issues in several fields of law. The author presents the examined topic along a unified logical system in the framework of comparative analysis.

The authors focuses on the specific aspects of the judicial independence in Hungary, Germany, Poland, and Myanmar. The composition of the constitutional court, the professionalism of the members, the scope of competencies, the accessibility of the constitutional courts, the legal effects of the constitutional courts' resolutions are mentioned. Qualitaive and quantative methodologies are applied as the author expressed the legal theories and cases as well. The author approaches the case study analysis to improve her logical thinking skill. The conclusions and findings are, therefore, developed and different form the others.

The author strictly adhered to the formal and content requirements during the preparation of the doctoral dissertation, its scope meets the expected requirements. The structure of the dissertation is logical, clear, the author has elaborated the available literature with sufficient thoroughness, the answer to the research question is successful, and this is presented in the dissertation with sufficient richness through logical descriptive and comparative analyzes and legal cases.

Debrecen, 2022. June 13.

Dr. Szűcs Lászlóné Dr. habil. Siska Katalin

supervisor

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I want to express my special thanks to my supervisor, Dr. Szűcs Lászlóné Dr. habil. Siska Katalin for her kindly supervision and encouragement to complete my dissertation successfully. I also want to thank Prof. Dr. Bencze Mátyás as my first supervisor, and I got a lot of help from him when I arrived in Hungary. It would not be complete if I did not thank the Tempus Public Foundation principal, who awarded me the Stipendium Hungaricum Scholarship to research the "Guarantees of Constitutional Adjudication: Specific Aspects of the Judicial Independence in Hungary, Germany, Poland and Myanmar."

The honorable persons I must say "thanks" to are Prof. Dr. Szabadfalvi József, DSC Professor of Law, Members of the Doctoral Committee, and the Coordinator Pro. Zaccaria Márton Leo and the professors from the Marton Geza Doctoral School of Legal Studies for their unique advice and support. I would love to earnestly acknowledge the sincere effort of our class teachers for the first two years to complete our complex exam. Finally, I am obliged to the staff of the DEENK library for their kindly guidance in accessing the necessary information for my dissertation.

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My expression of saying thanks goes to my parents, elder sister, younger brother, and friends from Hungary and Myanmar for their motivational support when I live in Hungary to smoothly finish this valuable Ph.D. dissertation in my life.

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Contents

Abbreviations

1. ASEAN	Association of Southeast Asian Nations
2. Art/s	Article/s
3. BL	Basic Law
4. CC	Hungarian Constitutional Court
5. CDC	Central District Court
6. CJC	Canadian Judicial Council
7. CJEU/ECJ	European Court of Justice
8. ECSC	European Coal and Steel Community
9. ECB	European Central Bank
10. EAW	European Arrest Warrant
11. EC	European Communities
12. EEC	European Economic Community
13. EU/ the Union	European Union
14. ECHR	European Convention of Human Rights
15. ECtHR	European Court of Human Rights
16. Euratom	European Atomic Energy Community
17. FL	Fundamental Law
18. FCC	Federal Constitutional Court
19. FRG	Federal Republic of Germany
20. GG	the German constitution
21. Hluttaws	Legislature in Myanmar
22. IBA	International Bar Association
23. ICCPR	International Covenant on Civil and Political Rights
24. ICESCR	International Covenant on Economic Social, and Cultural Rights
25. IDEA	International Institute and Electoral Assistance
26. Member/s	EU Member State/s
27. MOJ	Minister for Justice
28. Montreal Declaration Independence of Justice	Montreal Declaration or the Universal Declaration on the
29. NCJ	National Council for the Judiciary
30. N.D	No Date
31. Sec	Section
32. Sejm	Lower House of Polish Parliament
33. TAC	Treaty of Amity and Cooperation
34. TEU	Treaty on European Union
35. TFEU	Treaty on the Functioning of the European Union
36. The Charter	the European Charter of Fundamental Rights
37. The Commission	European Commission
38. TPFL	Transitional Provisions of Fundamental Law
39. Tribunal	Constitutional Tribunal of Myanmar
40. UDHR	Universal Declaration of Human Rights
41. UN	United Nations

Chapter I
Introduction to the Guarantees of Constitutional Adjudication

> 'Only legislative, judicial and executive action can completely guarantee the victory of the free world'
>
> – Adam Clayton Powell Jr.

Research Structure

The dissertation has two main parts with four chapters altogether. After the introduction, the first Chapter is about constitutional problems, especially the infringement of judicial independence and removal of judges in Myanmar, Hungary and Poland, and it traces the respective constitutional histories of these countries. The cases related to the violation of judicial independence in Myanmar, Hungary and Poland are explained in the second Chapter. Comparative studies of these three countries located in different regions are leading to the composition of the constitutional courts, the tenure of judges, and constitutional court competencies. Competencies are relevant to the core cases mentioned in Chapter II and are primarily related to the separation of powers that can lead to an independent judiciary,[1]and these have not been consistent with the domestic, regional and international legal norms for judicial independence. Other international

[1] The main body of the judiciary/judges should not be influenced by the constraints of internal government and its policies in interpreting and applying law in their decisions. (Accessed on 24 May 2022) Retrieved from https://www.lawtecher.net/

landmark cases that support the dissertation's structure are also cited. It is undeniable that each country has different legal traditions and culture. However, basic legal norms and standards in line with international law and treaties are obligatory for all countries.[2]

Starting with Chapter III, and IV, the second part of this dissertation is centred on the German legal system within the EU legal framework according to the regional integration and how Germany successfully established its Federal Constitutional Court (hereinafter: the FCC). According to the literature review,[3] the FCC is of significance worldwide and it can handle the political issues within its legal framework.[4] Germany is also a founding member of the European Union (EU), and its legal concepts of human rights protections are fresh. In the EU and according to the precedents of the FCC, democracy is implemented through the protection of human rights. In addition, Bundestag represents democracy and stands for federalism. Cooperation among powers is applied between the legislature and executive in a federalist structure instead of in the judiciary. All these notions are interesting to trace back to the establishment of reconciliation between the governmental organs through political stability. Political stability is more important and is a formal requirement to build a stable constitutional court. The FCC then became significant because of its legal reasoning and effective protections of human rights. It is essential to recognise the effect of the other two branches on the legally binding force of the FCC.

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[2] *Jus Cogens (peremptory norm of international law)*: this designates norms from which no derogation is permitted by way of agreement.
Retrieved from https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml#:

[3] Several legal and political scholars are interested in the existence of the FCC and its prominence, and they have published articles about the topic in the several journals and as books. Most of the authors created a comparative analysis between the FCC and the Supreme Court of the United States although the countries practice different legal systems. These two countries are developed and are top countries in terms of economics, education and politics. Their federal systems, separation of powers and legal systems are worth studying because of their fame in general. The clear differences in competences between the constitutional courts and supreme courts are that civil case matters are of concern to the constitutional courts and both civil and criminal matters are connected to the supreme courts. The dissertation focuses on constitutional adjudication and its related matters.

[4] Thomas Honey. (2019). Lectures in the Faculty of Law, University of Debrecen. (The lectures were about the German legal system, legal history and the Weimer Republic, the Basic Law and the FCC and well-known cases during that time [2019]). Starting from that time, I got an idea to move my research trend to the German legal system after studying the removal of judges in Myanmar, Hungary and Poland as I could not find out better ways to reconcile between the legislature and judiciary and between the executive and judiciary to complete the dissertation's objectives. On the other hand, studying the Myanmar and Polish constitutional crisis, the removal of judges and the violation of judicial independence in Hungary helps to reach the grounded feedback for the research questions. Combining the research's outcomes in the two parts justifies the hypothesis.

Research Objectives

(1) The dissertation is composed of two parts, and they are not similar in research content and structure. The primary purpose of the dissertation is to provide support for the targeted country of Myanmar and its reformation in the future. I believe that the first part of the constitutional problems, that is, infringement of the judicial independence principle in Hungary, Poland and Myanmar itself, and the second part of structuring the FCC and its legal reasoning which is focused on society, democracy and federal policies will be advantageous for Myanmar in order to build a federal democracy or democracy federal country (since long ago, there is confusion as to which one should be first and which one should be second), which is what the majority want in the future. Now is the time to fight for democracy.

(2) The direction of the dissertation is to first determine how to set up peaceful relations between governmental organs; and second, how to build an independent judiciary. Hungary, Poland and Germany have prominent legal cultures and traditions dating back to before the establishment of the EU. The legal culture of separate constitutional court trials on constitutional matters is also rooted in Europe. Accordingly, the existence of respective constitutional courts is also crucial to the implementation of constitutional laws and regional and international law as far as the abilities and competences of the courts. In the application of international law, legal and political scholars expect to achieve a minimum standard. The application of laws and legal regulations by a court is necessary to have the support of legislation and administration.

(3) The purpose of the research is to learn a practical and reasonable structure for a constitutional court that is harmonious with the other political institutions: the legislature and the executive. The research also aims to examine how the theory of an independent judiciary works in practice based on the FCC under German constitutionalism. The judiciary alone cannot be independent without the cooperation of the other branches. On the other hand, the judiciary is also responsible for the implementation of an independent judiciary. In Chapter III, the literature review

revealed that there was cooperation between the FCC and other branches.[5] The FCC also did not use its interpretive power in an extreme manner in order to avoid conflicts with the other branches.

(4) The dissertation also aims to learn the German way of practicing cooperation among the powers[6] combined with federalism without sharing the unique capability of the judiciary to select its constitutional court judges.

Methodologies

Comparative and interdisciplinary approaches are not separable in the dissertation because of the research's structure, objectives, questions and the countries chosen in different regions. Comparative law is one of the most fruitful fields for experimenting interdisciplinary research involving other sciences and it is not wonderful that comparative law is interdisciplinary by its very nature.[7]The historical approach is also a must, analysing cases in the targeted countries for feedback on the research questions and to confirm the hypothesis. Furthermore, case study analysis is vital to draw a conclusion within the dissertation.[8] According to Ragin (1987), the comparison of a few countries has been described as 'case oriented' rather than 'variable oriented' since the focus of the analysis is much more on the specific unfolding of events and the variation in political developments within each country than on variation in macro-variables between countries.[9] The comparative method is comprehensively applied throughout the whole dissertation to understand

[5] This was related to the appointment of the FCC's judges by the selected committee which consists of Bundestag's members as well as the interpretation by the FCC of the FCC's Act. See Chapter III about the composition of the FCC.
[6] John Locke's theory of cooperation of powers.
[7] Note 22, Girgia Guerra. (2018). An Interdisciplinary Approach for Comparative Lawyers: Insight from the Fast-Moving Field of Law and Technology, *German Law Journal*, Vol 19(03), p-585, Pp (579-612). (Accessed on 21 May 2022). Retrieved from https://www.cambridge.org/core/service/aop-cambridge-core/content/view/
[8] I am not a practicing lawyer or a judge; I am a student at the University of Debrecen and am experienced as a lecturer in the Law Department, Taunggyi University, Taunggyi, Myanmar. I release the position of a university's teacher participating in the Civil Disobedience Movement (CDM) for the Spring Revolution, Myanmar. This is a peaceful demonstration to prove that we do not agree with the Military junta, especially their inhumanity, brutality, and autocracy towards the citizens. The insensitive Military junta removed all CDM staff from their positions and added their names in the blacklist not to have any governmental or private jobs in their future. In fact, politics is not everything, but policies are changed when the politics change, which is what I have acknowledged in practice. (At least, I can impart the importance of judicial independence as far as I have learnedas an independent researcher during the time I cannot go home as a lecturer because I know that my duty in studying for a PhD is to share my knowledge with the students.)
[9] Todd Landman. (2008). Issues and Methods in Comparative Politics: An Introduction, 3rd Edition, Routledge, London, p-69.

how the guarantees of constitutional adjudication are theoretically and practically secured at the domestic, regional and international levels. An exploration of the prominence of the FCC as well as freedom at the domestic, European and international levels makes an interdisciplinary approach essential for the comparative study of the guarantees of constitutional adjudication in Hungary, Poland and Myanmar.

I used a comparative analysis of judicial independence based on the constitutionalism of Myanmar, Hungary, Poland and Germany, which are countries with different locations and legal systems. Even though EU Member States have different legal traditions, they must respect the uniformity of EU law, paying respect to regional integration. It is good to know that some judges in the EU that were removed could get their jobs back thanks to the regional integration process.

Nowadays, common law and civil law systems govern worldwide. Although practicing legal families are different, legal issues and constitutional problems in Poland, Hungary and Myanmar are criticised in a similar way which emphasises the society.

Thus, in the dissertation, the comparative method is reasonable as a core methodology to learn more about the judicial systems of Hungary, Poland, Germany and Myanmar within their different legal systems as well as the handling of legal conflicts by their constitutional courts based on the countries' social and legal backgrounds. Theoretically, the countries have different legal systems but similar legal issues, and crises remarkably appeared in practice among the three main governmental institutions. Clarifying and analysing the different legal systems among the selected countries shows that Myanmar accepts the common law system while the EU countries recognise the civil law family. Going back to the dissertation's topic of 'Guarantees of Constitutional Adjudication', the aspects by which to evaluate an independent judiciary are the formation of the constitutional courts, terms of office and competences of the respective courts because everything is included to define the guarantees of constitutional adjudication; judicial independence in line with the 'Introduction' section. Surprisingly, the modes of appointment of constitutional court judges in the respective countries and even in the EU are similar and can be conducted by the legislature and executive and can deviate from the international norms for the independent judiciary. On this point, there is no uniformity of law to select constitutional court judges in the EU. The tenures of office in Germany, Poland, Myanmar and Hungary are varied and are of no matter to help the sustainable independence of the judiciary. Nonetheless, guaranteeing the official

terms of office in their respective constitutional laws is very critical because of the core cases cited in Chapter II. Competencies of constitutional courts also can be comparable in different legal systems.

In Myanmar, criticism is allowed which states that the Constitutional Tribunal of Myanmar does not have the power to try cases asserting human rights or constitutional rights violations. Nevertheless, the Supreme Court of Myanmar has human rights protection by issuing writs of habeas corpus, mandamus, prohibition, certiorari and Quo Warranto.[10] In Hungary, Poland and Germany just submitting constitutional complaints is enough to solve the human rights violations. Both writs and constitution complaints are the procedures to claim a legal remedy before a constitutional/highest court. The procedure of claiming writs is not the same as for constitutional complaints. There are certain writs for the types of violations by particular authorities. This is just explanatory, and the research does not intend to compare writs and constitutional complaints as the Myanmar Constitutional Tribunal cannot issue writs. The aspects mentioned in the dissertation about the constitutional complaints and the procedures are due to relevancy. They are one of the main aspects in evaluating the judicial independence of Hungary due to the Andra Baka case. Furthermore, the intentional modification of the constitutional court's ability made the court unable to allow the right to hear the case given the reasons for the reorganisation of the courts.

Why did the respective governments try not to promote the abilities of the respective constitutional courts in Myanmar, Poland and Hungary? This is different in Germany, as the FCC is free to update the ways to interpret the basic law when the basic law does not expressly state what should be done. This means that even though Germany applies civil law, sophisticated legal reasoning by the FCC's judges on basic law are recognised. Normally, codification of laws is a core of the civil law. Codified law alone is not enough to decide the cases and the discretionary power of judges is needed in combination to make judgements. In doing so, legal precedents are cited with other legal principles. On the other hand, Myanmar practices the common law system, and practically, interpretation shall be emphasised based on the text of statutes.

[10] In my opinion, this is similar to the ECJ which can interpret EU law but does not expressly have the function of the protection of human rights. Therefore, the individual who has been violated their EU citizenship rights bring a suit to the ECtHR not to the ECJ. As a result, there were/will be several legal conflicts between the ECJ and the FCC because of the ECJ's interpretation of the EU treaties is just interpretation and it does not focus on the human rights matters.

Those are the reasons I rely on the comparative approach among the different countries with different legal systems. Some are similar and, of course, some are not. The advantage of using the comparative method is to collect the differences and similarities that can lead to the research's results and findings in the final step.

Being a developed or developing country or the practice of different legal systems seems not to matter according to the dissertation's findings, but how the countries and their highest courts handle the legal problems within the constitutional framework following the essential legal norms will be a backbone to complete the dissertation's aims. I will point out some proper findings regarding the necessities to establish an independent judiciary within these three countries using the comparative method and paying attention to the textual approach.

Myanmar is the least developed country because of the political instability and its attempts to solve several related problems for a long time. In contrast, Hungry and Poland are developed countries located in Europe. Therefore, economics, education, living standards, history and cultures are different, but the legal theories these three countries have accepted are similar because of the existence of their respective constitutional courts. Indeed, the legal systems between the countries are also different. There are several similarities and differences in the formation of the constitutional courts concerned. The focal point of using the comparative study in the dissertation is because the cases which happened in the respective three countries were linked to the 'irremovability of judges' and the indirect infringement of institutional and individual guarantees.

Another crucial reason I have focused on some EU countries compared with the Myanmar legal system is because of the existence of a constitutional court in Myanmar even if it practices the common law system, and the origin of the constitutional court is from Europe.[11]

The constitutional court or Kelsenian Court originated in Europe and was first widely accepted in Europe. In Hungary and Poland, the courts were set up to transform from a socialist–communist system to democracy. In Myanmar, the Constitutional Tribunal (hereinafter: Tribunal)

[11] It is my first and foremost intention to do PhD research in the EU, and I have not found any universal differences between common law and civil law systems. In my opinion, legal families are mixed because some common law countries accept constitutional court systems and the constitutional courts in the civil law countries also emphasise legal precedents in addition to codified laws. The theme is to implement fairness and justice for the society and to gain public trust in the government through the legal courts; it is also a solution to provide stability between the government and the governed.

functions to construe the constitutional law and to solve related problems. But the Tribunal was not successful in serving its primary function within two years after its establishment. According to Wojciech Sadurski, the younger democracy is 'easy to backslide'.[12] This is logical as Myanmar started to implement democracy by setting up a separate constitutional court (Tribunal) and it was not successful because of the impeachment of the legislature. The constitution of 2008 states that the resolutions of the Tribunal are final and conclusive. Unfortunately, this was not the case in practice. Therefore, I would like to seek the possible ways to reconcile the three main branches by learning how the judicial machineries run in Hungary, Poland and Germany via the constitutional courts within the legal framework of the European Union.

Hypothesis and Research Questions

The research hypothesis is that 'the judiciary cannot be independent of external influence whenever the judiciary itself has political characteristics. The hypothesis should be tested, and it has to be confirmed by studying the implementation of domestic laws, regional laws, international law and legal theories which deal with the guarantees of constitutional adjudication: judicial independence in the respective chosen countries along with cases.

The first and second parts of the dissertation intend to outline the research questions of:

(1) When can the executive and the legislature influence the judiciary and its independence?

(2) Which organisation most influences the judiciary and how does it exert influence?

1.1 What is Constitutional Adjudication?

Constitutional adjudication is political in its object, and the effect of the constitutional court decision is political.[13] According to the author Frank I. Michelman, 'constitutional jurisdiction is

[12] Wojciech Sadurski (2018). How Democracy Dies (in Poland): A Case Study of Anti-Constitutionalist Populist Backsliding, Sydney Law School, The University of Sydney, p-11(pp 1-71).

[13] Supreme Court of India. (2016). Constitution Day Celebration (26 November 2016). (Accessed on 20 December 2021). Retrieved from https://www.main.sci.gov.in/pdf/speeches/speeches_2014/Lecture.

the power of a court or similar body to pronounce on the compatibility of questioned laws and acts with constitutional requirements'.[14]

Professor Alec Stone Sweet conceptualised constitutional adjudication as a modification of the constitution and constitutional law making. A *juridical coup d'état* constitutes a particular type of law making that alters the basic norms and the rule of recognition. He first strongly stated that the constitutional law produced by the transformation would have been rejected by the founders if it had been placed on the negotiating table. Second, the outcome must fundamentally alter how the legal system operates, again in a way that would have been unintended by the founders.[15]

Another definition of constitutional adjudication is that it is administering justice within the legal framework through the courts and tribunals, practicing and interpreting the law and finding facts in cases brought before the courts and tribunals.

Judicial review was successful in the famous case of *Marbury v. Madison*[16] in the United States (US). The Supreme Court declared that the US Constitution is law and that courts can adjudicate disputes arising under the Constitution in a way that is binding on the parties, but it did not specify whether interpretations of the Constitution were meant to be authoritative or binding on anyone beyond the actual litigants.[17] It is a landmark decision regarding independent judicial review worldwide. The Supreme Court of the US is the oldest court to adopt independent judicial review and textual interpretation that was innovated by the discretionary power of the judges.

In 1919, the first separate constitutional court emerged in Austria under the legal scholar Hans Kelsen,[18] who developed the European model of constitutional review.[19] The separate constitutional court began in Austria in Europe to check the actions of the executive and legislative bodies as constitutional or not by the judiciary. It may have been intended that the role of the

[14] Frank I. Michelman. (2011). The Interplay of Constitutional and Ordinary Jurisdiction, in Tom Ginsburg and Rosalind Dixon (Eds.), Comparative Constitutional Law, Edward Elgar, Cheltenham, UK, p-278 (pp 278-297).
[15] Alec Stone Sweet. (2007). A *juridical coup d'état* and the Problem of Authority, *German Law Journal*, Vol-8, No-10, pp. 915-916 (pp 915-928). (Accessed on 9 December 2021). Retrieved from https://digitalcommons.law.yale.edu/cgi/.
[16] 5 U.S. (1 Cranch) 137(1803).
[17] Michel Rosenfeld. (2005). Constitutional Adjudication in Europe and the United States, George Nolte (Ed.) in European and US Constitutionalism, Cambridge University Press, UK, p-202 (1-312).
[18] Retrieved from https://www.vfgh.gv.at/verfassungsgerichtshof/geschichte/history_overview.en.html
[19] Alec Stone Sweet. (2002). Constitutional Courts and Parliamentary Democracy (Special Issue on Delegation). *Faculty Scholarship Repository Series* 84:78-100.

judiciary be independent from the legislature and executive. In addition, that court has the power to try cases involving the misuse of power by the state authority. Since then, that style of court has been widely accepted in Europe, Africa and Asia.

The authors Roderick A. Macdonald and Hoi Kong accepted that independence could be understood as describing the structural, procedural and personal decisions to conduct the interfering decision making. For that reason, institutional structures, procedural mechanisms and constitutional guarantees are related to judicial independence.[20] These authors also investigated the question of 'Independence from whom or from what?' in their research article.[21]

The judiciary is one of the government's branches according to the separation of powers. It guarantees that there is at least a more dangerous branch than the other branches of power, different from the other political holders.[22] The Inter-American Court of Human Rights held that one of the main objectives of the separation of powers is judicial independence.[23] The judiciary stands for the people and justice. It is also an essential institution to check the arbitrary actions of authorities, including judicial officers. Only a state's supreme judicial court can be the guardian of a state's constitutional law due to constitutionalism. A constitution can prescribe the minimum standard of individual liberty and the principles of the rule of law. The judiciary has the task to protect those fundamental rights and safeguard the constitution.

The judiciary is an essential element of all contemporary constitutional regimes, and there is no single best model for institutionalising the role of the magistrates vis-à-vis other branches of power.[24] The judiciary needs constitutional prerogatives and guarantees of independence to ensure a sufficient division of power.[25] The court is the lesser dangerous branch because it does not keep either the purse or the sword of the polity.[26]

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[20] Roderick A. Macdonald and Hoi Kong. (2012). p-834.
[21] Roderick A. Macdonald and Hoi Kong. (2012). p-833.
[22] Daniel Smilov. (2012). The Judiciary: The Least Dangerous Branch? in Michel Rosenfeld and Andra Sajo, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, United Kingdom, p-864 (pp 859-873).
[23] Dr.Franziska Rinke, Dr. Monica Castillejos-Aragon and Aishwarya Natarajan. (2018). Judicial Independence Under Threat? Global Conference in Strasbourg, Conference Report, p-29.
[24] Daniel Smilov. (2012). The Judiciary: The Least Dangerous Branch? p-859.
[25] James Madison, The Federalist Papers, No.51(1788). See also Daniel Smilov. (2012), p-859.
[26] Daniel Smilov. (2012). The Judiciary: The Least Dangerous Branch? p-871.

The judiciary is charged with the responsibility of that the rule of law is respected.[27] Pro. Dr. Michael Eichberger, the FCC's former judge, remarked that 'Independent courts can only exit in a state governed by the rule of law, and the rule of law is not possible without an independent judiciary'.[28]

Alexander Hamilton explained that the judiciary is a minor dangerous branch of government. The courts do not have the legislative power or the ability of the executive to implement political policies. They may not enforce their judgement without the support and approval of the other executive and legislative officials. Hamilton agreed with Montesquieu's recommendation that there is no liberty if the judicial power is not separated from the legislature and executive. He indicated that an independent judiciary is required in a limited constitution.[29] Two safeguards to protect the independence of judges and courts are to secure the appointment process and tenure of their term of office.[30]

The judiciary cannot be independent if petitioners do not enjoy independence, especially the right to a fair trial and to seek justice.[31]

Judicial independence allows judges to make an impartial decision by law and evidence only, shielding them from inappropriate influence, whether from other branches of Government, the public or the private sector. Independent judges should be able to decide cases in ways that may upset governments, the media and public opinion. The impartial adjudication of disputes is crucial to a peaceful, prosperous and democratic society.[32]

Therefore, the theme of establishing judicial independence is to protect against human rights abuses within the legal framework. The introduction of the UDHR (Universal Declaration

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[27] Lisa Webley and Harriet Samuels. (2018). Complete Public Law, Fourth Edition, Oxford University Press, UK, p-111(pp 1-680).

[28] Dr. Franziska Rinke, Dr. Monica Castillejos-Aragon and Aishwarya Natarajan. (2018). Judicial Independence Under Threat? Global Conference in Strasbourg, Conference Report. Retrieved from https:/www.kas.de/documents/Judicial+Independence.
Retrieved from https:/www.kas.de/documents/Judicial+Independence.

[29] Alexander Hamilton. (1788). Federalist No.78. See also Lisa Webley and Harriet Samuels. (2018), p-115.

[30] Everyone's Parliament. (2015). The Role of the Judiciary, factsheet. (Accessed on 5 November 2021) Retrieved from www.parliament.qld.gov.au.

[31] Alec Stone Sweet. (2007). A *juridical coup d'état* and the Problem of Authority.

[32] Frans van Dijk and Geoffrey Vos. (2018). A Method for Assessment of the Independence and Accountability of the Judiciary, *International Journal for Court Administration*, Vol-9(3), p-2 (pp 1-21). (Accessed on 29 November 2021). Retrieved from https://www.iacajournal.org.

of Human Rights). expressed that the human rights abuses did not end when the UDHR was adopted, but several people have enjoyed greater freedom. The laws, rules and regulations have to be enacted, prepared, amended and annulled if they are not consistent with the time and situations to fill the necessities of society.

Judicial independence implies that the judiciary will operate on fairness and impartiality standards and will be immune from improper internal or external influences. Therefore, it is the hope of the public that they will receive fair and equal treatment before the law.[33]

1.2 Guarantees of Judicial Independence under the Bangalore Principles on Judicial Conduct

The Bangalore Principles on judicial conduct were intended to create better standards and to support the judiciary.[34]

First, the state has a responsibility to provide guarantees through their constitutions or by other means. The principles of judicial independence require that:

(1) the judiciary shall be independent of the executive and legislature.
(2) everyone has the right to be tried with due expedition and without undue delay by the ordinary courts or tribunals established by law subject to appeal to the courts or review by the courts.
(3) no special ad hoc tribunals shall be found to displace the ordinary jurisdiction otherwise vested in the courts.
(4) in the decision-making process, judges are able to act without any restriction, improper influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any reason, and to exercise unfettered freedom to impartially decide cases, following their conscience and the application of the law.
(5) the judiciary shall have jurisdiction over all issues of a judicial nature and that no organ other than the court may decide its own jurisdiction as defined by law.

[33] Dr. Franziska Rinke, Dr. Monica Castillejos-Aragon and Aishwarya Natarajan. (2018). p-32.
[34] Constitutionnet. (2016). The Bangalore Principle of Judicial Conduct 2002. (Accessed on 7 January 2022). Retrieved from https://constitutionet.org/vl/itembangalore-principles-judicial-conduct-2002.

(6) a person exercising legislative or executive power shall not try to exercise any form of pressure on judges, either expressly or impliedly.

(7) the legislature or executive power that may affect judges in their office, their remuneration, conditions of service or their resources shall not be used with the object of threatening the particular judge or judges.

(8) the state shall ensure the security and physical protection of members of the judiciary and their families, especially in the event of threats being made against them.

(9) allegations of misconduct against a judge shall not be discussed in the legislature except on a substantive motion for the removal of a judge of which prior notice has been given.[35]

According to the commentary to the Bangalore Principles, 'the judiciary alone cannot carry out the protection of the administration of justice from the political influence'. Therefore, the state has to set up the institutional arrangements that would secure the independence of the judiciary from the legislative and executive. This measurement is conducted by the judicial integrity group in reference to several national constitutions and international initiatives.[36]

The principles identify six core values of judicial independence as mentioned. Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial.

[35] Judicial Integrity Group. (2010). Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, Lusaka, Zambia., pp-12-13. (Accessed on 5 January 2022).

[36] Judicial Integrity Group. (2010). Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct, p-4. According to the Judicial Integrity Group, their measures include (1) The Draft Principle on the Independence of Judiciary formulated by a representative committee of experts in 1981, (2) The Minimum Standards of Judicial Independence adopted by the International Bar Association in 1982, (3) The United Nations Basic Principles on the Independence of Judiciary 1985, (4) The Draft Universal Declaration on the Independence of Justice 1988, (5) Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the Independence, Efficiency and Role of Judges, 1994, (6) The Beijing Statement of Principles of the Independence of the Judiciary adopted by a conference of chief justices of the Asia-Pacific region in 1995, (7) The European Charter on the Statute for Judges adopted in 1998, (8) The Universal Charter of the Judge adopted by the International Association of Judges in 1999, (9) The Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence for the Commonwealth adopted in 2001, (10) Opinions of the Consultative Council of European Judges (CCJE), (11) The Blantyre Rule of Law/Separation of Powers Communique issued by representatives of all three branches of government in the Southern African Development Community (SADC) region in 2003, (12) The Cairo Declaration on Judicial Independence adopted by the participants of the Second Arab Justice Conference held in 2003, (13) The Suva Statement on the Principles of Judicial Independence and Access to Justice adopted at a judicial colloquium in 2004, (14) 'Justice Matters' – the report of the Irish Council for Civil Liberties on Independence, Accountability and the Irish Judiciary, 2007, (15) General Comment No.32 (2007) of the Human Rights Committee on Article 14 of the International Covenant on Civil and Political Rights, (16) The Venice Commission Report on Judicial Appointments, 2007, (17) The United Nations Office on Drugs and Crime (UNODC) and the Draft Guide on Strengthening Judicial Integrity and Capacity, October 2009.

Impartiality is essential to the proper discharge of the judicial office. It applies to the decision itself and the process by which the decision is made. Integrity is also critical to the proper discharge of the judicial office. Propriety is essential to the performance of all of the activities of a judge. Equality is essential for the due performance of the judicial office. Competence and diligence are required for the due performance of the judicial office.[37]

1.3 Judicial Independence: International Perspective

The World Bank recently remarked, 'A judiciary independent from both government intervention and influence by the parties in a dispute provides the single most incredible institutional support for the rule of law'.[38]

The UDHR recognised the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations and any criminal charge.[39] Furthermore, everyone has the right to an effective remedy by the competent national tribunals for acts that violate the fundamental rights granted to him or her by the constitution or law.[40]

The International Covenant on Civil and Political Rights (hereinafter: ICCPR) also guarantees that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.[41]

Individual judges should enjoy personal and substantive independence. The terms and conditions of judicial service are secured to ensure that individual judges are not subject to executive control. Substantive freedom means that in the discharge of his or her judicial function, a judge is subject to the law and the commands of his or her own conscience.[42]

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[37] United Nations Office on Drugs and Crime. (2018). The Bangalore Principles of Judicial Conduct, the United Nations, Vienna. (Accessed on 5 January 2022).
Retrieved from https:/www.unodc.org/documents/training/bangaloreprinciples.pdf.
[38] Steve Charnovitz. (2014). Judicial Independence in the World Trade Organization, p-219.
[39] Para 1, Preamble, The Bangalore Principles of Judicial Conduct 2002.
[40] Article 8, UDHR, 1948.
[41] Para 2, Preamble, The Bangalore Principles of Judicial Conduct 2002. See also Art 14, ICCPR, 1966.
[42] Para 1, IBA Minimum Standard of Judicial Independence, 1982. Retrieved from https://www.ibanet.org.

The independence of the judiciary shall be guaranteed by the state and inserted in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect the independence of the judiciary.[43]

The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.[44] The essence is to preserve a separate institution of government that can adjudicate cases or controversies with impartiality.[45] The fundamental elements to establish the judicial independence outlined by the UN's principles are that the judges, like other citizens, must have freedom of expression and association; standards for qualification, selection and training; conditions of service; tenure; professional secrecy and immunity; discipline; and a suspension process and removal process.[46]

Judicial independence implies that the judiciary will operate based on fairness and impartiality standards and will be free from the undue influence of the legislature and executive. Furthermore, judicial independence creates the conditions for members of society to believe that all of them will receive fair and equal treatment before the law and increases their incentives to respect the outcomes of the judicial process.[47]

Judicial independence generally means that the judiciary must be free from external pressure or political intimidation. It must be exempt from the undue influence of the legislature and executive bodies. Finally, it must remain committed to the preservation of the rule of law and the safeguarding of the guarantees of constitutional law: protection of individual rights and liberty.[48] The term independence is generally used to characterise the judiciary's relationship to other institutions or agencies.[49] Owen M. Fiss, a Sterling Professor from Yale University,

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[43] Para 1, The UN's Basic Principles on the Independence of the Judiciary, 1985. (Accessed on 17 October 2021). Retrieved from https://www.ohchr.org.
[44] Para 6, The UN's Basic Principles on the Independence of the Judiciary, 1985.
[45] Irving R. Kaufman. (1980). The Essence of Judicial Independence, *Columbia Law Review*, Vol-80(4), p-688 (pp 671-701). (Accessed on 27 October 2021). Retrieved from https://www.jstor.org/stable/1122136.
[46] The UN's Basic Principles on the Independence of the Judiciary, 1985.
[47] Alec Stone Sweet. (2007). A *juridical coup d'état* and the Problem of Authority, *German Law Journal*, Vol-8, No-10, pp 915-916 (pp 915-928).
[48] Federal Bar Association. (2021). Statement on the Rule of Law and an Independence Judiciary. (Accessed on 18 September 2021). Retrieved from https://www.federal.org.
[49] Owen M. Fiss. (1993). The Limit of Judicial Independence, *The University of Miami Inter-America Law Review*, Vol 25(1), p-57(57-76). (Accessed on 3 October 2021). Retrieved from https://www.corteidh.or.cr.

concluded that there are three notions of independence: party detachment, individual autonomy and political insularity.[50]

There were some attacks on judicial independence, such as in Myanmar, Hungary and Poland, as several types of human rights violations. However, the greatest threat to judicial independence is complete disregard by a government for the constitution's provisions. Unfortunately, many military governments today refuse to subject their authority to a constitutional system, ignoring court orders made against them and providing few mechanisms to protect human rights.[51] In the international legal order, the national legal order is not clearly defined. No supranational executive or legislative branch exists from which a judicial branch could aspire to be independent.[52]

1.4 Euro-Atlantic Perspective of the Independence of the Judiciary

Judicial independence is one of the main components of the rule of law,[53] the fundamental rights to a fair trial[54] and the principle of adequate judicial protection.[55] [56] These are the undeniable components needed to implement an independent judiciary. The lack of the rule of law in Myanmar and Poland showed the incomplete missions of the judicial branches. The case in Hungary in 2012 also related to the lack of fair trial rights and adequate judicial protection.[57] Most commentators believe that a prerequisite for the rule of law is an independent judiciary that employs a system of fair hearings to review the operation of the law.[58] Werner Heun described it as 'the separation of powers, the independence of the courts and the guarantee of judicial remedies against

[50] Owen M. Fiss. (1993). The Limit of Judicial Independence, pp 58-59.
[51] Daniel C. Préfontaine, Q.C. and Joanne Lee. (1998). The Rule of Law and Independence of the Judiciary, A paper prepared for World Conference on the UDHR, Montreal, p-22(1-29). (Accessed on 1 October 2021). Retrieved from https://biblioteca.cejamericas.org.
[52] Steve Charnovitz. (2014). Judicial Independence in the World Trade Organization, p-220 (pp 219-240). Retrieved from https://www.worldtradelaw.net/articles/charnovitzjudicial.pdf.dpwnload.
[53] Art 2, TEU, 1992.
[54] Art 47, the EU Charter of Fundamental Rights, 2000.
[55] Art 19(1), TEU, 1992.
[56] I have collected these from the Briefing to Council of Europe Standards on Judicial Independence (EPRS). (2021). Research credit honorably goes to author Rafeal Manko. (Accessed on 17 October 2021). Retrieved from https://www.europarl.uropa.eu/
[57] These are conclusions of mine, recalling the core cases I referred to in my previous chapters and a combination of the standards of the Council of Europe.
[58] Lisa Webley and Harriet Samuels. (2018). Complete Public Law: Text, Cases, and Materials, p-86.

encroachments by state authority serve the protection of the individual and realize the core function of the Rechtsstaat (the rule of law) as an essential condition of democratic legitimacy'.[59]

The Venice Commission of the Council of Europe expressed that the judiciary should be independent of external pressure and not subject to political manipulation, especially by the executive. This recommendation is an integral part of the fundamental democratic principle of the separation of powers.[60]

Judicial independence is commonly regarded as an institutional safeguard for the judiciary as such, not as a right or privilege for the individual judges.[61] The independence of judges also requires the security of the constitution and the rights of individuals from the effect of ill humour.[62] The roles of the legislature and executive are primarily essential to keep the judiciary independent. If we check the liberal democratic countries, the judiciary's role is prominent. In the U. S, it says that the legislature and executive accept the Supreme Court's decisions even if the Court may in some cases be wrong. Good behaviour is the standard considered as to whether or not judges are disqualified.

The judiciary alone cannot create its own independence. The FCC reveals its aim to protect adjudication from legislature and executive interference.[63]

President Koen Lenaerts, a Belgian jurist and the President of the ECJ, declared that 'Judicial independence is thus not only a defining feature of the judicial function but is also an essential component of the rule of law, one of the key values on which the EU is founded. It is the bedrock of our democracies, whether at the national or European level'.[64] According to him, judicial independence matters for a democratic society and for the natural and legal persons who rely on the rule of law, justice and fundamental rights.

[59] Werner Heun. (2011). The Constitution of Germany: A Contextual Analysis, Hart Publishing, UK, p-40 (pp 1-241).
[60] Venice Commission of the Council of Europe. (2016). Rule of Law Checklist, p-35. (Accessed on 7 January 2022). Retrieved from https://venice.coe.int.
[61] Anja Seibert-Fohr. (2006). Constitutional Guarantees of Judicial Independence in Germany, Recent Trends in German and European Constitutional Law, p-269 (pp 268-287). (Accessed on 20 September 2021). Retrieved from https://www.biblioteca.cejamericas.org/bitstream/...PDFfile.
[62] Alexander Hamilton. (1788). Federalist No.78.
[63] Paul Bovend'Eert and Marten Burkens. (2014). The Federal Republic of Germany, p-689.
[64] Dr. Herman van Harten. (2021). Judicial Independence: All day, every day?

The principle of the independence of the judiciary notwithstanding is attributed to the respective EU Member States.[65]

Judicial independence is commonly regarded as an institutional safeguard for the judiciary. It is comprised of three elements: substantive independence, structural independence and personal independence. The guarantee of judicial independence is directed against the legislative and executive branches.[66] Substantive independence guarantees freedom from instruction, action and insight.[67] It aims for independence from the legislature, executive and judiciary itself.

In the same way, it has criteria of independence from internal and external influences. According to the BL, judges are subject only to the law. But it does not mean that the legislature may interfere with individual cases by enacting case-specific legislation.[68]

The Canadian Judicial Council (CJC) defines that 'judges must be free but obliged to decide on their own. Judges must be set apart from someone else's influence or supervision. Judges must be independent of all forms of coercion, threat or harassment, direct or indirect, whether from government, politicians, persons in authority, relatives, neighbors, interested parties, fellow judges, chief justice, judicial bodies or organizations'.[69] Judges should also not have any worries or revenge against them after their term of office or during their tenure. Therefore, the constitutional courts' judges became legal professors to avoid political attacks in their future. This may also have a benefit for practicing legal theories in legal reasoning.

From the American point of view, judicial independence means a judge's freedom to interpret the law with respect to each case before him or her'.[70] It requires that a legal system protect its judges from governmental business, personal matters and social pressure that could force a judge to deviate from his or her interpretation and application of the law.[71] Matin Redish

[65] Franz Mayer. (2003). European Integration: The New German Scholarship, Jean Monnet Working Paper 9/03, p-8.
[66] Anja Seibert-Fohr. (2006). Constitutional Guarantees of the Independence of the German Judiciary, Recent Trends in German and European Constitutional Law, pp 267-287. (Accessed on 1 October 2021). Retrieved from https://www.papers.ssrn.com.
[67] Anja Seibert-Fohr. (2006), p-270.
[68] Anja Seibert-Fohr. (2006). p-271.
[69] Canadian Judicial Council. (2016). Why is Judicial Independence Important to You? (Accessed on 3 October 2021). Retrieved from https://www.bccourt.ca/documents.
[70] Thomas E. Plank. (1996). The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia, *William and Mary Bills of Rights Journal*, Vol 5(1), p-6 (pp 1-74). (Accessed on 14 October 21021). Retrieved from https://scholarship.law.wm.edu/wmborj.
[71] Thomas E. Plank. (1996). p-7.

identifies institutional independence, law-making independence, counter-majoritarian independence (a judge's ability to override legislative acts) and decisional independence.[72]

The degree and existence of judicial independence highly depends on the institutional arrangements. The requirements for institutional independence are also linked to the (1) guarantees of fixed tenure, (2) fixed and limited compensation, (3) high minimum qualifications in education and experience and (4) limited judicial immunity.[73]According to Thomas E. Plank, tenure plays a significant role in protecting judges from external influence.[74]The FCC's judges, according to the BL, have a permanent term of office. They have a retirement age of 68 years. Before that, they should not be removed or suspended. The EU principle of irremovability of judges is also recommended for the independence of judges. But it is just a recommendation and not a regulation, directive or decision.[75]

1.5 Requirements for an Independent Judiciary

According to Professor Jerome Cohen, the possible matters that preclude an absolute form of judicial independence are (1) judicial independence that relies upon political bodies for appointment, (2) judicial appointment based on an executive that enforces decisions and upon a legislature to finance the judiciary, (3) the ability of political institutions to overrule judicial interpretations by constitutional amendments or future[76] legislation and (4) the ability of political institutions to increase the number of judges.

According to Professor Siri Gloppen, the following are the approaches to be an independent judiciary:

(1) Reducing political and executive influence on judicial selection has been the focus of much attention. Recommendations run along three lines: increase the number of actors (veto players) involved in the selection process, establish clear criteria and increase the transparency of the process.

[72] Thomas E. Plank. (1996). p-6.
[73] Thomas E. Plank. (1996). p-9.
[74] Ibid.
[75] European Commission. Types of EU law. (Accessed on 1 November 2021). Retrieved from https://ec.europa.eu.
[76] Thomas E. Plank. (1996). p-35.

(2) Minimising political influence on judges' tenure and conditions is arguably more important. Once a judge is in place, who appointed him or her is less important than who holds the key to a future career and wellbeing. It is thus crucial to minimise the executive's ability to influence judges' tenure and conditions. Judges should be appointed for life or long non-renewable terms and conditions of service should be constitutionally guaranteed, with strictly defined impeachment criteria and procedures.
(3) Eliminating undue influence on the judicial budget and administration; that is, administrative autonomy and budget independence for the judiciary to prevent the executive from 'starving' the judiciary.
(4) Increasing resilience by strengthening judges' competence and professional norms has been an important area of reform.[77]

General principles on the independence of judges under the Council of Europe Recommendation no. R (94) are:

(1) All necessary measures should be taken to respect, protect and promote the independence of judges.
(2) The independence of judges should be guaranteed under the provisions of the Convention and constitutional principles, for instance, by adding specific requirements in the constitution or other legislation or incorporating the provisions of this recommendation in international law. Accordingly, the following exemplified rules should be inserted.
    (i) The decision of judges should not be the subject of any revision outside any appeals procedures as provided for by law;
    (ii) The terms of office of judges and their remuneration should be guaranteed by law;
    (iii) No organ other than the courts themselves should decide on its own competence, as defined by law;

[77] Siri Gloppen. (2013). Court, Corruption and Judicial Independence, pp-76-77 (Pp 68-79). (Accessed on 29 November 2021). Retrieved from https://www.cmi.no/publications/5091/courts-corruption.

(iv) Except decisions on amnesty, pardon or similar matters, the government or the administration should not be able to take any decision which retroactively invalidates judicial decisions.

(3) The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.

(4) All decisions concerning the professional careers of judges should be based on objective criteria, and the selection and career of judges should be based on merits, having regard to qualifications, integrity, ability and efficiency. The authority deciding on the selection and career of judges should be independent of the government and administration. To safeguard its independence, rules should be ensured that, for instance, its member are elected by the judiciary and that the authority decides on its procedural rules itself.[78]

However, the Commission suggested that there should be guarantees to ensure that the appointment of judges is transparent and independent in practice.[79]

According to the conditions of the Universal Charter of the Judge to set up the liberty of the judiciary:

(1) Judges shall ensure the rights of everyone to a fair trial.

(2) They shall promote the rights of individuals to a fair and public hearing within a reasonable time and by an independent and impartial tribunal established by law.

(3) The independence of the judge is indispensable to impartial justice under the law.

(4) Whether international or national, all institutions and authorities must respect, protect and defend that independence.[80]

Point (4) mentions that the domestic and international organs have to protect the judiciary's independence. Therefore, integration of the judge and judicial organisations is essential to collaboratively defend the court's freedom. In Europe, the ECJ and ECtHR's legal proceedings are evidence to defend the liberty of judicial branches in the EU Member States.

[78] Recommendation No. R (94) 12.
[79] Ibid.
[80] Art 1, The Universal Charter of the Judge, 1999.

(5) Judicial independence must be ensured by law, creating and protecting judicial office that is effectively independent of other state power.
(6) The judge must be able to exercise judicial powers free from social, economic and political pressure and independently from other judges and the administration of the judiciary.[81]
(7) The judges are subject to the law and must consider only the law.[82]

This is correlated with the principle of the rule of law. Most countries and their constitutions recognise the rule of law principle in different approaches. In Germany, judges are subject both to law and justice.[83] The rule of law ground of legitimacy is a requirement for a professional judiciary from the institutional perspective. A judge or a lawyer needs to be well trained before undertaking their tasks or even after.[84]

(8) Judges cannot be transferred, suspended or removed from their offices unless provided for by law and then only by decision in the proper disciplinary procedure.
(9) A judge must be appointed for life or other period and there must be conditions that ensure judicial independence is not endangered.
(10) Any change to the obligatory judicial retirement age must not have a retroactive effect.[85]
(11) The selection and appointment of judges must be performed according to objective and transparent criteria, and it should be carried out by an independent body that includes judicial representation.[86]

The checklist underlines four elements of judicial independence: (1) manner of appointment, (2) term of office, (3) the existence of guarantees against outside pressure, including budgetary matters and (4) whether the judiciary appears as independent and impartial.[87]

[81] Art 2, Ibid.
[82] Art 3, Ibid.
[83] Daniel Smilov. (2012). The Judiciary: The Least Dangerous Branch? p-866.
[84] Daniel Smilov. (2012). The Judiciary: The Least Dangerous Branch? p-866.
[85] Art 8, The Universal Charter of the Judge, 1999.
[86] Art 9, Ibid.
[87] European Parliament. (2021). Council of Europe Standards on Judicial Independence, p-7 (pp 1-12). (Accessed on 26 April 2022). Retrieved from https://www.europarl.europa.eu/RegData/etudes/ERIE/2021/690623/EPRS_BRI(2021)690623_EN.pdf.

According to the German perspective, independence means personal and functional independence. The former means that a judge is free from the discretion of the legislature or the executive. Personal independence relates to the individual legal position of judges: transfer and dismissal matters.[88] The remuneration of judges is also linked with personal independence. The third form is institutional independence.[89] Personal independence depends on the administration of justice. Functional independence is subject to a limited form of supervision of service. Institutional independence relates to the appointment of judges, finances and the management of resources.[90]

The FCC has competencies to enforce fundamental rights and to declare statutes void. Accordingly, in 1952, the FCC announced itself as a constitutional organ[91] and guardian of the Basic Law.[92] The FCC derives the following rights from this special status.

(1) Independence concerning management and administration;
(2) Independence with regard to the drafting of its budgets and utilisation of the funds;
(3) A particular legal position for its members;
(4) Total parity with the point (1) to (3).[93]

The BL guarantees substantial and personal independence to maintain the law protected by the provisions and practice of the separation of powers from the other two branches.[94] The substantive autonomy is that the judges shall obey the law and not orders or instructions from anyone else. On the other hand, the courts can interpret the laws and statutes themselves. The legislature should accept the interpretation of legislative decisions to mean the opposite of what was intended. This substantive independence is supplemented and enforced by the guarantee of personal autonomy.[95]

[88] Article 97(2), the BL, 1949.
[89] Paul Bovend'Eert and Marten Burkens. (2014). P-689.
[90] Paul Bovend'Eert and Marten Burkens. (2014). P-690.
[91] The Federal Constitutional Court. (2021). History of the Federal Constitutional Court. (Accessed on 4 November).
[92] Paul Bovend'Eert and Burkens. (2014). P-694.
[93] Paul Bovend'Eert and Burkens. (2014). P-695.
[94] Arts 97 and 98 of the BL; see also Werner Heun. (2011). p-161.
[95] Werner Heun. (2011). The Constitution of Germany: The Contextual Analysis, Hart Publishing, p-162.

In *Luth,* the FCC dictated that the BL's rights have a double aspect, worded guarantees and subject rights, and they obligate only the state and its officials. This is an objective value system underlying values and principles for the whole of German civic life.[96]

[96] Frank I. Michelman. (2011). The Interplay of Constitutional and Ordinary Jurisdiction, p-289.

Chapter II
Assessment of the Independence of the Judiciary in Hungary, Poland and Myanmar

'The judiciary must be strengthened and released from political interference'.

−Aung San Suu Kyi

2.1. Introduction to the EU and ASEAN Institutions

Hungary and Poland exist in Europe and the West and Myanmar is located in the East. The former two are EU members, and the latter belongs to the Association of Southeast Asian Nations (hereinafter: ASEAN). Although the countries are far apart geographically, similar constitutional cases happened in 2012 in Hungary and Myanmar and 2015 in Poland. Typically, European countries use a civil law system, and Myanmar accepts a common law system. Still, these two systems are connected to each other as some common law countries have established constitutional courts, and the civil law countries also focus on case law.

The EU is the third largest group of international organisations.[97] The EU is an economic and political organisation, and it consists of 27 Members States (hereinafter: Member/s). The EU

[97] The world's first and most powerful organ is the United Nations, a unique organisation in our world for peace and security, to protect the environment, to save children and women, to solve the arms conflict and to handle the newest and upcoming world's problems.

originated from the two bodies of the European Coal and Steel Community (ECSC) and the European Economic Community (EEC). These two organisations were established by the Treaty of Paris and the Treaty of Rome. The first six EU countries were Belgium, Italy, France, Luxembourg, the Netherlands and West Germany. In 2004, ten countries, including Hungary and Poland, were accepted as new Member. The regional integration founded by the EU is effective and famous in economics, politics, employment and so forth.[98]

A positive aspect of the EU is that the citizens of a Member receive EU citizenship and related opportunities. For the governments concerned in the community of the EU, their activities deal with the violations of the EU values and EU citizenship rights expressly mention in EU primary and secondary law.

The EU is based on the rule of law. The rule of law includes legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty by prohibiting the arbitrary exercise of executive power; and adequate judicial protection by impartial and independent courts. From the EU perspective, the status of independence of judiciary measures means the priority of human rights protection, separation of powers and equality before the law.[99] Everything the EU does is founded on treaties that were voluntarily and democratically agreed upon by its Members. Liberal democracy can be implemented but not by the violation of fundamental rights. An independent judiciary upholds law and justice for the interests of the public. The EU Members gave final jurisdiction to the ECJ, and all its judgements have to be respected. The rule of law relates to a more institutional dimension of social life. Society needs to guarantee governance by law and rule-bound behaviour. Judges have the primary function of raising their importance compared to other professions. The social, political and economic conflicts should be resolvable based on rules and the law, which are the basis of the rule of law. In this way, the rule of law lends additional normative weight and legitimacy to the judiciary and explains why judges should be privileged.[100]

Beyond its legal involvement in the treaties, the rule of law has been promoted to a symbol of Europeanness, a signature item in EU foreign policy, a sign of belonging that candidate

[98] Lucy Hatton, 2011, Theories of European Integration. Retrieved from http://www.civitsa.org.uk/eufacts/index.php
[99] European Commission, {SWD (2020) 300-326}, 2020 Rule of Law Report.
[100] Daniel Smilov. (2012). The Judiciary: The Least Dangerous Branch? p-866.

countries must display and a scale of conformity for the Member/s.[101] Issues of respect for the EU's fundamental values are the rule of law and its enforcement.[102]While there is no hierarchy among EU values, respect for the rule of law is essential to protect the other fundamental values on which the EU is founded, such as freedom, democracy, equality and respect for human rights.[103] TEU, Art 7, provides mechanisms to enforce EU values based on a decision by the Council with the participation of the Commission and parliament. The EU values are supported as the basis for a common European 'way of life': political and economic integration. They support the EU identity on democratic values. Hence, common EU values represent limits to the diversity of the Members as reflected in their constitutional identities and limits on agreements among Members/s in order to forge mutual trust among themselves and in their legal system, for which the observance of the rule of law is of upmost importance.[104] The UDHR also highly recommended that the rule of law protect human rights.[105]

The rule of law is often defined as a constitutional principle of the EU. It has been confirmed by the TEU and can be learned in the Charter.[106] Respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights are values upon which the EU is founded.[107] Art 6 supports that the EU recognises the rights and freedoms set out in the Charter. And the rights, freedoms and principles of the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter.[108] It means that every action taken by the EU is founded on treaties that have been democratically approved by its Members. TEU and TFEU are the primary EU laws, and the regulations, decisions, recommendations, opinions and directives are

[101] Colm. O Cinneide. (N. D). Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age.
[102] Dr Günter Wilms. (2017). Protecting Fundamental Values in the European Union through the Rule of Law, p-3(pp 1-104). doi:10.2870/083300. (Accessed on 4 June 2021). Retrieved from https://cadmus.eui.eu/bitstream/handle/1814/44987/RSCAS_Ebook_Wilms_EU_RuleOfLaw_2017.pdf?sequence=3&isAllowed=y.
[103] EU Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (6).
[104] European Parliament. (2016). Understanding the EU Rule of Law Mechanism, Briefing, Member Research Service. (pp 1-10). (Accessed on 9 May 2022). Retrieved from https:///www.europa.eu/RegData/etudes/BRIE/2016/579932/EPRS_BRI%282016/%29573922_EN.pdf.
[105] Third Paragraph, Preamble, Universal Declaration of Human Rights, United Nations, 1948.
[106] Nasiya Daminova. (2019). Rule of Law vs. Poland and Hungary – an Inconsistent Approach? *Hungarian Journal of Legal Studies*, 60(3), p-238 (pp 236-259). (Accessed on 4 May 2022). Retrieved from https://www.researchgate.net/publication/348762974_Rule_of_Law_vs_Poland_and_Hungry_an_Inconsistent_approach.
[107] Art 2, TEU, 1992.
[108] Art 6, ibid.

defined as secondary law.[109] Since every Member/s participates in legislating for the entire EU (through the EU Council), a significant problem in one state affects every member and contaminates the whole process. The EU relies on its Member/s to enforce EU laws so they must ensure that there are independent courts in these states.[110] It is the main responsibility of the Member/s to provide remedies sufficient to ensure effective legal protections in the fields covered by EU law.[111]

There is a court called the ECJ as a judicial organ to interpret EU law and as the main body to safeguard the values of the EU. The ECJ interprets EU law to make sure it is applied in the same way in all EU countries and settles legal disputes between national governments and EU institutions.[112] The three important decision-making institutions are the Council of the European Union, the Commission and the European Parliament.[113] If the Commission or a Member thinks that the Commission or other EU institutions or another Member/s is not complying with EU law, it can take a case to the ECJ, and if a Member does not comply with the law, the ECJ can impose a fine.[114]

Myanmar is a member of the Association of the Southeast Asian Nations (ASEAN). ASEAN was established on 8 August 1967 in Bangkok by Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei Darussalam joined in 1984, Vietnam in 1995, Laos and Myanmar in 1997 and Cambodia in 1999. Papua New Guinea is an observer country. [115]

The fundamental principles for the contracting parties are: (1) mutual respect for the independence**,** sovereignty, equality, territorial integrity and national identity of all nations; (2) the right of every state to lead its national existence free from external interference, subversion or coercion; (3) non-interference in the internal affairs of other states; (4) settlement of differences or disputes in a peaceful manner; (5) renunciation of the threat or use of force; and (6) effective

[109] European Commission, Types of EU Law. Retrieved from https://ec.europa.eu/info/law/law-making-process/types-eu-law_en
[110] Democracy Reporting International. (2018). What is Hppening to Poland's Judges? Retrieved from https://www.democracy-reporting.org/poland-judges/
[111] Art 19(1), TEU, 1992.
[112] European Union, Court of Justice of the European Union (CJEU). Retrieved from https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en
[113] EU Today, Organizations. Retrieved from https://pages.uoregon.edu/euro410/eutoday/organizations.php
[114] Art 260, TFEU, 1957.
[115] The Balance, (2019), ASEAN, its Members, Purpose and History. Retrieved from https://www.thebalance.com/what-is-asean-3305810

cooperation with each other. Under point (3), member states cannot interfere in the internal affairs of other states. These are the basic provisions to be followed by the contracting parties under the Treaty of Amity and Cooperation (TAC) 1976.[116] By concluding those fundamental principles, there is no separations of powers among ASEAN members. This means that there is no ASEAN court, no ASEAN commission and no ASEAN Parliament that can check and balance the activities of the governments that are members in the ASEAN related to political abuses. The main purpose is the acceleration of economic growth, social progress and cultural development among its members, the protection of the peace and stability of the region and the provision of opportunities for member countries to peacefully discuss differences.

In Myanmar, the first constitutional Tribunal was established under the provisions of the constitution of 2008, but it could not handle a constitutional problem, especially interpretation even though this is the main task of the Tribunal. The main aim of establishing a constitutional court is to implement democracy in Europe. Myanmar exercises the common law system, but a separate Tribunal has been built to solve constitutional disputes, and it is one of the highest courts in Myanmar. Unfortunately, the first nine members of the Tribunal resigned because two-thirds of the members of the legislature started impeachment proceedings. The impeachment procedure is also exercised in the US to remove Supreme Court judges as the tenure of judges there are unlimited, and they cannot be removed until they die. This means the process of impeachment is rarely used in the US, but it can be used if judges abuse the powers vested in them. On the side of the legislature, the legislators mentioned that the members of the Tribunal could not perform their duties. On the other hand, the resolutions of the Tribunal affect governmental organisations and they are exclusive and final. In practice, two-thirds of the members of the legislature must agree to impeach the members of the Tribunal to move out their resolution. This was contrary to the provisions of the constitution of 2008 because the resolution of the Tribunal is final and conclusive.[117]

In the above-mentioned case, I would like to argue that there should be another solution other than the impeachment procedure to avoid the constitutional conflict and to maintain the

[116] NTI, (2019), Association of Southeast Asian Nations (ASEAN). Retrieved from https://www.nti.org/learn/treaties-and-regimes/association-southeast-asian-nations-asean/
[117] Sec 324, the Constitution of Myanmar, 2008.

principle of the rule of law. Otherwise, the judiciary's role will be under the dominance of the other branches.

Therefore, the independence of the judiciary would also be just a phrase, even though it can be seen in constitutional law and its provisions, and it cannot be real in practice.

2.2 The Separation of Powers in the EU: Judicial Independence in Hungary and Poland

The separation of powers is not easy to implement in a practical sense at the domestic level. In Europe, the Member/s, even they do not share the absolute sovereignty of the EU central organs, have responsibilities to respect EU values since they joined the EU. According to the integration clause of the fundamental law of Hungary, Hungary may exercise some of its competencies to the extent required for the exercise of the rights and the fulfilment of obligations arising from the founding treaties.[118] The Republic of Poland may, by virtue of international agreements, transfer to an international organisation or international institution the competence of organs of state authority in relation to certain matters. This is called the integration clause.[119]

The first step for the country is to meet the key criteria for accession. Countries that wish to join the EU need to have:

- stable institutions which guarantee democracy, the rule of law, human rights and respect for and protection of minorities;
- a functioning market economy and the capacity to cope with competition and market forces in the EU;
- the ability to take on and effectively implement the obligations of membership, including the adherence to the aims of political, economic and monetary union.

These are called the ‘Copenhagen criteria’ and it was agreed to set them up in 1993 at the European Council.[120]

[118] Art E (2), the FL of Hungary, 2011.
[119] Art 90(1), the Constitution of Poland, 1997.
[120] European Neighborhood Policy and Enlargement Negotiations. (2016). European Commission. Retrieved from https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en

In this case, democracy, the rule of law, human rights and respect for and protection of minorities are political values. After joining the EU, a state normally has to keep these values stable. The Member/s have to make sure that any actions they take are consistent with the rules of EU law and must adopt any legislation necessary to give effect to EU law in their national law.[121] Some EU law has a direct effect.[122] The proportionality principle limits how the EU can use its powers.[123]

It can be said that the Member have been checked and balanced as to whether or not their activities are consistent with EU law. Actually, they have to obey not only their domestic laws but EU primary and secondary law. EU law is mostly based on international law. Because of this, it is not easy for the Member to consistently maintain these EU values and standards. This is the reason the constitutional court or Tribunal was founded to maintain these values, and the important purpose was to reduce centralization. Myanmar also established a Tribunal in 2010 under the 2008 constitution to implement democracy. But the plan was not successful in Myanmar and the democracy implemented was not liberal. Liberal democracy or stable democracy: one of the values the EU is sure to practice in the least developed country. According to the legal concept of the modern world, judicial review is crucial to implement a democratic system. That is why functions or competencies of constitutional courts should be stable and updated to handle both constitutional and political problems in the countries where democracy is implemented. Both Hungary and Poland became Members of the EU in 2004 and they tried to become democratic countries after the Socialist regime ended.

The doctrine of the separation of powers was popular in Europe and originated in France by the effort of French scholar Montesquieu in 19th century. Under his exploration, no person should take a seat in the legislature, executive or judiciary at the same time. Similarly, three great branches should not interfere with each other in doing their responsibilities.[124]On the other hand, they can create reciprocal controls, checks and balances under constitutionalism. Under modern

[121] Williams Lea Group (2016). Right and Obligations of European Union Membership, p-11.
[122] Art 288, TFEU and the judgment of Van Gend en Loos, 5 Feb 1963.
[123] European Commission. (N.D). Proportionality. (Accessed on 4 June 2022). Retrieved from https://ec.europa.eu/regional_policy/en/policy/what/glossary/p/proportionality.
[124] Montesquieu, Baron Charles de. (1748). *The Spirit of the Law*. (Tran.) Thomas Nugent. (2001). Ontario: Batocle Books, p-174.

constitutionalism, judicial review vested in the judiciary and the rule of law among the three branches should be valued in the interests of the governed.

The great amendment to the constitution of 1949 in 1989 created the constitutional court to initiate a democratic state.[125] The court achieved the success of judicial independence in a short time after its establishment.[126] The court abolished the death penalty[127] to rise human dignity. It could protect equal property rights and prevent retroactive legislation by the legislature. The resolutions are so that the Court could promote the image of Hungary as a democratic state.

2.2.1 Formation of the Constitutional Court in Hungary

The competencies of the Constitutional Court (hereinafter: CC) under the old constitution 1949 are discussed in Chapter IV. The main tasks of the CC were to review the constitutionality of laws, and it could annul the laws and statues that were contrary to the fundamental law. Citizens could bring a suit to the CC according to the law.[128] The CC was composed of eleven members elected by the Parliament. Judges of the court were nominated by the Nominating Committee consisting of one member of each political party represented by the Parliament. A two-thirds majority vote of the members of Parliament was required to elect a member of the CC. Judges of the court were barred from joining any other political party or political activities. This restriction was essential for the judges to be free from any political influence. A two-thirds vote of the members of Parliament was needed to pass laws regulating the organisation and operation of the CC.[129] Thus, the Parliament had the power to elect all members of the CC because Hungary exercised a parliamentary system. But Hungary initiated a change to lead the state system into a democracy because one of the provisions of the constitution said, 'Hungary's Head of State is the President of the Republic, who represents the unity of the nation and monitors the democratic operation of the State'.[130]

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[125] Laszlo Solyom, (1994). The Hungarian Constitutional Court and Social Change. *Yale Journal of International Law,* Vol-19(1), p-223 (pp 223-237).
[126] Laszlo Solyom, (1994).
[127] 23/1990 (X.31.) ABH Constitutional Court Decision. Retrieved from https://hunconcourt.hu
[128] *Actio Popularis* was an action that could be brought by an individual on behalf of the public interest. Retrieved from http://chicagounbound.unchicago.edu/uclf/vol2003/iss1/9
[129] Art 32/A, the Constitution of Hungary, 1949.
[130] Art 29(1), the Constitution of Hungary, 1949.

In comparison, a maximum of nine members of the CC judges, including its Chairperson, are nominated by the legislature and executive and appointed by the President with the approval of the Legislature in Myanmar.[131]

2.2.1.1 Professionalism and Qualification of Judges

Any Hungarian citizens who have no criminal record and has the right to stand as a candidate in Parliamentary elections shall be eligible to become a Member of the CC, if they:

(1) Have a law degree;
(2) Have reached 45 years of age and not over 70 years of age; and
(3) Are theoretical lawyers of outstanding knowledge or have at least twenty years of professional work experience in the field of law.
(4) Law degree is required for a professional work experience.
(5) The term of office of the CC's Members shall be twelve year and they may not be reelected.
(6) Having been a member of Government or a leading official in any political party or having held a leading state officials or held a senior political or professional office in the four years prior to election shall disqualify persons from becoming Members of the CC.[132]

Judges may only be removed from office on ground and according to procedures specified in an implementing act. Judges shall not be affiliated to any political party or engage in any political activity.[133]

A judge shall exercise the judicial duties free from any influences, as to validate the principle of equal treatment among the parties involved. The judge has the freedom to decide within the framework of substantive and procedural requirement, in accordance with their own conscience. A judge shall avoid unnecessary relation to the legislative and executive power in a way that is obvious to outsiders.[134]A judge shall not be involved in political activities or take part

[131] Art 320 and 321, the Constitution of Myanmar, 2008.
[132] Sec 6(1), the Act CLI of 2011.
[133] Art 26(1), the Constitution of Hungary, 1949.
[134] Art 1 (Independence), the Code of Judicial Conduct, 2014.

in political gathering and shall refrain from political expressions in public. A judge shall not pursue a task or activity, which by nature or origin would affect him or her impartiality or prevent the fulfillment of judicial duties. A judge shall not support any enterprise, charitable or civil organization which can be linked to political activities.[135] A judge shall refrain from extremities in behavior as well as in appearance, which is suitable to the occasion and worthy of the profession at all times. A judge shall avoid public situations which are undeserving of the judicial profession.[136]

The CCJE (Consultative Council of European Judges) considers that rules of professional conduct should require judges to avoid any activities liable to comprise the dignity of their office and to maintain public confidence in the judicial system by minimizing the risk of conflicts of interest. Judges should refrain from any supplementary professional activities that would restrict their independence and jeopardize their impartiality.[137] The European Charter on the Statute for Judges recognizes the right of judges to join professional organizations and a right of expression to avoid excessive rigidity between society and the judges themselves.[138] There was a case regarding with the code of judicial conduct.[139] The Acting President of the Budapest-Capital Regional Court initiated disciplinary proceedings against judge Csaba Vasvari for referring questions to the ECJ under Art 267 of the TFEU (see below). The motion, which argues that the content of the questions violates the " dignity of the judiciary" , is unprecedented in Hungary.[140] Roisin Pillay said that " the actions of judge Vasvari in making a preliminary reference to the CJEU were an entirely legitimate exercise of his judicial functions in accordance with EU law.[141] Besides, the International Commission of Jurists (ICJ) recalled that under international standard on the independence of the judiciary, judges must decide matters before them impartially, without any restrictions, improper influence, inducement, pressures, threats, or interferences, direct or

[135] Art 2 (Impartiality), the Code of Judicial Conduct, 2014.
[136] Art 3 (Dignity), the Code of Judicial Conduct, 2014.
[137] Para 39. Opinion no.3, Consultative Council of European Justices, (2002).
[138] Para 4.3, European Charter on the Statute for Judges, DAJ/DOC (98) 23.
[139] C- 564/19 *IS (illegality of the order for reference).*
[140] Hungarian Helsinki Committee. (2019). Disciplinary action threaten judge for turning to EU Court of Justice. (Accessed on 24 May 2022). Retrieved from https://helsinki.hu/en/disciplinary-action-threatens-judge-for-turning-to-cjeu.
[141] International Commission of Jurists. (2019). Hungary: disciplinary action against judge for recourse to EU court must cease. (Accessed on 24 May 2022). Retrieved from https://www.icj.org/hungary-disciplinary-action-against-judge-for-recourse-to-eu-court-must-cease/

indirect, from any quarter or for any reason.[142] The Committee of Ministers specifies that " the interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in case of malice and gross negligence.[143]

The effectiveness of the judicial system also requires judges to have a high degree of professional awareness.[144] Judges should be provided with proper facilities, equipment, and assistance. So provided, judges should be performed their duties impartiality and independently to deliver judgment within a proper time.[145]

Independence under the Bangalore Principle of Judicial Conduct (ECOSOC 2006/23), judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold the institutional and individual independence of the judiciary.[146] Impartiality applies not only to the decision itself but also to the process by which the decision is made.[147] The Bangalore principle of Judicial Conduct adopted by the General Assembly of the UN Human Rights Commission in May 2003, establish guidelines for ethical judicial conduct in the form of six values.[148] These values are to give a guidance to the judges, for their conduct and to educate the public, lawyers, and the other two branches of powers about behavioral standards by which judges are expected to respect.[149]International Criminal Court- Code of Judicial Ethics expressly allows the judges to exercise their freedom of expression and association in a manner that is compatible with their office that does not affect judicial independence or impartiality.[150] In exercising the rights to freedom of expression, belief, association and assembly, a judge shall preserve the judicial office's dignity, judicial independence and impartiality.[151] Independence of the judges and courts should be enshrined in the constitution or at the highest possible legal level

[142] Principle 2, UN Basic Principles of the Independence of Judiciary, 1985.
[143] The Committee of Ministers of the Council of Europe. (2010). Recommendation CM/Rec (2010)12.
[144] Para 25, Opinion no.3, Consultative Council of European Justices, (2002).
[145] Para 26, Opinion no.3, Consultative Council of European Justices, (2002).
[146] Value 1 (Independence), the Bangalore Principle of Judicial Conduct, 2006.
[147] Value 2 (Impartiality), the Bangalore Principle of Judicial Conduct, 2006.
[148] The Judicial Integrity Group. (N.D). the Bangalore Principle of Judicial Conduct, 2006. (Accessed on 4 June 2022) Retrieved from https://www.judicialintegritygroup.org/jig-principles
[149] Council of Europe. (N.D). Judicial Ethics: Development, Challenges and Solutions. Moldova's Experience in Enforcing Ethics Standards for Judges. (Accessed on 3 June 2022). Retrieved from https://www.coe.int/dghl/cooperation/lisbonnetwork/Themis/Ethics/Paper1_en.asp.
[150] Art 9, Code of Judicial Ethics, 2005. (ICC BD/02-01-05)
[151] Para 4.6, the Bangalore Principle of Judicial Conduct, 2006.

in the Member States with more specific rule provided at the legislative level.[152] Judges should protect the rights and freedoms of all persons equally, respecting their dignity in the conduct of courts proceedings. They should act independently and impartially in all cases, ensuring that a fair hearing. They should act and be seen to act without any improper external influence on the judicial proceedings.[153]

2.2.1.2 Scope of Competencies of the Constitutional Court

Scope of competencies of the CC is connected to the CC's competencies. The functions of the CC's under the FL and the Act on the CC should be counted. Furthermore, who are concerned to submit legal petitions including the constitutional complaints at the CC are important. According to the CC's competencies, the Parliament or the President of the Republic can submit a petition for the preliminary norm control. The President, the Government and one-quarter of the members of Parliament may submit a petition for the constitutional review for the international agreement prior to their ratification. According to the new rules, applicable from 1 January 2012, the Government, one-quarter of the members of Parliament, the Commissioner for fundamental rights (Ombudsman), the President of the Curia, and the General Prosecutor may lodge a petition asking for the posterior norm control.

The situation is different if a judge, in the course of the adjudication case in progress, is bound to apply that he or she perceives to be contrary to the FL or which has already been declared to be contrary to the FL by the CC. In that case, the judge shall suspend the cases and submit the petition to the CC for declaring that the law or a provision thereof is contrary to the FL. Besides, the persons or organizations when their fundamental rights are violated by a court's decision, they can submit constitutional complaints to the CC. Besides the judicial decision, the constitutial complaint proceeding can also be initiated if the application of law contrary to the FL and it makes the FL rights violated when it becomes effective.[154]

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[152] Para 7, Recommendation CM/REC (2010)12 on Judges, independence, efficiency and responsibility, Council of Europe Publishing. (Accessed on 3 June 2022). Retrieve from https//rm.coe.comrec2010-12-on-independence-efficiency-responsibility of judges.
[153] Paras 59/60, Recommendation CM/REC (2010)12.
[154] Secs 23 to 38, the Act on the CC, 2020.

In general, scope of the CC extends to the President of the Republic, Parliament, the Government, the courts under Section 25 of the Act on the CC, and the Commissioner for Fundamental Rights (Ombudsman). The CC's scope can reach the cases legal, political and religious things. The competencies and its scope in detailed are expressed in the following subtitle (2.2.6).

2.2.1.3 Accessibility of the Constitutional Court

Due to the scope and competencies of the CC mentioned above, direct accessibility for the individual can be occurred when his or her fundamental rights are violated directly by the implementation of the law. Otherwise, the governmental institutions like the Parliament, the Government, the courts, and the Commissioner for Fundamental Rights (Ombudsman) may access the CC's competences directly. The petition for initiating proceedings shall be filed directly at the CC. However, the petitions for the constitutional complaint have to be filed at the court of first instance and they shall be addressed to the CC. The court of first instance shall forward the constitutional complaint to the CC. The court may suspend the execution of the decision contested to the constitutional complaint until the CC's proceedings are concluded. Exceptionally, the constitutional complaint may be submitted directly to the CC if rights were violated directly without a judicial decision.[155] The CC could not deal with direct constitutional complaint against an administrative or judicial decisions in a concrete case if those direct complaints did not challenge the constitutionality of the norms on the basis of which the decision has been brought.[156]

Kelsen did not favour individual access and only state's bodies should be able to appeal to the Constitutional Court, except for the challenge of administrative act. Like Kelsen, Venice Commission has a critical attitude towards the *actio popularis*, whereby any citizen can request the annulment of the law, even if the citizen is not effected by that law. Such a wide access can

[155] Constitutional Court of Hungary. (2017). Competences. (Accessed on 25 May 2022). Retrieved from https://hunconcourt.hu/competences.
[156] Gabor Halmai. (N.D). Dismantling Constitutional Review in Hungary, p-2 (pp 1-20). (Accessed on 26 May 2022). Retrieved from https//me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/11/Boccini_HC_Halmai.pdf.

lead to a serious overburdening of the Constitutional Court. Hungary replaced the actio popularis with an individual complaint.[157]

According to the constitutional amendment 2012 in Hungary, the CC may access the constitutionality of acts related to the state budget, central taxes, duties and contributions, custom duties and central conditions for local taxes in connection with the rights to life and human dignity, the protection of personal data, the freedom of thought, conscience and religion, or with rights related to Hungarian citizenship.[158]

Accessibility of the CC is very important for the CC itself for its independence and for the complainants as well. It is connected to the right to defense and fair trial right.[159] The ECtHR will only recognizese a national remedy as effective if this remedy can provide relief to the complainant.[160]

2.2.1.4 The Legal Effect of the Decision of the Constitutional Court

The decisions of the CC are binding on everyone. There shall be no remedy against the decisions of the CC. The CC shall establish itself the applicable legal consequences within the legal framework of the FL and the Act on the Constitutional Court.[161] The Act may not be promulgated if the CC declares that the provision or provisions of an Act examined within the framework of preliminary norm control proceeding. If the CC declares again that the unconstitutionality of the provision or provisions of an Act within the framework of proceedings conducted in accordance with Art 6(8) of the FL, it shall call upon the Parliament to perform its legislative task in accordance with the FL.[162] If the CC, within the framework of preliminary norm control procedure, declares that a provision of an international treaty is contrary to the FL, the

[157] Schnutz Rudolf Durr. (2016). Improving Human Rights Protection on the National and the European Levels, p-281 (pp 267-298). (Accessed on 25 May 2022).
Retrieved from https://archivos.juridicas.unam.mx/www.bjv/libros/11/5017/16.pdf.
[158] Eszter Bodnar, Fruzsina Gardos-Orosz and Zoltan Pozsar -Szentmiklosy. (2016). Development in Hungarian Constitutional Law: The Year 2016 in review, *International Journal of Constitutional Law*. (Accessed on 25 May 2022). Retrieved from www.iconnectblog.com/
[159] *Andra Baka v. Hungary, no. 20291/12.*
[160] Schnutz Rudolf Durr. (2016). Improving Human Rights Protection on the National and the European Levels, p-282.
[161] Sec 39, the Act on the CC, 2011.
[162] Sec 40 (1/2), the FL, 2011.

binding force of the international treaty shall not be recognized. This part of the CC's legal binding force is dealt with the reservation of the international treaty. The constitutional amendment on the FL shall not be promulgated if the CC declares that it is not met with the constitutional requirement.[163]

The legal effects of the CC may be wider because Hungary is a member of the EU and its integration, and the courts should implement the EU values of democracy under Art 2 of the TEU, the rule of law, human dignity, equality, and respect for human rights, including the right of persons belonging to minorities in the adjudication. The CC and other courts have to respect the primary and secondary law of the EU. If the cases are related to the EU matters, the courts shall get the ECJ's opinion on it. The national courts are normally responsible for applying EU law, when a case so requires. However, when an issue relating to the interpretation of the law is raised before a national court or tribunal, the court or tribunal may seek a preliminary rulings from the ECJ. If it is a court of last instance, it is compulsory to refer the matter to the Court.[164] Otherwise, the legal effect of the CC or other courts cannot be recognized by the EU institutions and the Commission, or a Member State may bring the matter before the ECJ.[165]

Hungary is an independent, democratic constitutional state governed by the rule of law. Hungary is a parliamentary republic. Hungary practices civil law system and the courts directly interpret the words of the legislation. The sources of Hungarian law are the Acts of Parliament, governmental and ministerial decrees.[166]

In the countries practice with the civil law system, the enacted laws are priority. Therefore, Hungary, as a parliamentary democracy state, will put the enacted laws first than the legal precedent.

[163] Sec 40 (3/4), the FL, 2011.
[164] European Parliament. (2021). Fact Sheets on the European Union. (Accessed on 4 June 2022). Retrieved from https://www.europarl.europa.eu/factsheets/en/sheet/12/competences-of-the-court-of-justice-of-the-uropean-union.
[165] Arts 258/259, Consolidated Version of the Treaty on the Functioning of the European Union. (26/10/2012).
[166] Zsuzsanna Antal. (2013). Introduction to Hungarian Law Research. (Accessed on 26 May 2022). Retrieved from https://www.nyulaw.global.org/globalex/Hungary1.html.

2.2.2 Functions of the Constitutional Court before 2011

The general functions and duties of the CCs worldwide are to review whether or not laws are constitutional. But in some countries, like Myanmar, the court only has the power to interpret the constitution and to decide constitutional disputes among the government organisations. The Tribunal in Myanmar cannot decide the cases when the fundamental rights are violated by the actions of the government branches. That power is guaranteed to the Supreme Court of the Union of Myanmar.

In general, the CC can have just two vital functions.

1. Legal Function
2. Political Function[167]

The most important legal function is to review the constitutionality of laws and the duties assigned to its jurisdiction by law. This can be called constitutional review by the separate CC that originated in Europe. The court had the competence to annul those laws that were not consistent with constitutional law.[168]

2.2.3 Constitutional Review; Landmark Decisions in Hungary

The CC made important decisions to promote human rights before it joined as a Member of the EU in 2004. Hungary was one of the countries that abolished the death penalty or capital punishment to point out how Hungary respects the values of the EU, such as the protection of human rights through democracy following the provisions of the UN Charter, ECHR and the ICCPR.

Capital punishment was completely abolished on 4 October 1990 in Hungary when the CC ruled it unconstitutional.[169]According to the survey conducted by pollster Závecz Research, 24 percent of the Hungarian population supports capital punishment, 52 percent accepts it in specific

[167] These two functions are just my opinion after I learned about constitutionalism and legal systems of some Asian countries and European countries. Constitutional court judges faced challenges, such as removal or transfer of the positions of judges when they used their dictionary power in deciding political cases or when the legal problems changed into political ones.
[168] Art 32/A, the Constitution of Hungary, 1949.
[169] 23/1990 (X.31.) ABH Constitutional Court Decision.

cases of crimes against life, while only 21 percent rejects it outright.[170] Related to the abolishment of the death penalty in Hungary, the President of the CC expressed the concept of the invisible constitution.[171]

According to Hungarian practice, women are legally entitled to request the termination of their pregnancy. The permission is granted if the pregnancy endangers the health or life of the mother:

- the foetus has genetic or other defects,
- the pregnancy is a result of a crime,
- or the mother is in a crisis (financial difficulties, already has children, too young, etc.).

The CC decided, in 1991, that the non-statutory regulation of abortion was unconstitutional. But there was an argument related to whether an embryo was a legal subject or not. The constitution also said that everyone has the inherent right to life and human dignity. No one can be arbitrarily denied these rights.[172]

Related to the abortion case in Germany, the FCC decided that the constitutional right to life required the legislators to enact further criminal sanctions against abortion, it acted very much as a positive legislature by selecting one among several plausible political choices.[173] The FCC first held that a law permitting abortion is unconstitutional under certain circumstances because of the need to protect the dignity of the unborn foetus. But also, on the side of the pregnant woman, whose autonomy and personal development are strongly implicated in the decision to terminate the pregnancy.[174]

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[170] Balazs Pivarnyik, More Hungarian Support Death Penalty Than 10 Years Ago. Retrieved from http://budapestbeacom.com/hungarians-suppoort-death-penalty-10-years.

[171] 'The Constitutional Court has to continue its works to formulate in its interpretations the fundamentals of the Constitution and the rights it contains; to create a coherent system with it decision over the Constitution that is often amended for short-term political interests; as an "invisible constitution" it serves as a solid constitutional measurement, and therefore it surely will neither contradict the Constitution to be adopted nor any further constitutions'. (See *note 7*, Istvan Stumps, [2017]. The Hungarian Constitutional Court's Place in the Constitutional System of Hungary. *Civic Review*, V-13, Special Issue, p-241.)

[172] Art 54 (1), the Constitution of Hungary, 1949.

[173] BVerfGE 39, 1; see Michel Rosenfeld. (2005). European and US Constitutionalism, Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts, in George Nolte (Ed.), Cambridge University Press, UK, p-200 (pp 1-312).

[174] Paolo G. Carozza. (2011). Human Dignity in Constitutional Adjudication, in Tom Ginsburg and Rosalind Dixon (Eds.), Comparative Constitutional Law, Edward Elgar, Cheltenham, UK, p- 461 (pp 459-472).

Abortion is a crime in Myanmar, and most of the medical petitioners do not allow abortion except if a mother's life is in danger due to having a baby or if the mother has a serious disease like cancer and the medicine could damage the embryo. Legally, abortion is not allowed in Myanmar by any rule, regulation, order, notification or law.[175]

The right of property is also a fundamental right for the citizens of Hungary. Hungary is one of the European countries that exercises the civil law system. Hungary was occupied by Socialist Russia. On August 18, 1949, Hungary became the People's Republic of Hungary. The constitution of 1949 was greatly amended, and the separate CC was established by the Parliament. Hungary also implemented a market economy. The real purpose of establishing the CC was to transform Hungary into a democratic country.

Under the Socialist system, governments claimed some people's properties as nationalisation.[176] The sign of nationalisation was seen in the member countries of Socialist Law Family. After the disintegration of the Soviet Union, Socialist countries tried to change their state systems into democracies.

After the Socialist system in Hungary, the CC played an important role in the time of transition from an undemocratic state to a state based on the rule of law. The Court performed a crucial role in pre-constitutional norms with the constitution through a process of abstract judicial review.[177]

The former President of Hungary concluded, 'one of the landmark decisions was related to the Compensation Law and the question of private property that was nationalised in the 1940s and 1950s should be returned to its original owners or should pay compensation to those owners. The Prime Minister asked the CC to interpret the constitution's provisions relating to equality and the right of property. The CC found that a plan to compensate former real property owners and personal property owners would breach the constitution's equality provision and declared that the

[175] Secs 312 to 316, Penal Code of Myanmar, 1861.
[176] In Myanmar, the SLORC's Chairman took over the state's power in 1962 and established the state as a Socialist country, then he nationalized the properties of some people to make the state's budget strong. Economic permission and licences were controlled by the Socialist government. The living standard of the citizens, the economy, education and medical care by the State were down deeply at that time. This has affected the country's economic situation until now, even though Myanmar tries to implement a market economy.
[177] Laszlo Solyom. (1994). The Hungarian Constitutional Court and Social Change. *Yale Journal of International Law.* Vol-19(1), pp-223-224.

constitution protects the property of agricultural cooperatives, and that this property cannot be taken away without prompt and complete compensation'.[178]

The former government in Myanmar also took the farms and lands on the ground for the benefit of the state and citizens to build public schools, markets and housing. But there was no compensation for the damaged persons. There might sometimes be some compensation, but it was not enough for the current price.[179]

2.2.4 Constitutional Reform 2011 in Hungary

Hungary's first written constitution was adopted in 1919, but it was not implemented due to the short existence of the political structure. The Constitution of the Hungarian People's Republic adopted in 1949 was a written constitution which was totally modified in 1989.[180] There was some effect after the constitution of 1949 was reformed in 2011. In the 2010 election, the Hungarian Civic Alliance won with two-thirds of the seats in the Parliament. This was enough votes to change the constitution.[181] In 2010/11, not only constitutional amendments took place in Hungary, but a new constitution was adopted.[182]The governing party amended the constitution and then enacted a wholly new constitution that entered into force on January 1, 2012.[183] In the replacement of the old constitution with the new, the development of another constitutional regime and writing of the FL came about in parallel with the devastation of the previous constitutional order.[184] Under the new constitutional order, the CC's responsibility to review the laws for constitutionality were limited to:

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[178] Laszlo Solyom, (1994). The Hungarian Constitutional Court and Social Change, p- 231-232.
[179] The military government took the lands of some citizens for building highways, public offices and public universities and sometimes for no exact reasons, but the authorities did not consider paying compensation and the Constitution 1974 itself did not confer power upon the Supreme Court to issue the writs.
[180] Csaba Erdos. (2022). Fore-evaluators for the preliminary professional debate of the dissertation titled 'Guarantees of Constitutional Adjudication'. (22 April 2022).
[181] Kim Lane Scheppele. (N.D). Understanding Hungary's Constitutional Revolution, p-111(pp 111-124). (Accessed on 11 May 2022).
Retrieved from https://law.yale.edu/sites/default/files/understanding_hungarys_constitutionlrevolution.pdf.
[182] Chronowski Nora. (2022). Preliminary Opinion on PhD thesis titled 'Guarantees of Constitutional Adjudication' for workshop discussion of 22 April 2022.
[183] Kim Lane Scheppele. (N.D). Understanding Hungary's Constitutional Revolution, p-111.
[184] Chronowski Nora. (2022). Preliminary Opinion. *See supra note 143.*

(1) nomination of CC's judges,

(2) The limitation of the CC competence regarding the review of acts concerning public finances,

(3) the rule of access to the CC so that it will no longer be easily able to review laws in the abstract for their compliance with the constitution,[185] and

(4) the election of the President of the CC which now shall be elected by the Parliament instead of the court itself, and the number of the CC's court judges expanded from 11 to 15[186] by filling with their own political allies.[187]

According to Kim Lane Scheppele, if independence of the judiciary is over then a government puts its own judges on the bench.[188]

The functions of the CC had also been changed in line with the policies of the governing party. So, it is clear that the competences of the CC are very important in the constitutional review and interpretation of the political issues within the legal framework because the governing party in Hungary modified the active abilities of the CC.[189] It is similar to the Myanmar Tribunal which has not been vested with the active capacities by the legislature even though the constitution of 2008, expressed that the Tribunal's duties can be extended by the enacted laws.[190]

This is not contrary to the nature of politics and constitutional systems nowadays. Even though the states accept Montesquieu's doctrine to reduce centralisation to implement the decentralisation system, a state system will have relied on the actions of a current governing party during their terms elaborated in the relevant constitutional laws. The politically potent party can make laws or legislation by supporting the legislature's majority vote.

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[185] The New York Times. (2011). The Opinion Pages: Hungary's Constitutional Revolution by Kim Lane Scheppele. (Accessed on 11 May 2022). Retrieved from https://krugman.blogsnytimes.com/2011/12/19/hungars-constitutional-revolution/

[186] Chronowski Nora. (2020). The Post-2010 'Democratic Rule of Law' practice of the Hungarian Constitutional Court under a Rule by Law Governance, *Hungarian Journal of Legal Studies*, pp 140-141 (pp 136-158). (Accessed on 11 May 2022). Retrieved from https://akjournals.com/view/journals/2052/61/2/article-p136.xml#fn37.

[187] The New York Times. (2011).

[188] Kim Lane Scheppele. (N.D). Understanding Hungary's Constitutional Revolution, p-111.

[189] Interpretation is the primary competency.

[190] Sec 322(g), the Constitution of Myanmar, 2008.

Tamas Boros's analysis of constitutional amendments in Hungary was that[191] 'the document starts with a socially divisive conservative preamble which contains an incorrect interpretation of Hungarian history, legally interpretable components and elements of radical right-wing imagery.

On the other hand, the essential elements of amendments for nine times were (1) to reduce the number of members of Parliament, introduce the institution of a deputy prime minister and to create the status of government official; (2) to elect someone without municipal representative to the position of municipal mayor; (3) to change the composition of the body appointing CC judges; (4) to reshape public service media; (5) to vest the decision-making power with the court clerk; (6) to create the conditions for the retroactive taxation of severance payments that brewed a dark political storm; (7) to implement the changes made necessary by the repeal of the Act on legislation; (8) to limit the powers of the CC in reviewing acts related to the economy; (9) and to combine the institution of the National Media and Info-communication Authority into the text of the constitution.[192]

Modification of the capacities of the CC could not be wonderful but not allowing the direct submission of constitutional complaints to the CC due to modifications was questionable. Again, this happened during a transitional period and there was not duly enough time for the damages. The domestic court could also not provide a legal remedy because the constitutional complaint procedure was also prohibited.[193] The primary criticism was due to the removal of judges against the constitutional law and other leal norms within the domestic, regional and international legal frameworks.

In the background of the debates following the 2010 election and surrounding the efforts of the parliamentary majority holding a constitution-making majority to transform public law relations, the implicit question was whether two decades after the change in political regime, the time had come to curb the competences of the overly powerful CC. Analysts close to the national–

[191] He is a political analyst and the Director of Policy Solutions, Budapest.
[192] Note 11, Istvan Stumpf and Csaba Erdos. (2020). Changes in the Constitutional Review of Legislation in Hungary, Central European Papers, Vol- VIII (1), p-30 (pp 27-46). (Accessed on 13 May 2022). Retrieved from https://www.researchgate.net/
[193]In this way, the competencies of the CC were disabled so as not to support the right to hear the applicant and allow him or her an independent and impartial court. Therefore, the competencies of the constitutional courts in the chosen countries in the dissertation become relevant to investigate and answer the research's questions.

conservative side believed that serious distortions had taken place within the constitutional system, drastically limiting the governments' scope of action. Therefore, the excessive separation of powers must be cut back to restore the supremacy of the elected parliament and to build a strong government with an efficient public administration. Several proposals were formulated to change the constitutional system and to introduce innovations to the new constitution. [194]

The most significant changes were made to the role of the CC in the new power sharing system. The President selects the CC's judges and the CC's ability to review the constitutionality of economic matters is limited. The President of the CC shall be elected by the Parliament.[195]

The CC is composed of fifteen judges. The Parliament with the voting of a two-thirds majority elected judges for a twelve-year term.[196] The Parliament elected the CC's President from among the judges. The significant change is that the term of the CC's judges is limited, and they cannot be re-elected. This is a little contrary to the former constitution of 1949[197] as well as different from the systems in other countries.[198]In Myanmar, the judges of the Tribunal can take a seat for five years similar to the term of the legislature (Pyidaungsu Hluttaw in Myanmar) under the constitution of 2008.[199]

2.2.5 Why is a Constitutional Court Important?

The functions of the CC can be briefly found in the constitution of 2011[200], and detailed procedures are expressed in the law on the CC 2011.[201] The CC is the supreme body for the protection of the Fundamental Law (hereinafter: FL). The supreme judicial body is the Supreme Court (Curia).[202] A CC should be established to take control and to check and balance the actions

[194] Istvan Stumpf and Csaba Erdos. (2020). pp-29-30.
[195] Istvan Stumpf and Csaba Erdos. (2020). p-31.
[196] Art 24(4), the FL of Hungary, 2011. Retrieved from https://hunconcourt.hu
[197] Lecture by Laszlo Deter, The Functioning of the Court and Recent Decisions, (Counselor, Constitutional Court). Constitutional Court, Budapest, (27/2/2019).
[198] I know that judges of the constitutional courts in most of the countries can be reelected for a second term as I have previously completed a research project on the comparison of constitutional courts among some ASEAN countries.
[199] Sec 335, Constitution of Myanmar, 2008.
[200] Art 24, the FL, 2011.
[201] Chapter II, 'Procedure Falling with the Tasks and Competencies of the Constitutional Court; Legal Consequences', the Act on the Constitutional Court of Hungary, 2011.
[202] Art 25, The FL, 2011.

of the legislature and executive as to whether they are constitutional or not. These kinds of courts are necessary to keep the rule of law. State authorities should respect each other, and whatever they do, should initiate it for the benefit of the state and citizens. Citizens could understand the value of the rule of law through their governments. The 'rule of law' relates to the legal maxim of 'no man is above the law.' The authorities of a state should follow the laws they enact, and if they do not do so, it can be said that there is a lack of the rule of law.[203]

2.2.6 Analysis of the Competencies of a Constitutional Court

The competencies of CCs are different in general. Their main aims are to promote democracy and human rights.[204] This is a well-known EU perspective. In Myanmar, the Tribunal has no power to promote human rights, just the task of interpretation of the constitution when constitutional disputes arise among the government authorities.[205] But the Supreme Court of Myanmar has the power to issue writs when the fundamental rights of a citizen are violated by any actions of one of the three branches.[206]

The CC of Hungary has been vested with effective functions and powers. Hungary respects and obeys either International Treaties or EU values. As Hungary became a member of the EU in 2004, the CC shall review whether or not the laws passed by the parliament are consistent with EU values.

The CC has the important functions of:

- Ex-ante Review of Conformity with the Fundamental Law (Preliminary Norm Control);
- Ex-Post Review of Conformity with the Fundamental Law (Posterior Norm Control);

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[203] Robert S. Summers. (1991). Principles of the Rule of Law, *Notre Dame Law Review*, Vol-74(5), p-1703(pp 1691-1712). Retrieved from http://scholarship.law.nd.edu/ndlr/vol74/iss5/11
See also the famous saying of the philosopher Aristotle, 'Government by laws was superior to the government by men'. Retrieved from https://www.ka.edu.pl/download/gfx/ksw/pl/.../krakow_rule_of_lawlecture_4pptx
[204] Constitutional Courts, 'International Encyclopedia of the Social Science'. Retrieved from Encyclopedia.com: https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/constitutional-courts
[205] Sec 322, the Constitution of Myanmar, 2008.
[206] Sec 378(A), the Constitution of Myanmar, 2008.

- Judicial Initiative for Norm Control in Concrete Cases;
- Constitutional Complaints;
- Examination of Conflicts with International Treaties;
- Examination of Parliamentary Resolutions Related to Ordering Referendums;
- Opinion on the Dissolution of a Local Representative Body Operating Contrary to the Fundamental Law;
- Removal of the President of the Republic from Office;
- Resolving Conflicts of Competence;
- Examination of Local Government Decrees, Normative Decisions and Orders and Decisions on the Uniform Application of the Law; and
- Interpretation of the Fundamental Law.[207]

2.2.7 Main Competencies; Ex-Ante Review and Ex-Post Review

Ex-ante review and ex-post review are the main competencies of the CC. Ex-ante review can be applied by the members of the Parliament and the President of the Republic. The President submitted to the CC an initiative on preliminary norm control which dealt with the right to public health and environmental protection. The Parliament amended an Act intending to reduce the unnecessary administrative burden for digging and maintaining wells (water management) concerning the amendment. The provision allowed the construction of water projects without permission and reporting until the depth of 80 metres which would conflict with the FL. The CC also determined that the protection of the volume and the quality of sub-surface waters and the regulation of the use of water taking into consideration the interests of future generations is a primary obligation of the State resulting from the FL.

Finally, the CC found the regulations were not consistent with the FL and thus they were not to be promulgated.[208]

Ex post review[209] shall be submitted to the CC by the authorities defined under the FL, such as the government, one-fourth of the members of the Parliament, the President of the Curia,

[207] Secs 23 to 38, Act CLI of 2011 on the CC of Hungary.
[208] 13/2018 (IX.4), AB Constitutional Court Decision.
[209] Lecture by Laszlo Deter (2019).

the Prosecutor General and the fundamental rights' Commission. [210] The President of the Curia submitted a motion which asked for the establishment of conformity with the FL and the annulment of those provisions of the Act on National Security Services that deal with the national security vetting of judges and a review of the national security vetting procedure. The President of Curia pointed out that the Act exempts members of the Parliament from the scope of persons affected by national security vetting, but judges are not exempted. Under the petition, the challenged statutory regulations could make the legal certainty originating from the rule of law, the principle of division of powers, the right to lawful judges and judicial independence that are guarantees given by the FL violations under constitutionalism. The CC annulled certain provisions of the Act on National Security Services that violated the judicial independence enshrined by the FL and the basic right privacy.[211]

2.2.8 Constitutional Complaint (a new type of *Actio Popularis*)

The constitutional complaint is a legal remedy for legal or natural persons. It can be submitted to the CC when:

- rights enshrined in the fundamental law are violated; and
- the possibilities for legal remedy have already been exhausted or no possibility for legal remedy is available. [212]

The constitutional complaint is a new type of complaint instead of the actio popularis. In a justified complaint procedure, the CC has the competence to annul the challenged legal norms which are not in harmony with the constitutional law and break a petitioner's fundamental rights. The real or genuine constitutional complaint enables the CC to provide a constitutional remedy against judicial decisions.[213] According to some constitutional law researchers from Hungary, the main function of the CC is supplemented with a function which serves a more direct protection of fundamental rights in the form of the real constitutional complaint procedure in some European

[210] Ibid.
[211] 12/2017 (VI.19.) AB Constitutional Court Decision.
[212] 24/2 (c), the FL of Hungary 2011 and Sec 26/1, Act CLI of 2011 on the CC.
[213] Lecture by Laszlo Deter (2019).

countries like Germany, the Czech Republic, Croatia and Slovenia.[214] The FL abolished the so-called *actio popularis* and introduced a more complex system of review in which the emphasis is on the individual's concerns. It is the system of constitutional complaints.[215]

This kind of constitutional complaint is permitted as a remedy for the victim whose fundamental or constitutional rights affected by the decision of a court and the legal regulation were damaged. It is like five writs[216] that can be issued by the highest courts in common law countries.

2.2.9 Case Studies

The Commissioner for fundamental rights submitted to the CC a request for review of the whole of the Transitional Provisions of the FL of Hungary (hereinafter: TPFL) with regard to whether they were contrary to the fundamental law and asked for its annulment on 31 December 2011. [217] In the opinion of the petitioner, the Court had the competencies to review the TPFL in the framework of abstract posterior norm control, as TPFL cannot be regarded to be part of the FL.[218]

As a result of the constitutional changes in 2012 in Hungary, the mandate of the President of the Supreme Court was stopped on the date the FL entered into force and a new President of the Curia was elected. The previous law on the legal status and remuneration of judges[219] permitted judges to serve the state until the age of seventy before the new FL became active. Under the provisions of the new FL, the service of judges would terminate upon reaching the age of general retirement, except for the President of the Curia and the President of the National Office for the Judiciary.[220] A judge shall retire on 30 June 2012 if he or she reaches the age of general retirement

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[214] Bernadette Somody and Beatrix Vissy, 'Citizen's Role in Constitutional Adjudication in Hungary: From the *Actio Popularis* to the Constitutional Complaint'.
Available at https://www.ajk.elte.hu/file/annules_2012_05_SomodyVissy.pdf
[215] Balazs Szalbot, Essay on Constitutional Complaint in Hungary. Retrieved from https://www.academia.edu/21638505/Constitutional.
[216] 1. Habeas Corpus, 2. Mandamus, 3. Prohibition, 4. Quo warranto and 5. Certiorari.
[217] Sec 24(2), Act CLI of 2011 on the CC, 2011.
[218] According to Art 31(2), of the TPFL, 2011, it shall form part of the FL, and it shall come into force on 1 January 2012. This was the same date that the new constitution of Hungary entered into force.
[219] Art 57(2), Legal Status and Remuneration of Judges, 1997.
[220] Art 26(2), the FL, 2011.

before 1 January 2012. He or she shall retire on 31 December 2012, if the general retirement age I reached between 1 January 2012 and 31 December 2012.[221] Similarly, with respect to prosecutors, under Art 29(3) of the FL, prosecutors may remain in office until their general retirement age, with the exception of the Prosecutor General.[222] In 2012, The TPFL insisted that those judges over the general age of retirement of 62 take retirement. The same rules applied to 236 judges, 100 prosecutors and 60 notaries.[223]

The Commission brought a suit to the ECJ against Hungary as it omitted to fulfil a Member's obligation under Art 258 TFEU.

This can also be viewed as a type of violation of the individual guarantees of judges.[224] There are some exceptions for the free speech right,[225] but the case did not concern this. Free speech right is widely guaranteed in the domestic laws, regional laws and in the international laws. Freedom of expression is one of the 30 rights and freedoms under the UDHR. Everyone has the right to freedom of opinion and expression.[226] The ECHR and E' Charter of Fundamental Rights set it up as a European convention right.[227]

Regarding this principle of irremovability of judges, Andra Baka, whose right to a hearing was rejected before the national CC, submitted a suit to the ECtHR in 2012. He was the former president of the Supreme Court of Hungary and was forced into retirement when the constitution came into force in 2012, under which the general retirement age immediately changed from 70 to 62 years. In addition, five-years of experience became necessary to be a judge of a Curia due to the term of the Act CLXII of the Act 2011 on the Legal Status and Remuneration of Judges. This term intentionally prohibited Baka from being a judge of a Curia due to the reorganisation of the judicial system in Hungary. In fact, Baka was a judge of ECtHR from 1991 to 2008 and then he was elected for a six-year term by the Hungarian Parliament as the President of the Supreme Court in 2009. Thus, he could be a judge until 2015. Unfortunately, the restriction of at least five-years of experience to be a judge in Hungary was essential to be a judge. He criticised the actions of

[221] Art 12 (1), TPFL, 2011.
[222] Para 8, Commission v. Hungary, C-286/12.
[223] Attila Vincze. (2014). Judicial Independence and Its Guarantees Beyond the Nation State – Some Recent Hungarian Experience. *Journal of the Indian Law Institute*. Volume 56(2), p-204(pp 202-215).
[224] Art IX (1), the FL 2011.
[225] Art IX (4/5), the FL 2011.
[226] Art 19, UDHR, 1948.
[227] Art 10, ECHR, 1950 and Art 11, the EU Charter of Fundamental Rights, 2000.

government related to the judicial reform as an experienced judge. The most important point was that he could not access the right to a hearing before the CC, and when he made a complaint to the CC, his complaint was rejected for the reason of reformation of the judiciary. The alteration of the system is one of the three exceptions to the principle of irremovability recognised by the Council of Europe. However, the reason given by Hungary under this exception was not acceptable due to the Baka case. Therefore, in 2016, the ECtHR found that Hungary violated freedom of speech,[228] the right to a fair trial in the ECHR[229] and the European Standard[230] on the independence of judiciary and rule of law.[231]

The Commission alleged that Hungary violated Arts 2 and 6(1) of Directive 2000/78/EC – equal treatment in employment and occupation – and applied for an expedited procedure.[232] The ECJ also declared that Hungary failed its obligations under Art 2 and 6(1) of Directive 2000/78/EC of 27 November 2000 by adopting a national scheme requiring compulsory retirement of judges, prosecutors and notaries at their general retirement age.[233]

Nonetheless, the judges removed could not get back their former positions. It could be criticised that there were no effective remedies under politics for public servants who had their fundamental rights violated, even though these rights are guaranteed by the EU.[234]

The principle of irremovability of judges under the European standards on the independence of the judiciary and rule of law notes as follows: 'judges, whether elected or appointed, shall have tenure until a mandatory retirement age or the expiry of the term of office'.[235]

The internal influence between the courts also needs to be considered as one of the infringements of an independent judiciary. Superior judges are ranked as higher and they can

[228] Art 6(1), ECHR, 1950.
[229] Art 10, ECHR, 1950.
[230] Cannoot. P. (2016). *Baka v. Hungary*: Judicial Independence at Risk in Hungary's New Constitutional Reality. (Accessed on 3 May 2022). Retrieved from https://strasbourgobservers.com/2016/07/12/baka-v-hungary-judicial-independence-at-risk-in-hungarys-new-constitutional-reality/
[231] I took the entire paragraph from my previous article 'Principle of Irremovability of Judges: Judicial Independence in Hungary'.
[232] *European Commission v. Hungary* C-286/12.
[233] Judgment of the Court, 6 November 2022.
[234] Art 47, the EU Charter of Fundamental Rights, 2000.
[235] Recommendation R 94(12).

manage the appointment and promotion procedures for inferior judges.[236] There was an updated case to examine how the superior judges can influence the independence of the inferior judge.[237] The IS case is about a Hungarian Criminal Proceeding against a Swedish national who was originally from Turkey.[238] There was no evidence to prove the interpreter's competence or that the accused understood the interpreter after the first interview between the accused person and a Swedish language interpreter.[239] The Central District Court (hereinafter: CDC) decided to stay the proceeding and referred three questions to the ECJ for a preliminary ruling with regard to the fair trial right and judicial independence guaranteed by EU law.

In the preliminary ruling, the inconsistency of the letter of rights on arrest under Directive 2012/13/EU was also included. The directive applies from the time persons are made aware by the competent authorities of a Member/s that they are suspected or accused of having committed a criminal offence until the conclusion of the proceeding.[240] Member/s shall ensure that accused persons receive the letter of rights written in a language that they understand. The accused person should at least be orally informed of his or her rights in a language that they understand when a letter of rights is not available in the appropriate language.[241]

The accused person needed a proper translator and it seemed that the Court planned an interpreter for him, but it was not quite enough in the case. The CDC found that the case was related to EU law and submitted it to the CJEU with the aforementioned questions. According to the TFEU, the CJEU has jurisdiction to give preliminary rulings concerning (a) the interpretation of the treaties and (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.[242] The ECJ referred to the directives of 2010/64/EU and 2012/13/EU, which are important for judicial cooperation in criminal matters. The former guarantees the right to interpretation and translation in criminal proceedings. Interpretation and translation shall be sufficiently qualified to safeguard the fairness of the proceedings by ensuring that the accused

[236] My perspective in the dissertation is especially focused on the external influence of the other branches on the judiciary. Somehow, the internal influence is also impliedly connected to the external influence.
[237] C- 564/19 *IS (illegality of the order for reference).*
[238] Petra Bard. (2021). The Sanctity of Preliminary References: An Analysis of the CJEU Decision C 564/19 IS. (Accessed on 1 May 2022). Retrieved from https://www.verfassungsblog.de/the-sanctity-of-preliminary-references/
[239] The UK Law Societies' Joint Law Office. (2022). Case Law Digest – December 2021. (Accessed on 2 May 2022). Retrieved from https://www.lawsocieties.eu/news/case-law-digest-december-2021/6002137.article.
[240] Art 2(1), Directive 2012/13/EU.
[241] Art 4(5), Directive 2012/13/EU.
[242] Art 267, TFEU, 1958.

persons have knowledge of the case against them and are able to exercise their right of defence. Member/s shall ensure that accused persons are provided with information about the criminal act that they are accused of committing.[243]

The right to an effective remedy and the fair trail right were also connected to the case.[244] The fundamental principle of criminal proceedings is that the accused person shall not be called the accused; he/she is an innocent person until a court finds that he or she is guilty under criminal law. The principle is supported by certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings in the EU.[245] The case was under the jurisdiction of the ECJ within the EU legal framework,[246] although the Supreme Court (Kuria) of Hungary brought disciplinary proceedings against the referring judge and ruled the judge's request for a preliminary ruling to the ECJ as unlawful.[247]

In 2018, a judge from an inferior court requested a preliminary ruling from the ECJ and the president of the higher ranked court declared that the judge was not suitable as a judicial officer.[248]

The irremovability of judges is a remarkable principle when the other branches try to influence the independence of the judiciary not only in external affairs but also in internal matters because of the difficulties to get permission from a superior court to lodge a preliminary ruling to the ECJ. Normally, it seems not necessary to ask a higher rank court's permission to do that, but the interference of a superior judge in the case C- 564/19 IS was approved. The Venice Commission also confirmed that the border between external and internal independence may become blurred when the appointments of court presidents is politicised.[249]

[243] Art 6(1), Directive 2012/13/EU.
[244] The second paragraph of Art 19 expresses that 'Member State shall provide remedies sufficient to ensure effective legal protection in the fields covered by the Union law'.
[245] Directive 2016/343/EU.
[246] Art 267, TFEU,1957.
[247] The UK Law Societies' Joint Law Office. (2022).
[248] Petra Bard. (2021). The Sanctity of Preliminary References: An Analysis of the CJEU Decision C 564/19 IS.
[249] Venice Commission. (2019). Opinion No. 904/2017 {CDL-AD (2017) 031}.

Conclusion

The competencies of the CC have been updated in Hungary which is a Member/s of the EU. Therefore, the competences of the CC are also wider than before, and the citizens of Hungary have the opportunity to enjoy the national fundamental rights and the EU fundamental rights as well. The functions of the national CC need to be stable and free from the influence of political affairs. Even though *actio popularis* was famous for the protection of fundamental rights before, the constitutional complaint could not be effective after the FL 2011 came into force.[250] This kind of replacement is implemented in Hungary, and it should be noted that political influence is always stronger than legal influence. As a consequence, the rule of law could also be decreased because the politic is unstable and the governing party tried their power to be stable. But in the framework of the EU, if a national court could not protect human rights, the victim can submit the case to the ECtHR under the ECHR.[251] The EU accepts a country that values democracy and human rights based on the rule of law as a member of the EU. After becoming a Member of the EU, that country should obey the values of the EU prescribed in EU law. Otherwise, the EU has the power to impose a sanction and a fine on that country.[252]

2.3 Constitutional History of Poland

Poland has had more constitutional laws than Hungary and Myanmar. They are the Small Constitution 1919, March Constitution 1921, April Constitution 1935, Small Constitution of 1947, Constitution of the Polish People Republic 1952, Small Constitution of 1992, and the current Constitution of the Republic of Poland 1997.[253] Among these constitutions, the Constitution 1791 was the world's second oldest constitutional institution after the U.S. Constitution. The three partitions of Poland, that is, the territory that was seized by the Russian Empire, Prussia and the

[250] *Baka v. Hungary*, no.20261/12, SS 17-23.
[251] Pieter Cannoot. (2016). '*Baka v. Hungary*: Judicial Independence at Risk in Hungary's New Constitutional Reality"'. Retrieved from https://strasbourgobservers.com/2016/07/12/baka-v-hungary-judicial-independence-at -risk-in-hungarys-new-constitutional-reality.
[252] European Commission, 'European Neighborhood Policy and Enlargement Negotiations'. Retrieved from https://ec.europa.neighbourhood-enlargement/policy/condition-membership-en
[253] Constitutionnet. (2016). Constitutional History of Poland. Retrieved from http://constitutionnet.org/country/constitutional-history-poland

Austrian Empire, effectively ended Polish national sovereignty until 1918. Despite being effecting for only a short time, the Constitution of 3 May became a symbol of Poland's national identity based on constitutional values.[254] The Constitution of May 1791 was a constitution adopted by the Great Sejm (Lower House of the Polish Parliament) for the Polish Lithuanian Commonwealth, a dual monarchy combining the Kingdom of Poland and the Grand Duchy of Lithuania. This Constitution was different from the other forms of the monarchical system as it mentioned the division of powers between the executive, legislature and judiciary[255]. The history of Poland is complicated in Europe for its geography, and it was occupied by Russia, Prussia (Germany), Sweden and Austria–Hungary for half century.[256]

The system of the Republic of Poland shall be based on the separation of powers, checks and balances between the legislative, executive and judicial powers. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers and the judicial power shall be vested in courts and tribunals.[257] This provisional style of separation of powers is a little like the U.S. Constitution.

In Poland, the CC was established in 1985.[258] Its establishment was earlier than the one in Hungary. However, the Tribunal had limited power to create the policy of the socialist system because a court decision could be repealed by an Act of Parliament. The decisions of the Tribunal were not final and conclusive, and the Parliament could reject its decisions by a two-thirds majority vote. The March Constitution of 1921 and the April Constitution of 1935 mentioned that statutes should be consistent with the constitution. However, this was theory, and the value of the court was not as prominent as some legal scholars claimed.[259] Until 1997, the Chamber of Deputies, the highest organ of state power, could vote to reject such judgements of the CC. As such, the

[254] Stanisław Biernat and Monika Kawczyńska. (2019). The Role of the Polish Constitution (Pre: 2016): Development of a liberal Democracy in the Intranational and European Context. In: Albi A., Bardutzky S. (Eds:) National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. T.M.C. Asser Press, The Hague.
[255] Daniel H. Cole. (1998). Poland's 1997 Constitution in its Historical Context, *Articles by Maurer Faculty*. Paper 589, p-7(pp 1-43). Retrieved from http://www.repository.law.indiana.edu/facpub/589
[256] Daniel H. Cole. (1998). p-17.
[257] Art 10, Constitution of Poland, 1997.
[258] BBCJ (2022). Association of Justice of the Countries of the Baltic and Black Sea Region. (Accessed on 15 May 2022). Retrieved from https://www.bbcj.eu/
[259] Mirosław Granat and Katarzyna Granat. (2019). The Constitution of Poland, First edition, Hart Publishing, p-18. (I refer to this from the sample chapter that the author offered on the Constitutional Crisis of Poland website).

establishment of the CC was an achievement of the period of political liberalisation in the late 1980s.

The Polish citizens approved the Constitution that was passed by the Parliament on 25 May 1997, which went into effect on 17 October 1997. This Constitution defined the competences of the Constitutional Tribunal a bit differently than before and increased the number of judges from 12 to 15. Each term of office of a judge is individual and the term of office was extended from eight to nine years.[260]

2.3.1 Scope of Competences of the Polish Constitutional Tribunal

The Constitutional Tribunal also plays a crucial role in the Polish system of human rights protection. Everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Tribunal for its judgement on conformity with the Constitution or a statute or another normative act upon which a court or organ of public administration has made a final decision.[261]

1. The Tribunal shall adjudicate on the conformity of:

(1) statutes and international agreements to the Constitution;

(2) statutes that ratified international agreements if ratification was required by prior consent granted by statute; and

(3) legal provisions issued by central state authorities to the Constitution, ratified international agreements and statutes.

[260] *Prof. Dr. hab. Dr. h.c. Bogusław Banaszak. (2016). Constitutional Tribunal of Poland: Changes in the Appointment of Judges (Legal Analysis). Retrieved from http://www.constcourt.md/libview.php?l=en&idc=9&id=741&t=/Media/Publications/Constitutional-Tribunal-of-Poland-changes-in-the-appointment-of-judges-legal-analysis*

[261] Małgorzata Szuleka, Marcin Wolny, Marcin Szwed. (2016). Constitutional Crisis in Poland 2015–2016, Helsinki Foundation for Human Rights, p-7.

2. The Tribunal shall adjudicate on the conformity to the Constitution of a statute or another normative act challenged in a constitutional complaint referred to in Article 79(1) of the Constitution.

3. The Tribunal shall adjudicate on the conformity to the Constitution of ratified international agreements or a statute of a normative act challenged in a question of law referred to in Article 193 of the Constitution.

4. The Tribunal shall adjudicate on the conformity to the Constitution of the purposes or activities of political parties.

5. The Tribunal shall settle disputes over the powers of the central constitutional state authorities.

6. The Tribunal shall determine whether there exists an impediment to the exercise of the office of the President of the Republic of Poland. If the Tribunal so finds, it shall require the Marshal of the Sejm to temporarily perform the duties of the President of the Republic.[262]

The Tribunal is an organ of the judiciary founded to exercise powers vested in the Constitution and statutes.[263] The competencies of the Tribunal under the Constitution do not seem to be as confusing as in the Hungary Constitution 2011. Many legal scholars in Hungary criticised and concluded that the constitutional complaint system in Hungary was more confusing than the *actio popularis*: the previous effective function of the CC.

Constitutional Complaint: In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his publications specified in the constitution.[264] Constitutional complaint is characterized by substantive and formal conditions. The four kinds of substantive conditions what the author mentioned are (1) the complainant's personal interest (2) the complainant's legal

[262] Art 3, the Constitutional Tribunal Act, 2015.
[263] Art 2, the Constitutional Tribunal Act, 2015.
[264] Art 79, the Polish Constitution, 1997.

interest (3) the complainant's real interest and (4) the principle of subsidiarity. The three formal conditions are (1) a deadline (2) a form and (3) the required content of the complaint.[265]

A constitutional complaint shall be lodged after a complainant has exhausted all legal means, and within three months of the date when the complainant was served with a legally effective judgment, a final decision or another final determination.[266] The complaint shall specify (1) the subject of a review, (2) indicate which constitutional freedom or rights of the complainant, has been infringed, (3) provide justification for an allegation about the non-conformity of the subject of the review to the indicated constitutional freedoms or rights, including arguments or evidence in support of the allegation (4) state relevant facts.[267]

2.3.2 Composition of the Polish Constitutional Tribunal: Salient Articles under the Constitution 1997

According to the Constitution, judges cannot be removed from their positions.[268] The Constitutional Tribunal shall settle disputes over authority between central constitutional organs of the state. Judgements of the Constitutional Tribunal shall be universally binding and shall be final.[269] In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Tribunal for its judgement on conformity to the Constitution of a statute or other normative act upon which basis a court or organ of public administration has made a final decision on freedoms or rights or obligations specified in the Constitution.[270]

The Constitutional Tribunal shall be composed of 15 judges individually chosen by the Sejm for a term of office of nine years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.[271] The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from

[265] Lech Jamroz. (2014). The Constitutional Tribunal in Poland in the Context of Constitutional Judiciary, Temida 2, Faculty of Law, University of Białystok, p-89 (pp 1-159).
[266] Art 64, the Constitutional Tribunal Act, 2015.
[267] Art 65/1 (1 to 4), the Constitutional Tribunal Act, 2015.
[268] Art 180, the Constitution of Poland, 1997.
[269] Art 189 and 190, the Constitution of Poland, 1997.
[270] Art 79, the Constitution of Poland, 1997.
[271] Art 17 ad 18, the Constitutional Tribunal Act, 2015.

amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal.[272] In this case, this is not so different from the selected procedures of Hungary and Myanmar. The appointment of CC judges in these three countries are not independent even under the Constitutions, as the judges do not have the chance to participate in selecting and nominating CC judges like the executive and the legislature. This shows that the legislature and executive have influenced the judiciary before.

2.3.2.1 Professionalism and Qualification of Judges

A judge who has outstanding legal knowledge, possessed qualifications required for holding the position of the Supreme Court Judge, attained full 40 years of age and, but has not attained 67 years of age.[273]

According to the European perspective, the ethical aspects of judges' conduct need to be discussed for various reasons. The methods used in the settlement of disputes should always inspire confidence. The powers entrusted to judges are strictly linked to the values of judges, truth and freedom. The standards of conduct applying to judges are the corollary of these values and a precondition for confidence in the administration of justice.[274] Confidence in the justice system is all the more important in view of the increasing globalization of disputes and the wide circulation of judgments. Further, in a state governed by the rule of law, the public is entitled to expect general principles, compatible with the notion of the fair trial and guaranteeing fundamental rights, to be set out. The obligations incumbent to judges have been put in place in order to guarantee their impartiality and the effectiveness of their actions.[275]

The Constitution, statutes, ratified international agreements, and regulations are the sources of the universally binding law of Poland.[276] Therefore, although there was no judges' code of conduct in Poland, judges shall follow the general rule and regulations. But the National Council

[272] Art 194, the Constitution of Poland, 1997.
[273] Art 18, the Constitution of Poland, 1997.
[274] Para. 8, Consultative Council of European Judges (CCJE). (2002). Opinion No.3.
[275] Para. 9, Consultative Council of European Judges (CCJE). (2002). Opinion No.3.
[276] Art 87 (1), the Constitution of Poland, 1997.

on the Judiciary was authorised to draft such a code.[277] Later, in 2016, a judge of the Tribunal shall act in accordance with the Code of Ethics for the judges of the Constitutional Tribunal.[278]

Justices of the Tribunal shall not belong to a political party, a trade union or perform public activities incompatible with the principle of the independence of the courts and judges.[279] The judge may not take up additional occupation, except for employment as a teaching or research worker, provided this does not hamper fulfilling the duties of the Tribunal's judge. The judge may not take up other occupation which could undermine the trust in the judge's impartiality or independence.[280]

The Polish statute prescribes disciplinary proceeding to trial for the judges' misconduct process. It was the cases before the ECJ (see below). A judge of the Tribunal shall be subject to disciplinary proceedings for a breach of provisions of law, conduct that undermines the dignity of the office of a judge of the Tribunal, a breach of the Code of Ethics for the judge of the Tribunal, or any other unethical conduct that may weaken trust in the said judge's impartiality or independence. The Tribunal's judges shall be subject only to disciplinary proceedings for any misdemeanours.[281] Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.[282]

Judges should be guided in their activities by ethical principles of professional conduct. The principles should include the duties that may be punished by disciplinary measures but offer guidance to judges on how to conduct themselves. [283] The significant exception is that the judges should be removed to another judicial office without his or her consent or they may receive a new appointment in case of disciplinary sanctions or reform of organization of the judicial system.[284]

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[277] Appendix, Consultative Council of European Judges (CCJE). (2002). Opinion No.3.
[278] Art 7, the Act on the Status of the Judges of the Constitutional Tribunal,2016.
[279] Art 195(3), the Constitution of Poland, 1997.
[280] Art 23 (2/3/4), Act of 25 June 2015 on the Constitutional Court of Poland and Amendments, Venice Commission. (2016), p-6 (Pp-1-36). (Accessed on 29 May 2022).
Retrieved from https://www.venice.coe.int/
[281] Art 24 (1/2), Act of 25 June 2015 on the Constitutional Court of Poland and Amendments, Venice Commission (2016).
[282] Para 69, Recommendation CM/REC (2010)12.
[283] Para 72, Recommendation CM/REC (2010)12.
[284] Para 52, Recommendation CM/REC (2010)12.

Hungary applied the reorganization of courts, and it seems that Poland used the disciplinary sanctions in removing judges to get the exceptions under para 52 of the Recommendation CM/REC (2010)12.

2.3.2.2 Accessibility of the Constitutional Tribunal

The Polish Tribunal has the adjudications under Art 188 of the Constitution, 1997 and Art 3 of the Constitutional Tribunal Act, 2015. To get the Tribunal's accessibility,

(1) the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public-Prosecutor General, the President of the Supreme Chamber of Control and the Commissioner for citizens' rights,
(2) The National Council of the Judiciary regarding the conformity to the constitution of normative acts to the extent to which they relate to the independence of courts and judges,
(3) The consecutive organs of units of local self-government,
(4) The national organs of trade unions as well as the national authorities of employer's organizations and occupational organizations,
(5) Churches and religious organizations,
(6) Everyone, except under Art 56, whose constitutional freedoms or rights have been infringed,

shall have the right to appeal to the CT.[285]

2.3.2.3 The Legal Effects of the Polish Constitutional Tribunal

The Tribunal shall adjudicate as Plenary Court in some certain cases,[286] in a penal of five judges in some other cases,[287] and in a penal of three justices in some defined cases[288] to get

[285] Art 191(1), the Constitution of Poland, 1997.
[286] Art 44/1(1), Venice Commission. (2016). Act of 25 June 2015 on the Constitutional Court of Poland and Amendments, p-10.
[287] Art 44/1(2), ibid.
[288] Art 44/1(3), ibid.

legality. The decision whether a case is to be recognized as particularly complicated or particularly important shall be made by President of the Court either on the President's own initiative or on the request of the adjudicating panel. Adjudication by Plenary Court shall require at least nice judges. A hearing session shall be chaired by the President or Deputy President or the eldest judges of the Tribunal.

The legal effects of the Tribunal also will be concerned with the persons concerned under the Constitution, 1997[289] and the Constitutional Tribunal Act, 2015. However, the legality of the Tribunal's decisions should have legal binding force. It means that the existing Polish laws should have legal certainty and constitutionality. Legal certainty is another important legal philosophy to think about the implementation of the EU law by the Member States' courts. It is a kind of making check and balance the actions of the legislature and executive by the national courts according to the regional integration. Otherwise, the Polish authorities can be punished with one of the related EU law due to the principle of the primacy of EU law (see below).[290] The Commission or a Member may bring a suit to the ECJ.

The European Commission, together with other institutions and the Member States, is responsible under the Treaties for guaranteeing the rule of law, as a fundamental value of the EU and making sure that EU law, values and principles are respected.[291]

Again, the Polish domestic law shall also be consistent with the EU founded values under Art 2 TEU. These are the EU's *jus cogens*. It is worth saying that the EU's founded values are more effective than the peremptory norms of general international law. On the other hand, it is a proof that the EU law are based on the international law and the EU implements international law via the regional integration.

[289] Art 191(1), the Constitution of Poland, 1997.
[290] *Commission v. Poland, C-204/21 R.*
[291] European Commission. (2021). Rule of Law: Commission Launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal. (Accessed on 30 May 2022). Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070.

2.3.3 Judicial Independence in the International Norms

The Montreal Declaration or the Universal Declaration on the Independence of Justice recommends (hereinafter: Montreal Declaration) that participation in judicial appointments by the executive or legislature is consistent with judicial independence so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate.[292] Therefore, the selected and nominated procedures for CC judges are not consistent with the universal declaration between Hungary, Poland and Myanmar. This is not so strange and seems normal except for a few countries even in modern constitutionalism. One of the Polish researchers concluded that, 'In many legal systems constitutional judges are political agents, in part because the appointment mechanism is usually politicized. It is no mystery that appointment politics dictates and plays a crucial role in judicial behavior'.[293] This is a spotlight that politics always influence the independence of the judiciary related to the composition of CCs.

The legislatures wish to participate not only in appointments but also in the removal of judges by making constitutional laws inserting impeachment (Myanmar) or by amending laws and acts affecting retirement ages (Hungary and Poland). On those grounds, the principle of irremovability of judges became a recognised and important principle as an international standard. It is judges, whether appointed or elected, who shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office if such exists.[294] This standard is the same as the EU value of the principle of the irremovability of judges.[295]

2.3.4 Constitutional Crisis in Poland

The constitutional crisis in Poland is much more complicated than in Hungary and Myanmar. The competition among the political parties made the Constitutional Tribunal difficult. In Poland, the authorities breached several EU's values, such as the rule of law, judicial

[292] 2.14. (b), the Montreal Declaration, 1983.
[293] Konrad Kobylinski. (2016). p-99.
[294] 2.19 (b), the Montreal Declaration, 1983.
[295] Principle 1.3 of Recommendation (94) 12.

independence, the principle of the irremovability of judges and discrimination based on age. The Constitutional Tribunal could not handle those issues and it was the victim between the two opposite political parties that tried to control the checks and balances system by the judiciary.

From the international point of view, a constitutional crisis occurs when there is a danger that the constitution is about to fail at its central task.[296] Typically, a dispute or an interpretation or violation of a provision in the constitution between different branches of government is involved. A constitutional crisis may threaten to break down the function of the government. The legal definition of constitutional crisis refers to a situation dealing with the inability to resolve a disagreement involving the governing constitution of a political body.[297] The constitutional crises identified by Julia Azari, Associate Professor of Political Science at Marquette University, and Seth Masket, Professor of political science and director of the Centre on American Politics at the University of Denver, are as follows.

(1) The Constitution does not say what to do.

(2) The Constitution's meaning is in question.

(3) The Constitution tells us what to do, but it is not politically feasible.

(4) Institutions themselves fail.[298]

The Polish constitutional crisis began in November 2015, just after Poland's governing party (PiS) won the country's parliamentary elections. The first crisis in Poland started between the legislature and the judiciary as the PiS party appointed five judges of the Constitutional Tribunal in October 25. The Tribunal already had 15 judges, but the five judges appointed by the previous ruling party needed to take an oak by the current President to be legitimate under the Constitutional Tribunal Act 2015.[299] Normally, the tenure of the CC judges should be the same as the term of the ruling government. When the new party wins the election, the top organisations of

[296] Jack M. Balkin. (2017). Constitutional Crisis and Constitutional Rot. *Maryland Law Review*, Vol-77 (1), p-147 (pp 147-160). Retrieved from http://digitalcommons.law.yale.edu/fss_papers
[297] Constitutional Crisis Law and Legal Definition, USLEGAL.COM. Retrieved from https://definitions.uslegal.com
[298] Nge Nge Aung. (2019). Constitutional Crisis and Myanmar. Conference Volume, Miskolc, Hungary: University of Miskolc, p-125. Retrieved from https://jogikar.uni-miskolc.hu/files/8537/DF%20k%C3%B6tet%202018.pdf
[299] Art 21, the Constitutional Tribunal Act, 2015.

the government shall be reformed with the majority vote of the legislature. In Poland, the tenure of the Constitutional Tribunal judges is nine years and they cannot be re-elected.[300] The term of the President of Poland is five years and he or she may be re-elected for one more term.[301] The Sejm and the Senate shall be for four-year terms under the Constitution.[302] These three different terms of office between the executive, legislature and judiciary, are different from Hungary and Myanmar related to their terms and re-election procedures. In Hungary, the term of members of office of the CC is twelve years and they may not be re-elected;[303] the President of Hungary can stay in his or her post for five years and is renewable only once;[304] the Prime Minister has a term of four years and no limitation for that position, or his or her term may be terminated by the formation of the newly-elected Parliament provided Parliament adopts a motion of no confidence in the Prime Minister and elects a new Prime Minister, or by resignation, upon his or her death, by incompatibility or if the conditions of his or her position no longer exist.[305] For the legislature, the tenure is four years in Hungary. Therefore, there are significant terms of office guaranteed in Hungary, Poland and Myanmar. The term of office of constitutional judges may be different in each country and the judges from the Supreme Court of the U.S. can serve their duties until they die. In Myanmar, the term of office of the executive, legislature and judiciary (the Tribunal) is the same, namely five years. The main thing is that the situations can be complicated because of the different tenure of the three main branches between the ongoing party and the outgoing party, like with the constitutional crisis in Poland. In the Polish crisis, the outgoing party had appointed five judges to the Constitutional Tribunal before they left. As a result, the incoming party, especially the President, refused[306] to take an oath for the five judges appointed by the outgoing party (Civic Platform Government). On 3 December 2015, the Tribunal indicated in its judgement [307] that the previous Sejm had the right to appoint three judges (but not five) and the new Sejm had had the right to appoint two judges (but not five).[308] However, on 2 December, the law and justice

[300] Art 194(1), the Constitution of Poland, 1997.
[301] Art 127(2), the Constitution of Poland, 1997.
[302] Art 98(1), the Constitution of Poland, 1997.
[303] Art 24 (4), the FL, 2011.
[304] Art 10, the FL, 2011.
[305] Art 20(2), the FL, 2011.
[306] This is called the constitutional crisis; even though the President has the duty to take an oath for the new constitutional court's judges, he does not have to be willing to do so.
[307] K 34/15.
[308] Dawid Bunikowski. (2017). The Polish Constitutional Crisis: Obvious Facts and Bad (Fake) Arguments of the Government and its Supporters. ResearchGate, p-2 (pp 1-19).

government elected five judges of its own and they took an immediate oath administered by the President.[309] After that, the President denied swearing in the previously appointed judges for the reason of a lack of vacancies. The refusal by the President of the Republic to swear elected judges violates the Constitution which does not give the President any such role in designing the composition of the CC.[310]

By December 2016, the Chief Justice of the Constitutional Tribunal had not accepted appointment by the new Sejm. However, they became legal after his retirement and under the approval of the new President of the Tribunal with the assistance of the amendments to the Constitutional Tribunal Act.[311]

There was an informal appointment of the new President due to the 'Law on the organisation and the procedure before the Tribunal', formerly the successor should be the senior and most experienced Tribunal judge, but the Vice-President of the Tribunal was ignored to serve as an interim President.[312]

According to the amendment to the Constitutional Tribunal Act in November 2015, 'With regard to judges whose terms of office end in 2015, the time-limit for submitting the proposal referred to in Article 19(2) shall be 7 days as of the entry into force of this provision'.[313] The old Article mentioned, 'With regard to judges of the Tribunal whose terms of office end in 2015, the time-limit for submitting the proposal referred to in Article 19(2) shall be 30 days from the date of entry into force of the Act'. A candidate who can submit a proposal for the judgeship to the Tribunal has to submit it within 30 days under the old law and seven days under the amendment. The disputed judges appointed by the previous party were removed by amending the length of time for submitting applications.

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[309] Ellen Hinsey. (2020). Poland's Constitutional Crisis and The Future Legality of Europe: A Tragedy in Five Acts. Retrieved from http://www.nereview.com/polands-constitutional-crisis-and-the-future-legality-of-europe-a-tragedy-in-five-acts/

[310] Wojciech Sadurski. (2018). How Democracy Dies (in Poland): A Case Study of Anti-Constitutionalist Populist Backsliding, Sydney Law School, The University of Sydney. p-11(pp1-71). (Accessed on 10 May 2022). Retrieved from https://ssrn.com/abstract=3103491.

[311] *Supra note 105.*

[312]Tomasz Tadeusz Koncewicz. (2016). Constitutional Capture in Poland 2016 and Beyond: What is Next? Retrieved from https://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/

[313] Art 1 (6), the Act amending the Constitutional Tribunal Act, 2015. (The former Article is 137, and 137a has been added under the amendment).

The ruling party (PiS) does not have the required majority votes to amend the current constitution.[314] Therefore, enacting laws as statutes against the constitutional provisions is a series of de facto amendments of the constitution. Changing the constitution through statutory means is in itself a breach of the constitution.[315]

Here, the constitution includes a sort of rigid constitution. Therefore, PiS tried to change the ordinary laws instead of amending the Polish Constitution unlike Hungary's constitutional reform.

These is the brief beginning of the Polish constitutional crisis, and the happenings were under points (3) and (4) stated by Professor Julia Azari. Even in the Constitution it is clearly defined to that an oath should be taken to become a valid Constitutional Tribunal judge, but the governing party and President failed to obey the Constitution. This is what we call politically infeasible. This was also connected to the removal of judges and modification of laws. Later, the disputed three judges appointed by the outgoing party mentioned in earlier were removed by the amendments to the Constitutional Tribunal Act 2015.[316] The principle of irremovability of judges requires that judges may remain in their positions provided they have not reached the obligatory retirement age or until the expiry of their terms of office.[317]

Nevertheless, the removal of judges first arose from the political instability rather than the legal uncertainty in Polish cases.

Second, the Polish authorities have adopted more than 13 laws affecting the entire judicial structure, impacting the Constitutional Tribunal, Supreme Court, Ordinary Courts, National Council for the Judiciary (hereinafter: NCJ), the prosecution service and the National School of Judiciary.[318] The new law on the Supreme Court and the law amending the law on the system of ordinary courts and certain other laws affected the retirement age of serving judges and public

[314] Art 235 (4), The Constitution of Poland, 1997. This is confirmed by the analysis of the authors Hubert Tworzecki and Radosław Markowski in their article 'Why is Poland's Law and Justice Party Trying to Rein in the Judiciary?' (Accessed on 7 May 2022). Retrieved from https://www.washingtonpost.com/
[315] Wojciech Sadurski. (2018). p-11.
[316] Art 137, The Constitutional Tribunal Act, 2015.
[317] Para 76, C- 619/18.
[318] Wojciech Rylukowski. (2015).

prosecutors, especially for discrimination on age between men and women which was happening.[319]

The Polish Constitution provides that the First President of the Supreme Court is appointed by the President for a six-year term of office from amongst candidates proposed by the General Assembly of the Supreme Court.[320] The NCJ is the guardian of the independence of courts and judges.[321] It is composed of the First President of the Supreme Court, the Minister of Justice, the President of the Chief Administrative Court, an individual appointed by the President, fifteen judges chosen from among the judges of the Supreme Court, Ordinary Courts, administrative courts, military courts and four Deputies chosen from the Sejm and two chosen Senators from the Senate.[322] The Constitution does not specify how the judicial members are to be chosen. The Polish Constitutional Tribunal explained that the methods of election of the 15 judicial members of the NCJ should be regulated by law.[323]

The Commission brought two complaints alleging infringement of the obligations of the Member/s. By its first complaint, the Commission alleged that the Republic of Poland failed to comply with those obligations inasmuch as the new law on the Supreme Court was in breach of the principle of judicial independence and, in particular, of the principle of the irremovability of judges because the measure lowering the retirement age of judges of the Supreme Court was to apply to judges who were appointed to that court before 3 April 2018, the date on which that law entered into force.[324] By its second complaint, the Commission alleged that the Member/s failed to comply with those obligations by granting to the President of the Republic under that law and in breach of the principle of judicial independence the discretion to twice extend for a 3-year term the period of judicial activity of judges of the Supreme Court beyond the newly fixed retirement

[319] Martina Coli. (2019). The Judgment of the CJEU in Commission v. Poland II (C-192/18): The Resurgence of Infringement Procedures as a Tool to Enforce the Rule of Law? (Accessed on 5 May 2022) Retrieved from https://www.diritticomparati.it/judgment-cjeu-commission-v-poland-ii-c-192-18-resurgence-infringmennt-procedure-tool-enforce-the-rule-of-law.
[320] Art 183(3), The Constitution of Poland, 1997.
[321] Para 7, C 619/18.
[322] Art 187, The Constitution of Poland, 1997.
[323] Venice Commission. (2017). Opinion No. 904/2017 {CDL-AD (2017)031}.
[324] *European Commission v. Republic of Poland*, *C 619/18.*

age.[325] These are the actions by the Commission that can bring a suit before the ECJ if a Member/s fails to fulfil obligations which have to be followed by the Member/s.[326]

Furthermore, the Commission brought a case before the ECJ against Poland for failure to fulfil obligations.[327] The case was about the lowering of the retirement age of judges of the ordinary Polish courts.[328] The Commission estimated that the Polish authorities might breach the prohibition of discrimination based on sex in matters of pay, employment and occupation, the establishment of different retirement ages for men and women holding the position of judge of the ordinary Polish courts or of the Supreme Court of Poland or that of the public prosecutor in Poland.[329] The Member/s shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.[330] By reducing the retirement age of the current serving judges,[331] Polish authorities failed to protect the EU values of the rule of law, effective judicial protection in the fields covered by EU law,[332] the principle of the irremovability of judges and judicial independence.

The ECJ issued two landmark judgements on the Polish judicial system and found that the Law on the Organization of Ordinary Courts 2017 adopted by the Polish Sejm breached the prohibition on discrimination[333] as well as the principle of effective judicial protection. The principle of effective legal protection under the EU means that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. The Ordinary Courts Law 2017 lowered the age at which judges retired and discriminated against this age for men and women acting as common court judges (from 67 years old to 60 in the case of women and 65 in the case of men),[334] Supreme Court judges and prosecutors. Furthermore, the Act gave the Minister for Justice (hereinafter: MOJ) discretionary power to permit judges to

[325] *European Commission v. Republic of Poland*, *C 619/18.*
[326] Art 258, TFEU, 1957.
[327] Ibid.
[328] *European Commission v. Republic of Poland*, *C-192/18*
[329] Directive 2006/54/EC.
[330] Art 157, TFEU, 1957.
[331] Art 13(1) to (3), Law amending the Law on the system of ordinary courts and certain other laws, 2017.
[332] Art 19(1), TEU,1993.
[333] Art 157, TFEU and Directive 2006/54/EC.
[334] Art 37, New Law on the Supreme Court.

remain active in their positions.[335] The regulations authorised the MOJ to appoint a temporary successor to the first President of the Supreme Court and to present candidates for new judges to the NCJ. In addition, the MOJ can grant the extension of the three times of five fixed-year terms of the future judges of the Supreme Court after their retirement age of 65.[336]

The Court (Grand Chamber) declared that Poland has failed to fulfil its obligations by amending the Law on the System of Ordinary Courts and Certain Other Laws, July 2017. In addition, the Court declared that vetting the power to think about the extension of tenure after the retirement age of the ordinary Polish judges to the MOJ was against the second paragraph of Art 19(1) TEU.[337]

On 26 September 2017, the President of the Republic of Poland submitted his own draft law on the Supreme Court to the Sejm. According to his proposal, only judges already over 65 years of age were to retire and the discretionary power for longer service of a judge over 65 years changed to the President from the MOJ.[338] On 20 December 2017, the President signed the Act of 8 December 2017 on the Supreme Court. In 2018, the Supreme Court asked the ECJ for a preliminary ruling on the compatibility of lowing the age against their wishes with Art 19 of the TEU, Art 47 of the EU Charter of Fundamental Rights, and Arts 2, 9, 11 of Directive 2000/78.[339] The Commission again submitted a case under Art 258 TFEU on 25 October 2019. This was because of the repeated failure of Polish authorities to follow the EU law and the infringement of Art 19(1) TEU and Art 47 of the EU Charter of Fundamental Rights. The theme of the case was to restrict the rights of national courts to submit preliminary rulings to the ECJ to respect the requirement of reasonable time and the right of defence in disciplinary proceedings.

The ECJ declared that Poland had failed its obligations by: (1) failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, which has the

[335] Alexandra Brzozowski. (2019). Poland 2017's Judicial Reform Broke EU Law, Blocks Top Court's Rules. Retrieved from https://www.euractiv.com/section/justice-home-affairs/news/polands-2017-judicial-reform-broke-eu-law-blocs-top-court-rules/)

[336] Tymoteusz Zych, Tomasz Chudzinski, Pawet. M. t.ukaszewski, Magdalena Olek. (2018). The Reforms of the Judiciary in Poland: A Need for an Impartial Account, Institute for Legal Culture Warsaw, p-27(pp1-87). (Accessed on 6 May 2022). Retrieved from https://www.tweedekamer.nl/document.

[337] Judgment of the Court (Grand Chamber), 5 November 2019.

[338] Tymoteusz Zych, Tomasz Chudzinski, Pawet. M. t.ukaszewski, Magdalena Olek. (2018), p-28.

[339] C- 522/18, C-537/18. See also Tymoteusz Zych, Tomasz Chudzinski, Pawet. M. t.ukaszewski, Magdalena Olek. (2018), p-28.

right to review decisions issued in the disciplinary proceedings; (2) allowing the content of judicial decisions to be classified as a disciplinary offence involving judges of the ordinary courts; (3) conferring on the President of the Disciplinary Chamber of the Supreme Court the discretionary power to designate the disciplinary tribunal; and (4) failing to guarantee respect for the right of defence of accused judges of the ordinary courts.[340] The Polish law allows ordinary court judges to be subjected to disciplinary investigations, procedures and sanctions on the basis of the content of their judicial decisions, including the exercise of their rights under Art 267 TFEU to request the preliminary rulings from ECJ. Moreover, the new disciplinary regime does not guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court. The problem was that the NCJ selected judges for that and the NCJ is composed of the judges politically appointed by the Polish Parliament (Sejm).[341]

The European Council underlined that 'Legal certainty and trust in the quality and predictability of regulatory, tax and other policies and institutions are important factors that could allow an increase in the investment rate. The rule of law and an independent judiciary are also essential in this context. Addressing serious concerns related to the rule of law will help improve legal certainty'.[342] In April 2018, the governing majority changed these provisions and reinstituted a uniform retirement age for judges (65 years), but the damage had already been done.[343]

On 7 September 2021, the Commission lodged an application to the ECJ for interim measures[344] for Poland to make a daily penalty payment to the Budget of the EU.[345] It was clear that Poland had infringed EU law, the legal standard of the independent judiciary and had failed to fulfil a Member's duty to provide an effective legal remedy in the fields covered by EU law. Thus, the Polish authorities had to pay a period penalty payment of EUR 1,000,000 per day.[346] The

[340] *Commission v. Poland, C-791/19.*
[341] European Commission. (2019). Rule of Law: European Commission refers Poland to the Court of Justice to Protect Judges from Political Control. (Accessed on 8 May 2022). Retrieved from https://ec.europa.eu/commission/presscorcerner/ detail/en/ip_19_6033.
[342] European Commission. (2017). Commission Recommendation of 26.7.2017 regarding the rule of law in Poland. (Accessed on 13 March 2020). Retrieved from https://ec.europa.eu/info/index_en
[343] Malgorzata Szuleka. (2019). New Retirement Rules for Polish Judges Contravene EU Law-According to Advocate General. (Retrieved from https://ruleoflaw.pl/new-retirement-rules-for-polish-judges-contravene-eu-law-according-to-advocate-general/)
[344] Art 279, TFEU, 1957.
[345] *Commission v. Poland, C-204/21 R.*
[346] Order of the Vice-President of the Court, 27 October 2021.

ECJ granted an interim measure submitted by the Commission and suspended further provisions of Polish law affecting judicial independence.[347]

The Prime Minister of Poland put forward an application to the Constitutional Tribunal to consider whether the provisions of the TEU relating to the primacy of EU law and adequate judicial protection were in line with the Constitution of Poland.

The Charter, Art 47, requires access to an independent tribunal. The decision of an illegitimate Constitutional Tribunal attacks the European community of values and laws as a whole and undermines the primacy of EU law as one of its cornerstone principles in accordance with well-founded case law of the ECJ. An illegitimate Constitutional Tribunal lacks legal validity and independence but is also unqualified to interpret the Polish Constitution.[348]

On 7 October 2021, the Polish Constitutional Tribunal delivered K3/21. The Tribunal found that Arts 1, 4(3) TEU on cooperation and Art 19 TEU on effective legal protection are incompatible with the Polish Constitution in so far as the ECJ uses these provisions to address national judicial independence.[349]

The Commission reaffirmed the primacy of EU law dealing with the oral presentation ruling, K3/21, of the Polish CC because the Member/s had already acknowledged that the founding principles of the EU's legal order included: (1) EU law has primacy over national law, including constitutional provisions and (2) all rulings by the ECJ are binding on all Member/s' authorities, including national courts.[350]

The Commission declared that it has to safeguard the proper functioning of the EU's legal order. Therefore, it will continue to ensure that the Polish authorities' actions do not break the uniform application of EU laws.[351]

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[347] Para C, European Parliament Resolution of 21 October 2021 on the Rule of Law Crisis in Poland and the Primacy of EU Law (2021/2935/RFP). (Accessed on 13 May 2022). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021IPO439&from=EN.

[348] Para 1, European Parliament Resolution of 21 October 2021 on the Rule of Law Crisis in Poland and the primacy of EU Law (2021/2935/RFP).

[349] CEU Democracy Institute. (N.D). The Polish Constitutional Tribunal Judgment: European Integration in Question? (Accessed on 12 May 2022). Retrieved from https:/du/articles/polish-constitutionl-tribunal-judgement-european-integraion-question?

[350] European Commission. (2021). European Commission Reaffirms the Primacy of EU law. (Accessed on 13 May 2022). Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5142.

[351] European Commission. (2021). European Commission Reaffirms the Primacy of EU law.

Conclusion

Hungary and Poland are the Member/s of the EU and European countries which have earlier established CCs. The CC of Hungary achieved success in its judicial review, and it had landmark decisions, such as the abolishment of the death penalty within one year after its establishment. It still has good competencies other than the change in the system of constitutional complaint. The Polish Constitutional Tribunal seems to have achieved less than Hungary's Court. However, the competencies of the Tribunal would be stable, and it could maintain the principle of the rule of law if the outgoing party did not urgently appoint the judges and the incoming party did not violate the Constitution. The cases in Poland were worse than those in Hungary and a little similar to those in Myanmar as they were directly related to the binding force of the Constitutional Tribunals, and they refused to follow the resolutions of the Tribunals. In addition, a constitutional crisis happened in these two countries. The Polish constitutional crisis was much more complicated than Myanmar's as it prescribed several laws that affected the independence of the judiciary and violated EU law. Hungary and Poland infringed EU law which they must follow. The cases from these three countries show that the rule of law was broken with the collapse of the independence of the judiciary.

From the comparative point of analysing the violation of judicial independence in Hungary and Poland, both countries infringed judicial independence by removing judges. Discrimination based on age as a political strategy is analogous in Hungary and Poland. Following the literature reviews, the Hungarian government won the majority seats in the election to change the constitution. This may be different from Poland as the Polish governing party (PiS) did not win the necessary votes to amend the constitution.[352] Hungarian authorities enacted the new constitution 2011 and some laws which affected the judicial officers come into force on the same day. The problem was that the Hungarian government ignored due process, and the victims did not have proper time to access the right to sue or the right to a fair trial. There is a limitation on any kind of civil proceedings and no limitation on criminal matters. Removing judges grounded on reorganisation of the courts is also included as a civil matter but judges concerned did not get the due time needed because the TPFL and FL came into force concurrently. In addition, the former

[352] CEU Democracy Institute. (N.D). The Polish Constitutional Tribunal Judgment: European Integration in question?

president of the Supreme Court lost his fair trial right before the CC due to the reason for the courts' reformation and according to the limitation of being qualified to be a Supreme Court judge by making law. Removal of judges in general was dealt with in the breach of Directive 2000/78/EC before the ECJ[353] and it was connected to the violation of the fair trial right and free speech right: individual guarantees of judges before the ECtHR.[354] I would like to point out that the influence of the external branches on the judiciary at the domestic level was clear, but before the ECJ, it was just a violation of the Directive on discrimination on age within the EU legal framework. Only in the Andra Baka case did the ECtHR figure out the infringement of the European standard on the independence of the judiciary and irremovability of judges. The Polish cases were brought before the ECJ, and all of the cases were focused on Art 19(1) TEU and Art 47 of the EU Charter of Fundamental Rights. The articles are important to protect the fair trial right and to give effective legal protection by the Members in the fields covered by EU law. The difference from the Commission v. Hungary case is that the ECJ paid special attention to safeguarding EU values and judicial independence in the Polish cases. Although the cases are similar in removing judges using discrimination based on age, the ECJ's legal reasoning was not the same. In the Polish case, the ECJ pointed out the violation of Directive 2006/54/EC – equal treatment directive as a secondary legal source. This could be because the Polish cases were much more complicated than the cases in Hungary, or Poland might follow the same path as Hungary, and it seemed that the ECJ changed their legal opinion to handle the dominance of the other branches over the judiciary against the 'irremovability of judges' principle. The similar cases thus had different judgements based on the ECJ's legal reasoning. The ECJ started using Art 7 to issue sanctions to Poland on the infringement of the EU values found under Art 2 of TEU.[355] Therefore, the ECJ declared that Poland must make a period penalty payment.[356]

[353] *Commission v. Hungary*, *C-286/12.*
[354] *Andra Baka v. Hungary, No. 20261/12.*
[355] The idea is come from Martina Coli. (2019). The Judgment of the CJEU in *Commission v. Poland II* (C-192/18): The Resurgence of Infringement Procedures as a Tool to Enforce the Rule of Law? Diritti Comparati.
[356] *Commission v. Poland, C-204/21 R.*

2.4. Separation of Powers and Judicial Independence in Myanmar

The judiciary is under the control of the executive and legislature as the members of those branches are composed of political parties, and sometimes there are conflicts when the Constitutional law does not clearly mention the separation of powers between the executive and judiciary as well as the legislature and the judiciary. There will be a way to interpret the constitutional law if the law does not prescribe it clearly. This is why CC and Supreme Courts are recognised as guardians of the Constitution under Constitutionalism. This means that judges of those supreme courts have the discretionary powers to interpret constitutions for the public benefit. In addition**,** the rule of law is vital to keep the constitutional concepts consistent among the legislature, executive and judiciary. The Supreme Court of the US and the FCC of Germany could change the political into constitutional issues. Before they reached these achievements, the Courts seemed to be struggling. The result arising from these two civilised countries is that they put the public interests first and respected the principle of the rule of law. This research discovers the possible and the best ways to reconcile the constitutional issues among the three great branches initiative not only for the interests of Myanmar citizens but also for others.

In Myanmar, the present constitution is the Constitution of the Republic of the Union of Myanmar 2008. The two former constitutions are the Constitution of the Union of Burma 1947 (hereinafter: Constitution 1947) and the Constitution of the Socialist Republic of the Union of Burma 1974 (hereinafter: Constitution 1974).

The separation of powers due to the former constitution was unequal among the three main organs. Under the doctrine of the separation of powers, nobody should hold the offices of more than one of the three great branches, that is, senators should not concurrently be judges or presidents. In the same way, the president should not interfere in legislation. Judges should neither be members of parliament nor ministers at the same time. In addition, the three branches should not influence each other beyond the powers and duties allotted them by constitutions.

2.4.1 Colonial Period

The British governed Myanmar from 1824 until 1948, connecting it with India for a long time. In 1937, Myanmar separated from India under the Government of Burma Act 1935. The judiciary of Myanmar was combined with the customs and traditions of the English in those days and the English authorities used and exercised their concepts and knowledge in making decisions.[357] The five kinds of writs, namely habeas corpus, mandamus, prohibition, quo warranto and certiorari, were consecutively exercised after independence in Myanmar. Some Burmese legal scholars assumed that the British colonisation of Burma left a legacy of judicial independence.[358]

However, the rights of the Myanmar citizens, especially women, were in those days violated but they did not get the legal remedies that they claimed under the Myanmar customary law.

The High Court of Judicature in Yangon at that time was the Supreme judicial organ and most of the judges were foreigners from Great Britain and India. Myanmar citizens had no opportunity to be at the status of higher officials.

2.4.2 The Constitution of the Union of Burma 1947 after Independence

The main drafters of the Constitution 1947 were British-trained lawyers.[359] They intended to create a parliamentary democratic State. The Supreme Court and High Court were the highest courts in Myanmar at that time.

Related to the rights to Constitutional remedies, the Supreme Court was vested with the power to issue orders like habeas corpus, mandamus, prohibition, quo warranto and certiorari.[360]

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[357] Myint Zan, Dr. (2000) Judicial Independence in Myanmar: Constitutional History, Actual Practice, and Future Prospects, *Southern Law Review*, Vol- 4, p 22. (Accessed on 23 February 2019). Retrieved from http://www.austlii.edu.au

[358] John M. Epling. (2016). How Far Have We Come and Where Do We Go from Here? A Culturally Sensitive Strategy for Judicial Independence in Myanmar. *Duke Journal of Comparative & International Law*. Vol-27(107), p-108. Retrieved from https://pdfs.semanticscholar.org

[359] Myint Zan, Dr. (2000). Judicial Independence in Burma: No March Backwards Towards the Past, *Asia Pacific Law & Policy Journal*, 1 APLPJ 5, p-10.

[360] Sec 25 (2), the Constitution ,1974.

The judges, including Chief Justice of the Supreme Court and High Court, were appointed by the President with the approval of both chambers of the Parliament in the joint setting.[361] All judges shall be independent in the exercise of their judicial functions subject to the constitution and the laws.[362]

Dr. Maung, the former President and legal scholar, revealed that the judiciary was independent under the 1947 Constitution.

2.4.3 The Constitution of the Socialist Republic of the Union of Burma in 1974

All constitutional rights were ended soon after the Revolutionary Council took over state power in 1962. The state power was vested in the State Council and the Chairman of the State Council was the President.

The Council of State had the right to convene sessions of the Pyithu Hluttaw (Parliament) and could submit the candidates for the members of the Council of Ministers, the Council of People's Justice, the Council of People's Attorney and the Council of People's Inspectors. It could interpret the laws and statutes except for the Constitution. It could also promulgate laws enacted and made by the Pyithu Hluttaw (Parliament) and abrogate the decisions and orders of the central and local organs of state power if they were not consistent with the law.[363]

The Chairman of the State Council recounted that the Supreme and High Court judges under the 1974 Constitution were too powerful.[364]

The members of the Council of People's Justice were nominated by the Council of State and elected by the Pyithu Hluttaw (Parliament) among its members.[365] The Council of People's Justice was obliged to be responsible to the Pyithu Hluttaw on the state of the administration of justice.[366]

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[361] Sec 140, the Constitution ,1974.
[362] Sec 141, the Constitution ,1974.
[363] Sec 73, the Constitution ,1974.
[364] Myint Zan, Dr. 2000:25.
[365] Sec 95, the Constitution,1974.
[366] Sec 104, the Constitution ,1974.

According to the doctrine of Montesquieu, there would be an end to everything, whether of the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, those of execution of the public resolutions and trying the causes of individuals.[367]

The combination of powers in a single party took a long time in Myanmar. Under the Constitution 1974, the principle of the separation of powers did not count at all and it was clear that judicial independence had disappeared even in theory, and it could not be imagined in practice either.

2.4.4 The Constitution of the Republic of the Union of Myanmar, 2008

The state situations under the present constitution are facing challenges and difficulties and they can easily be changed. Laws, rules and regulations after 2008 have been amended and some old ones have been repealed. However, the constitution itself cannot be changed because it is strict in how it can be amended.[368] The Constitution 2008 has emerged as the third and new constitution after two decades. Although there was no constitution from 1988 to 2008, the composition of the courts and judicial system were altered two more times.

Significant factors resulting from this constitution are that there are three types of courts, such as the Supreme Court of the Union, Court-Martial and Constitutional Tribunal of the Union.[369]

The Supreme Court is the highest judicial organ, and it can supervise and give directions to the inferior courts. The main function of the Supreme Court is to try violations of the fundamental rights provided in the Constitution.

[367] Montesquieu, Baron Charles de. (1748). *The Spirit of the Law*. (Tran.) Thomas Nugent. (2001). Ontario: Battle Books, p- 174.
[368] Sec 436, the Constitution of Myanmar, 2008.
[369] Sec 294, the Constitution of Myanmar, 2008.

The Court Martial is only for the military personnel who committed offences when they were on duty and any other circumstances.[370]

The role of the Constitutional Tribunal is crucial for the interpretation of the Constitution and the other important duty is to handle constitutional disputes among the different layers of the government organisations[371]

This kind of court system was originally established in civil law countries. But nowadays, common law and civil law systems are mixed and some common law countries, including Myanmar, are practicing this style of court. The original intention of building that court was to protect constitutions, and the CCs are exactly recognised as the guardians of the constitution, but in Myanmar, the military has been vested with the power to be the guardian of the constitution. This point can be strange under the separation of powers policy as most of the world's countries prescribe that the judiciary, like the CC or Supreme Court, has the responsibility to safeguard the constitution.

2.4.5 The Separation of Powers

Under the Constitution 2008, the three branches of sovereign power, namely legislative power, executive power and judicial power, are separated to the extent possible and exert reciprocal control and checks and balances among themselves.[372]

The Legislative power of the union is shared between the Pyidaungsu Hluttaw (Parliament), Regional Hluttaws (legislative organs in each region) and State Hluttaws (legislative organs in each state).[373] The state is divided by the union territory into seven regions and seven states according to the Constitution 2008.

[370] Sec 319, the Constitution of Myanmar, 2008.
[371] Sec 322, the Constitution of Myanmar, 2008.
[372] Sec 11(a), the Constitution of Myanmar, 2008.
[373] Sec 12(a), the Constitution of Myanmar, 2008.

The executive power of the union is shared between the Pyidaungsu (Union), regions and states.[374]

The judicial power of the union is shared between the Supreme Court of the Union, the High Courts of the Regions, the High Courts of the States and courts of different levels.[375]

2.4.6 The Role of the Judiciary: Constitutional Tribunal

The separate CC system started in Austria in Europe and its purpose was to check whether the actions of the executive and legislative bodies were constitutional. The idea of furnishing the courts was with the intention that the role of the judiciary be independent of the other two branches. The court also has the power to try the misuse of power by an authority.

This style of court is widely accepted in Central Europe, Africa and Asia. In Southeast Asian Countries, the courts are known by several names, including Constitutional Tribunal in Myanmar, Constitutional Court in Thailand, Constitutional Council in Cambodia, Constitutional Court in Indonesia and so forth. Even though the names are different, their tasks are to protect and safeguard the constitution related to the promotion of democracy and human rights.[376]

In Myanmar, the Tribunal has not been vested with the power to try human rights cases, and the main functions are to interpret the constitution and to decide the constitutional disputes which may arise from the different levels of the executive and legislative organs of the state and other matters prescribed by law.[377] That point may be a gap to arm more functions to vest in the court. The court has less power and functions than any others throughout the world. It may be concluded that the state situation is that of a least developed country and the rule of law is incomplete because of the poor condition of the economic, social standard and educational systems in that country. And these situations may be related to each other and that is why one condition can affect another.

[374] Sec 17(a), the Constitution of Myanmar, 2008.
[375] Sec 18(a), the Constitution of Myanmar, 2008.
[376] Tin Aung Aye, Dr. The Mirror Newspaper (9th February 2012).
[377] Sec 322, the Constitution of Myanmar, 2008.

The rule of law is essential to balance the situations and it needs to be recorded and obeyed among the authorities themselves and then the people will understand the meaning of it through these authorities.

Under the Constitution 2008, the Tribunal has been separately established and based on the Kelsenian Court model which originated in Austria to interpret the constitution and to decide the constitutional disputes among the authorities of the state organs.[378]

The Tribunal is composed of nine members including the chairperson.[379] Three members of the Tribunal are nominated by the President (Head of Executive), the Speaker of the Pyithu Hluttaw (Lower House) and the Speaker of the Amyotha Hluttaw (Upper House).[380]

There is no provision for the role of the judiciary to nominate equal numbers like the legislature and the executive. This is the weak point in that the independence of the judiciary has not been taken into consideration even in theory and it is not unusual that the judges of the CC are struggling with the difficulties in practice and those difficulties can exist until the dim and distant future.

2.4.6.1 Professionalism and Qualifications of Judges

A person who can be a justice of the Tribunal shall has:

(1) attained the age of 50 years;
(2) Qualifications, with the exception of the age limit, prescribed for Pyithu Hluttaw (Lower House) representatives;
(3) Not breached the provisions of a person standing for election as Lower House's representative.
(4) Served as a judge of the High Court of the Region or State at least five year; or
(5) Served as a judicial office or law officer at least ten years not lower than that of the Region or State level for; or

[378] Sec 46, the Constitution of Myanmar, 2008.
[379] Sec 320, the Constitution of Myanmar, 2008.
[380] Sec 321, the Constitution of Myanmar, 2008.

(6) Practiced as an Advocate for at least 20 years

(7) Not be a political party

(8) Political, administrative, economic, and security outlook.

(9) Loyalty to the Union and its citizens.

(10) Recommended as an eminent jurist by the President.[381]

The Chairman and members of the Tribunal may be impeached on any of the following reasons:

(a) High treason.

(b) Breach of any of the provisions under the constitution.

(c) Misconduct.

(d) Disqualification of qualifications of the members of the Tribunal under Sec 333;

(e) Inefficient discharge of duties assigned by law.[382]

According to the Constitution, 2008, the term disqualifications are clear to understand, and it is related with the qualifications of a person who would like to be chosen as a Tribunal's judge. The essential thing is that he or she must be a Myanmar citizen. The more strictly rule is that his or her parents also must be citizens who have resided in Myanmar for at least ten consecutive years up to the time of his or her election.[383]

However, the Constitution, 2008 does not mention for the meaning of misconduct domestically. Myanmar has been a common law country with a tradition of applying the principles of natural justice for a long time. The principle of natural justice has two rules. The first is the right to a fair hearing- listen to the other side. The second is that the rule against bias- no man is a judge in his own cause. That is why, a judge may not be a relative, friend or business associate of a party, or he may not be personally hostile as a result of happening either before or during a trial.[384]

Judicial misconduct according to the United Nations Office on Drugs and Crime (UNODC), is that the judiciary cannot exist without the trust and confidence of the people. Citizens who believe their judges are fair and impartial. Judges therefore be accountable to legal and ethical

[381] Sec 333, the Constitution of Myanmar 2008.
[382] Sec 334, the Constitution of Myanmar 2008.
[383] Sec 120(b/c), the Constitution of Myanmar 2008.
[384] Khin Khin Oo. (N.D). A Case Analysis of the Constitutional Tribunal of Myanmar, p-33.

standards.[385] Complaints about judicial misconduct must be processed expeditiously and fairly under an appropriate procedure that is subject to independent review. The judge in question has the right to a fair hearing before an independent and impartial body. The body responsible for discipline of judges should be independent of the executive, plural and composed mainly of judges and members of the legal profession.[386]

Myanmar does not have a Judicial Service Commission, or other comparable independent body entrusted with the discipline of judges. Judges sitting on the Constitutional Tribunal, Supreme Court and High Courts are subject to impeachment proceedings by the legislature.[387]

Impeachment by the Lower House to the first justices of the Tribunal was based on the dispute between the government and Parliament over the Tribunal began in March but gained momentum after the formation in August 12 of the rule of law committee. The basis for the disagreement and impeachment was the Members of Parliament's objection (Hereinafter: MPs) to a March decision of the Tribunal that denied parliamentary committees the status of parliamentary as a national-level organization. Without that a status, the committees could not overrule the government or summon government for questioning.[388]

A Lower House MP told that "We found this Constitutional Tribunal cannot work in a democratic way. If they have power above Parliament, there will be no one who can control the government. We are worried that there will be no checks and balances on the government, and the government may act similar to the last military regime."[389]

The conflict started with the political matters what the Tribunal could not solve within the legl framework.

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[385] David J.Sachar. (2008). Judicial Misconduct and Public Confidence in the Rule of Law. (Accessed on 23 May 2022). Retrieved from https://www.unodc.org/dohadeclaration/en/news/2019/08/judicial-misconduct-and-public-confidence-in-the-rule-of-law.html

[386] Interntional Commission of Jurist. (2014). Myanmar: Independence and Impartiality; Judicial Integrity and Accountability. (Accessed on 23 May 2022). Retrieved from https://www.icj.org/cijlcountryprofiles/myanmar-introduction/judges/independence-and-impartiality-judicial-integrity-and-accountability.

[387] Interntional Commission of Jurist. (2014). Myanmar: Independence and Impartiality; Judicial Integrity and Accountability.

[388] BBC News. (2012). Burmese MPs Force Out constitutional court judges. (Accessed on 23 May 2022) Retrieved from https/www.bbc.com/news/world-asia-19498968

[389] The Irrawaddy & the Associated Press. (2012). Nine Judges Quit in Constitution Tribunal Role. (Accessed on 23 May 2022). Retrieved from https://www.loc.gov/item/global-legal-monitor/2012-09-12/burma-resignation-of-constitutional-couurt-justices.

There is no provision for the role of the judiciary to nominate equal numbers like the legislature and the executive. This is the weak point that the independence of the judiciary has not taken into consideration even in theory and it is not peculiar that the judges of the Constitutional Court are struggling with the difficulties in practice.

2.4.6.2 Scope of Competencies of the Tribunal

The Tribunal shall pass the final verdict only with the consent of six members including the Chairperson. According to Dr. Khin Khin Oo, it is not clear whether all nine members of the tribunal including chairperson must attend at the tribunal in hearing and deciding the submission or at least six members including Chairperson could hear decide the submission due to certain important circumstances which may effect its decision.[390]

The judges may express their dissenting opinion during deliberations, but it may not be reflected in the decision. It shall be kept in record.[391] The decision of the tribunal is final and conclusive.[392] According to the amendments of the Constitutional Tribunal Law, the capacity of being final and conclusive of the Tribunal's resolutions has been restricted to the cases' opinion submitted by the ordinary courts and not to the motions lodged by the legislature as a consequence of the case *Pyithu Hluttaw v. the members of the Constitutional Tribunal*,*1/ 2012.*
The Constitution 2008 provides two sections (Section 323 and 324) separately to the scope of the Tribunal's resolution. The first section is for the ordinary courts' submission of cases to access the Tribunal's opinion of constitutionality and the resolutions in this case are final and conclusive. The second is mentioned simply on the comprehensive effectiveness of the Tribunal's resolutions on all governmental organs.

[390] Khin Khin Oo. (N.D). A Case Analysis of the Constitutional Tribunal of Myanmar, p-34.
[391] AACC SRD. (N.D). Jurisdictions and Organization of AACC Members, p-184 (pp 1-324). (Accessed on 23 May 2022) Retrieved from https://www.venice.coe.int/CoCentre/Jurisdictions-and-Organization-of- AACC-Members.pdf.
[392] Sec 324, the Constitution of Myanmar, 2008.

2.4.6.3 Accessibility of the Constitutional Tribunal

Although the individual cannot access the Tribunal's competencies, the persons and organizations limited by the Constitution, 2008, can submit the constitutional matters directly to the tribunal to obtain the interpretation, resolution, and opinion of the Tribunal. The first group includes that the President, Speakers of the Upper House, Lower House and the Union parliament, the Chief Justice of the Union, and the Chairperson of the Union Election Commission.[393] The second group that can access the Tribunal's competencies are that the Chief Minister of the Region or State, the Speaker of the Region or State, the Speaker of the Region or State Legislature, the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body, Representative numbering at least ten percent of all the representative of the Lower House or Upper House.[394]

2.4.6.4 The Legal Effects of the Tribunal

The decisions passed by the Tribunal relating to the matters submitted by a court shall be applied to all cases. The decisions of the Tribunal shall have effect on the relevant government departments, organization and persons or on the respective regions.[395] After the case[396] (see below) that was happened between the Tribunal and legislature in 2012, the Law on the Constitutional Tribunal was amended two times and the competences of the Tribunal also totally changed and lesser than it had before. According to the amendments, a decision of the Tribunal submitted by an ordinary court is final and conclusive and it does not encompass the resolution for a reference proposed by the legislature and executive.[397] The previous and original provision was that the resolution of the Tribunal is final and conclusive and binding force to all governmental organizations. This is a constitutional value consistent with the constitutional uniformity and

[393] Sec 325, the Constitution of Myanmar, 2008.
[394] Sec 326, the Constitution of Myanmar, 2008.
[395] Secs 24/25, the Constitutional Tribunal of the Union Law, 2010.
[396] *Pyithu Hluttaw v. the members of the Constitutional Tribunal*,1/ 2012.
[397] Section 23, 24 and 25, the Law Amending the Constitutional Tribunal of the Union Law No 4/2013.

international standard. Therefore, decisions of the Tribunal remain conclusive for the branch of the judiciary itself and its resolution and opinion seem not that meaning to the rest two branches.

According to the amendments after the resignation of the first nine members of the Tribunal, the Tribunal' new judges nominated by the executive and legislature have the duty to report of their performance to them back. It could define that the judges cannot decide cases themselves and they should ask the approval of the President, Speakers of the Pyithu Hluttaw (Lower House) and Amyotha Hluttaw (Upper House) first.[398]

However, the Constitution 2008, does not specify the effect of a decision by the Constitutional Tribunal that an inconsistency exists. It appears the Tribunal is simply to state its findings and any consistent law will therefore continue in force.[399] After the case 2012, the Tribunal's role faded at all, and it seemed that the Tribunal does not have any capacity under the separation of power principle. It is sad to comment that the governing party during that time, the National League for Democracy (NLD), could not handle that the infringement of the judicial independence and removing of judges by the Lower House. On the other hand, the implementation of democracy by the NLD party cooperation with the military government was not successful. After the 2012 crisis, the NLD proposed amendments to eliminate the provisions relating to the Tribunal completely from the constitution and suggested handing over its duty to the Supreme Court.[400] Since under the current constitution, the Supreme Court has a limited jurisdiction of writs relating to the protections of fundamental rights, the Tribunal was not given functions to protect these rights. Thus, it is not surprise that the public did not protect the Tribunal's members during its' 2012 crisis.

Democracy implementation in the EU is totally related to the establishment of the Constitutional Courts. Hungary, Poland, Myanmar[401] and Germany are parliamentary democracy countries and the respective legislative bodies already influenced on the judiciary in the

[398] Section 12, the Constitutional Tribunal of the Union Law No 21/2010 and the Law Amending the Constitutional Tribunal of the Union Law No 4/2013.
[399] Bingham Center Myanmar Project. (2014). Bingham Center for the Rule of Law, p-16 (pp 1-120). (Accessed on 24 May 2022). Retrieved from www.binghamcentre.biicl.org.
[400] Tun Zaw Chit. (2020). The Longevity of Constitutional Courts in New Democracy: A Comparative Analysis in Indonesia, South Korea and Myanmar, Central Europan Union (CEU), p-14 (pp 1-40).
[401] Note 53, Tun Zaw Chit. (2020). The Longevity of Constitutional Courts in New Democracy: A Comparative Analysis in Indonesia, South Korea and Myanmar, p-15.

appointment of the Constitutional Courts' justices. The election of the Ministers and allocation of their duties are also conducted by the governing parties (who got the majority vote) of the legislative organs. Therefore, it is simple to conclude that the implementation of democracy and establishment of the successful Constitutional Courts are concerned with the countries' legislature.

2.4.7 The Methods of Interpretation

The main function of the Tribunal is to interpret the provisions of the constitution.[402] There are two methods of interpretation: direct interpretation as prescribed in provisions and interpretation due to the intention of the original drafters or legislature.[403] The discussions, drafts and records related to law making can also be taken into consideration when a provision of the constitution is interpreted.[404] The Burma General Clauses Act 1898 was repealed by the Interpretation of Expression Law 1973[405] enacted by the Revolutionary Council. This law was drawn based on the common law that leads to the parliamentary democratic system. Thus, the will of the framers needs to be taken into consideration when existing laws are interpreted. This is traditional in English common law.[406]

There are two kinds of interpretation on the international level:

1. Originalism
2. Textualism

Originalism means that the interpretation is based on the intention of the legislature and is also known as the traditional interpretation.

Originalism has less traction in many other countries. It is based on the broader historical and cultural understanding of different polities. Constitutional interpretation in the courts around

[402] Sec 322(a) of the Constitution of Myanmar 2008 and Article 12(a) of the Constitutional Tribunal Law, 2010.
[403] Reference 1, the Constitutional Tribunal of the Republic of the Union of Myanmar, 2012, p-15.
[404] Sec 4, Interpretation of Expression Law, 1973.
[405] Law no. (22/73).
[406] CRAIG R. DUCAT. (2009). Constitutional Interpretation, 9th edition, Wadsworth, 2009, p-77.

the world practices proportionality. In Europe, the ECJ and ECtHR make use of the proportionality rule in the analysis of their foundational legal norms.[407]

The case of *Plessy v. Ferguson* (1896)[408] was decided based on the intention of the legislature in those days. It was a case between the black and the white in the U.S. The black claimed an equal right to education like the white. But the Supreme Court did not allow them the equal right they claimed because the intention of the legislature had to be taken into consideration. It was racial discrimination in education between the black and the white. It can be concluded that there was a lack of judicial independence in the control of the legislature and the national policy of the U.S. in those days.

Textualism can be defined as the interpretation of the judges by using discretionary powers beyond the influence of the legislature and the traditional method. It is the beginning of the achievement of democracy and human rights through the understanding of the rule of law. Otherwise, states that intend to exercise the democratic republic will still find it difficult to get to the point of the goal of democracy. By focusing on the desire of the people and not the control of the authorities, the system of democracy will be increased after realising the disadvantages of the system of tyranny, and most of the states avoid the system and accept the freedom of the people.

In the case of *Brown v. Board of Education* (1954)[409], the independence of the judiciary can be seen through textual interpretation and under the changing situation of the state. In the U.S., the discrimination between the black and the white had been longstanding. However, the U.S. exercises the constitutional republic and democracy so that they can prove how they are civilised by twice electing Obama as president.

Under *Craig R. Ducat*, 'interpretivism or constitutional absolutism rests on the premise that there is no necessary inconsistency between the practice of judicial review and the principles of democratic government because the American system is constitutional, not parliamentary. The judicial review will be out of place in such a system because it would contradict the defence that is constitutionally due to parliament. Ours, however, is a Constitutional system, which means that

[407] Vicki C. Jackson and Mark Tushnet. (2006). Comparative Constitutional Law, p-694.
[408] 263 U.S. 537.
[409] 347 U.S. 483.

the Constitution**,** not the legislature, is supreme. The Constitution limits all officers in all branches as all levels of government'.[410]

Therefore, the interpretation process in common law countries should be based on the discretionary power of judges and the judiciary should independently interpret the prescriptions in the Constitution rather than the will of the legislature. Only the judiciary can protect the interests of the citizens through the interpretation process when there is no exact provision in a constitution related to a certain matter. The legislature can make laws and the executive can confirm laws enacted by the legislature. The practical use of those laws always depends on the application by the judiciary for the benefits of the citizens.

2.4.8 Cases Analysis

The resolutions of the Tribunal are final and conclusive and influence the government departments concerned.[411] But they were not in harmony with that provision according to the case that happened in 2012 between the legislature and members of the Constitutional Tribunal. The question the Attorney General on behalf of the President presented to the Tribunal to interpret is: 'The Committees and Commissions formed by the Lower House are Union Level or not'.

After citing relevant laws and sections, the Tribunal decided the question by finding that the Committees and Commissions formed by the Lower House are not Union Level. Although the Constitution provided that the resolutions of the Tribunal are final and conclusive, the Parliament was not satisfied with this resolution and two-thirds of the members of Parliament impeached the members of the Tribunal against the Constitution. [412] This case showed that the rule of law did not exist among the highest organisations of the government themselves.

On behalf of the members of the legislature, the Attorney General presented whether or not the committees and commissions formed by the legislature were at the union level. The Constitutional Tribunal decided that the committees and commissions formed by the legislature

[410] Craig R. Ducat 2009: 76.
[411] Sec 324 of the Constitution of the Union of Myanmar and Sec 23 of the Constitutional Tribunal of the Union Law, 2010.
[412] *Pyithu Hluttaw v. the members of the Constitutional Tribunal*, 1/2012.

were not equal to the union level organisations by broadly citing the relevant sections. Naturally, the resolutions of that court are final and conclusive, and no appeal is allowed under the provisions of the current Constitution 2008 and the Law of the Constitutional Tribunal of the Union 2010. But the members of the legislature were not satisfied with and impeached all nine members of the Constitutional Tribunal.

All nine members resigned from the Tribunal because they did not want to amend or repeal the resolution they had issued because the current Constitution 2008 officially explained that the decision of the Court was final and conclusive. The authorities concerned should respect each other and obey the FL that they passed. When they do not mutually respect the rule of law and ignore it, the Constitutional Tribunal, the guardian of the constitution, will decrease value and thus the constitution will also be only a book and nonbinding law.

Therefore, the rule of law is essential among the heads of state, the separation of powers and the checks and balance systems which are needed to be alive. Only after that step will the fundamental rights determined as human rights in the Constitution in Myanmar be safe and the people can enjoy them freely. These are the country situations dealing with constitutionalism and this research tries to figure out a better way to promote the functions of the Constitutional Tribunal by doing a comparative study.

As a result, all nine members of the Tribunal resigned on their own account because they did not want to repeal their decision and they believed that the resolution was final and conclusive[413] under the Constitutional law 2008. After that, the Parliament amended some provisions of the Constitutional Tribunal Law 2010 and changed the sequence of Section 24 and 25. The important point is that the case led to a constitutional crisis. The constitution itself cannot be amended because the process is strict, and 25 percent of the legislature are from the military and their agreements are essential to get the majority votes over 75 percent to amend some important sections of the constitution.

Therefore, in Myanmar from the British period to the present, it can be seen that the judiciary is not independent of the other two branches. There was an exception period after

[413] Sec 324, the Constitution of Myanmar, 2008.

independence in Myanmar. Under the Socialist system, the role of the judiciary was totally under the power of the executive and legislature.

In Indonesia, the judicial power is independent, and it possesses the power to organise the judicature to enforce law and justice.[414] The CC is composed of nine persons. The first three shall be nominated by the Supreme Court; the second three, by the People's Representative; and the rest, by the President.[415]

In Thailand, members of the Constitutional Tribunal have consisted of nine at most. Three members are nominated by the Supreme Court and the rest by the Supreme Administrative Court.[416] Thus, the judiciary has the independent power to nominate the members of the CC. The CC found that the Prime Minister had violated the rule of law because the transfer of the position was for her family's personal benefit, and it did not represent the public interest. The CC vacated *Yingluck* from the premiership for promoting her brother-in-law as the new National Police Chief.[417]

The functions of those courts have the power to promote democracy and human rights. The CC in Thailand has the right to examine the abuse of state authority by the Prime Ministers. This also points out that the court has the power of constitutional review that can promote the rule of law. In Indonesia, the CC is reliable and working because human rights cases are presented to the court, and it is independent of the influence of the other branches. In Southeast Asia, the court is popular for its independent functions.

In Europe, the Venice Commission on Constitutional Justice aims to maintain not only democracy but also to safeguard the human rights and to achieve the rule of law.[418]

In Myanmar, the Supreme Court has the power to issue writs when fundamental rights of the citizens are violated by the actions of the executive and legislature.[419] This is why an individual

[414] Art 24(1), the Constitution of Indonesia, 1945.
[415] Art 24(c), the Constitution of Indonesia, 1945.
[416] Art 200, the Constitution of Thailand, 2007.
[417] Tonsakulrungruang, K. (2017). Entrenching the Minority: The Constitutional Court in Thailand's Politica Conflict. Journal Articles, *Washington International Law Journal* 26(2), p-247-268.
Retrieved from http:// digital.law.washington.edu/dspace-law/bitstream/handle/…/26WILJ247.pdf
[418] World Conference on Constitutional Justice. CDL-WCCJ-GA (2017) 010. Retrieved from http://www.venice.coe.int
[419] Sec 18(c), the Constitution of Myanmar, 2008.

in Myanmar cannot directly present constitutional disputes to the CC, but they can submit them through their elected representatives.[420]

At present, the constitutional framers might have intended the judiciary to be independent of the influences of the other two branches and established the separate CC in 2011. but it is not working in practice as shown by studying the aforementioned cases. Thus, the checks and balances system needs to be respected by the state authorities and the rule of law widely recognised by the modernised countries cannot be ignored. Finally, the FL, also known as the constitutional law, should be flexible and able to be amended in harmony with the changing situations and to solve constitutional conflicts.

In order to promote democracy and human rights, it is essential that the authorities of the three branches follow the rule of law. Otherwise, the citizens will not understand the value of having the principle of the rule of law. As a result, the role of the judiciary that can safeguard the constitution and the fundamental rights of the citizens might not be reliable at all. How then can the judiciary stand independently from the influence of the other branches?

2.4.9 Case Reviews

Reviewing the previously discussed case in Myanmar (2012), the separation of powers, the checks and balances system and the discretionary power of the courts in common law countries have been influenced by the legislature. The task of the constitution is to settle the constitutional disputes between the executive, legislature and judiciary. The judiciary is vested with the power of judicial review so that it can interpret the constitution. In an earlier time, Supreme Courts had the power to interpret the constitution. The separation of powers under the constitution in Myanmar is important. Even though some scholars assert that it is not related to judicial independence.[421]

First of all, the judiciary must be independent of the executive and legislative branches. In Myanmar, judicial independence disappeared during the regime of the Kings, except for the fact

[420] Sec 326, the Constitution of Myanmar, 2008.
[421] John Lowndes, Dr. (2016). Judicial Independence and Judicial Accountability at the Coalfare of the Australian Judiciary, Presentation in Northern Territory Bar Association Conference in Dili East Timor. Retrieved from www.cmja.org/downloads/JUDICIAL INDEP

that the King was fair and kind hearted. As only the Kings possessed all authorities in the land, sea and air, they could influence everything and everyone in that period.

In Myanmar, the doctrine of the separation of powers was repealed after the Revolutionary Council had taken over state power in 1962. The Chairman of the Revolutionary Council barred the previous independence of the judiciary throughout the state power which belonged to him.

At present, under the Constitution 2008, the separation of powers has been inserted to implement democracy and to access the rule of law. Three branches of sovereign power – legislative power, executive power, and judicial power – are separated to the extent possible, and they exert reciprocal control and checks and balances among themselves. [422]

According to the appointment of the Constitutional Tribunal judges, the doctrine of separation of powers cannot be seen.[423] Two-thirds of the judges of the Constitutional Tribunal are nominated by the Speaker of the Lower House and Upper House. The executive can nominate three members of the Tribunal. But the judiciary has no power to nominate any member of the Tribunal. The most important thing is that the judges nominated by the legislature and executive are responsible to them. It shows that the judiciary is not independent of the executive and legislature.

Under the checks and balances system, the judiciary can check whether or not the actions of the executive and legislature are constitutional. The Supreme Court of the Union has the power to issue writs, habeas corpus, mandamus, prohibition, quo warranto and certiorari.[424] The citizens can claim the legal remedy if their fundamental rights under the constitution have been infringed.[425]

The Constitutional Tribunal has the power to decide constitutional disputes among the authorities of the Union, States, Regions and Self-Administered areas of Myanmar The main task of the Tribunal is to interpret the constitution in Myanmar. The ambitions to promote democracy and human rights are not inserted in the functions of the Tribunal as they are in the other civil law

[422] Sec 11 (a), the Constitution of Myanmar, 2008.
[423] Sec 321, the Constitution of Myanmar, 2008.
[424] Sec 296(a), the Constitution of Myanmar, 2008.
[425] Sec 377, the Constitution of Myanmar, 2008.

countries.[426]Interpretation under the constitution shall have to follow the provisions of the constitution. The will of the legislature in drawing up a constitution shall be taken into consideration in interpreting it in common law countries.[427]

In civil law countries, statutory laws shall be cited when courts and judges make decisions. Laws are codified to apply in practice. Therefore, laws need to be amended under current situations. In common law countries, the discretionary powers of judges are important to make judgements rather than just the statutes. But in common law countries, especially in Myanmar, the Interpretation of Expression Law 1973 has to be followed to make decisions. It seems to prohibit the independence of the judiciary. Discretionary power is the legal right of the judiciary to make some legal decisions according to their discretion. Under the doctrine of the separation of powers, the ability of judges to exercise discretion is an aspect of judicial independence.

On the other hand, when the exercise of discretion goes beyond constraints set down by legislation, by binding precedents or by a constitution, the court may be abusing its discretion and undermining the rule of law. In that case, the decision of the court may be *ultra vires*, and may sometimes be characterised as judicial activism.[428]

In 1824, US Chief Justice John Marshall wrote the following relative to the discretionary power.

'Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the laws and can be nothing. When they are said to exercise discretion, it is a mere legal discretion, discretion to be exercised in discerning the course prescribed by-laws; and when that is discerned, the court must follow it. Judicial power is never exercised to give effect to the will of the legislature; or, in other words, to the will of the law'.[429]

But ultra vires by the judiciary is rarely heard as against the other two branches, the legislature and executive. Most of the cases that are faced are that the executive or legislature tries to influence the judiciary. The judiciary all over the world is always a more powerless branch than the legislative and executive. Therefore, as many scholars have written, the separation of powers

[426] Sec 322, the Constitution of Myanmar, 2008.
[427] Sec 453, the Constitution of Myanmar, 2008.
[428] https://en.m.wikipedia.org.
[429] *Osborn v. Bank of the United States, 22 U.S.738 (1824).*

is important for the independence of the judiciary and there should be the reciprocal control of checks and balances among the three branches.

Even though most of the countries in the world accept that CCs or tribunals have to safeguard and protect the constitution, the military must protect the official constitution of Myanmar.[430] In the legislature, 25 percent are from the military nominated by the Commander in Chief of the military. Therefore, the constitution is difficult to amend because of the influence of the military in politics. The requirements of the constitution are difficult to be performed unless 25 percent of the military personnel agree. This is a noticeable point beyond the separation of powers between the executive, legislature and judiciary.

In 2011, the executive tried to influence the judicial power of the state under reference 1 of the Constitutional Tribunal of the Union of Myanmar. The Ministry of Home Affairs asked the Supreme Court of the Union to vest the judicial power in the twenty-seven administers to serve as the first-class power magistrates in subdivisions.[431]

The Supreme Court of the Union is the supreme judicial organ, and it can supervise the inferior courts. It submitted the reference to the Constitutional Tribunal to interpret in line with Articles 293 and 317 of the constitution, vesting the judicial power to decide crimes to the administers under the control of the Department of General Administration, vesting them the first-class power of Magistrates under Article 32(1)(a) of the Criminal Procedure Code and vesting them with summary trial power under Article 260 of CrPC, appointing judges to try whether or not the juvenile cases under the Child Law 1993 are constitutional.

The Constitutional Tribunal held that this is not consistent with constitutional law because the state powers shall be shared between the executive, legislature and judiciary under the fundamental principles of the constitution and judicial powers had been vested to the judges on the different levels of the courts.

This is one of the pieces of evidence that the executive again wanted to influence the judiciary. In former times, the separation of powers was not clear and the administrators who had been appointed in the remote areas were concurrently vested with the judicial power to decide

[430] Sec 20(f), the Constitution of Myanmar, 2008.
[431] *Chief Justice of the Union v. Ministry of Home Affairs*, *2011*.

cases. Moreover, the Constitutional Tribunal could check the action of the Ministry of Home Affairs, and the court balanced the separation of powers between the executive and the judiciary.

Summary Table for Comparative Study among the Three Countries

	Hungary	Poland	Myanmar
Regional Integration	EU Member State	EU Member State	ASEAN Member
Legal System	Civil Law	Civil Law	Common Law
Composition of Constitutional Court/Tribunals	15	15	9
Terms of Office of the Judges	12	9	5
Nomination	Legislature and Executive	Legislature and Executive	Legislature and Executive
Human Rights Protection	Domestic and European Union Citizenship rights	Domestic and European Union Citizenship rights	Non- competency
Interpretation	Will of the Legislature	Will of the Legislature	Will of the Legislature

In summary, the independence of the judiciary, the composition of courts, the processes of nomination and selection of judges, the competencies of courts and the ways courts interpret constitutions should be considerable. The tenure of the judges in those three countries was also remarkable as shown by the case studies. There were no guarantees of the 'irremovability of judges' and the independence of the judiciary in Hungary, Poland and Myanmar. However, it can be noted that the legislature can make laws to promote the competencies of the court; on the other hand, it can denigrate the competencies of the courts, such as under the case of *Baka v. Hungary*.[432] Among these countries, integration is different in politics and similar in economics. Myanmar is a member of the ASEAN, and it has advantages in economic matters through cooperation but not for politics. The organisations of the ASEAN must follow the Treaty of Amity and Cooperation (TAC) 1976, and the member states cannot interfere in the internal affairs of each other. Therefore, the independence of the judiciary in Myanmar will be concerned only with the responsibilities of local authorities. This means Myanmar citizens cannot rely on the central bodies of ASEAN when the Myanmar government violates the fundamental rights under the constitution and the Tribunal could not resolve those conflicts. There is no ASEAN Court of Justice for a trial against a member state when it abuses its power and violates human rights. In Hungary and Poland, the local governments must follow the national constitutional laws and the values of EU law. The EU law is based on international law and international legal norms. Thus, the members shall be checked and balanced by European organisations like the European Council, European Commission, European Court of Justice and the Venice Commission. According to the Montevideo Convention 1933, a country with a population, territory, government, sovereignty and the capacity to enter mutual relations with other countries can be defined as an independent state.[433] In the theory of EU integration, the Member/s do not need to share their sovereignty with the EU organisations. But they have to implement EU law and maintain EU values which are already recognised as the requirements for accession of Member/s. This is the reason the EU was awarded the Nobel Prize in 2012 on the grounds of advancing the causes of peace, reconciliations, democracy and human rights in Europe.[434] However, integration and state sovereignty could conflict with each other according to the cases in Hungary and Poland.

[432] No.20261/12.
[433] Art 1, Montevideo Convention on Rights and Duties of State, 1993.
[434] European Union. (2012). European Union Receives Nobel Peace Prize, 2012.

In the same way, Member/s like Hungary and Poland can break EU values when they cannot implement them under politics. Although the politics were changed, the principle of independence of the judiciary and the irremovability of judges should be stable under regional integration.[435] Whenever a Member breaks constitutionalism, the EU values and the freedom of the judiciary will be damaged. The EU defines the judiciary as the only body that can check the actions of the legislature and executive to keep the peace, stability and democracy of a state. Therefore, I conclude that EU integration is better for reconciling the legislature, executive and judiciary to promote democracy and human rights than is ASEAN regional integration.

Conclusion

Some countries accept that the separation of powers is not essential for the independence of the judiciary, for example, in Australia. According to the concept of the French legal scholar Montesquieu, the separation of powers is necessary both in legal theory and in practice. Author Irving R. Kaufman remarked, 'the separation of powers is grounded in a need to protect the citizenry rather than the occupants of official positions within each branch. It means that the independence of executive stands for the 'Republic' not for the President's benefit as an individual. On the other hand, the free speech right that is originally allowed for the senators is not for the personal profits but for the public interests. Similarly, independence of the judiciary is a guarantee to safeguard the constitution and to protect its fundamental rights for the individuals including judges'.[436]

N.W. Barber expressed the inventive idea that 'the standard understanding of the principle of separation of powers presses for three types of division between three branches of the state. The three branches are the legislature, the courts, and the executive. The three divisions are between institutions, powers, and officials in the legislature, executive, and judiciary institutions.' [437]

Retrieved from https://europa.eu/european-union/about-eu/history/2020-today/2012/eu-nobel_en

[435] Nge Nge Aung. (2019), Principle of Irremovability of Judges: Judicial Independence in Hungary, *Journal of Education, Culture and Society*, Vol-19 (2), p-298, (pp 293-298).

[436] Note 99, Irving R. Kaufman. (1980). The Essence of Judicial Independence, *Columbia Law Review*, Vol-80(4), Columbia Law Review Association Inc, p-687 (pp 671-701).

[437] N.W. Barber. (2018). The Principles of Constitutionalism, Oxford University Press, United Kingdom, p-56.

In 'The Federalist Papers', James Madison recognised the need for a division of powers to protect the people from a tyrannical government. The author commented that the efficient model was found in 'The Federalist Papers'.[438] On the other hand, John Locke attempted to shape a vision of the state that would be so great an improvement on individual's rights within a state of nature that they would voluntarily surrender these rights to participate in the common good. And he believed that state legitimacy required that the constitution be sufficiently effective to provide positive protection for citizens and promote the public good; it was not enough that the constitution prevented the state from harming its citizens.[439]

According to N.W. Barber, 'the separation of powers requires that the constitution be structured to facilitate and encourage cooperation between institutions: the branches of states should be working towards shared goals using their different capacities for a common end'. There is inevitably friction within the constitution ss well as the need for self-defence mechanisms.[440] Conflict most clearly arises when a branch seeks to correct the errors. But it is also likely to come from the integrative function of the separation of powers and the capacity of the three branches to see different aspects of the common good and combine them into single state action.[441]

Especially in developing countries like Myanmar, the constitution is the FL and the power. The duties of the legislature, executive and the judiciary should be prescribed in it to avoid ambiguity in practice. Otherwise, the role of the judiciary and the functions of the Constitutional Tribunal should be democratically promoted. If Myanmar could have exercised liberal democracy, there would be fewer constitutional problems among the government organisations, and the constitution would become flexible. In the U.S., semi-separation of powers is exercised, and it cannot be defined as complete. But the judiciary could stand independently under the case of *Marbury v. Madison* decided in 1803 and the concept of judicial review it established. John Marshall could confidently refer to the 'people's supreme and original will' which organises the government and limits its power.[442]

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[438] N.W. Barber. (2018). The Principles of Constitutionalism, p-55.
[439] N.W. Barber. (2018). The Principles of Constitutionalism, p-54. (I have collected the author's sentences and ideas directly as his expressions are interesting and clear for the readers to understand).
[440] N.W. Barber. (2018). p-80.
[441] N.W. Barber. (2018). pp-82-83.
[442] Richard S. Kay. (1998). American Constitutionalism, in Larry Alexander (Ed.), Constitutionalism: Philosophical Foundations, p-30 (pp 16-63), Cambridge University Press, Cambridge.

In conclusion, it seems that the legislature influences the independence of the judiciary by the nomination process in most countries and according to their recognised constitutional laws. Second, the judiciary can have difficulty keeping its autonomy when political changes occur as under the cases of Hungary and Poland. Although politics is not everything, the policies and laws change when there are political changes. Moreover, the judiciary needs to be independent of the influence of the executive and legislature in practicing its duties and responsibilities, even though the provisions of separation of powers under constitutions are not complete. One of the crucial responsibilities of the executive and the legislature is to support the machinery of the judiciary. This is because the law, rules, regulations and orders provisionally enacted by those branches must be implemented by the courts and justices to the public interest.

Chapter III
Part I
Composition of the German Federal Constitutional Court

3.1 The Federal Constitutional Court under the Basic Law

Ironically, Germany's decision to set up a specialised constitutional court was influenced by the notion that 'Europe's career judiciaries are not well suited to constitutional adjudication' advanced by Professor Cappelletti and 'the public distrust of the regular courts' by the Kommers.[443]

The German Federal Constitutional Court (hereinafter: FCC) is famous for its practical competencies and constitutional interpretation of current political affairs within the legal framework. It was established in 1951 according to the basic law (BL). It is undoubtedly the most potent European CC since it has the broadest jurisdiction.[444] Nevertheless, the formation of the court was not consistent with the international recommendation of judicial independence because the judges cannot participate in the appointment procedure under the BL of 1949 and the Act on the FCC 1951. Instead, Bundestag and Bundesrat select the judges, and the federal president

[443] Vicki C. Jackson and Mark Tushnet. (2006). Comparative Constitutional Law, 3rd Edition, Foundation Press, United States of America, p-657.
[444] Vicki C. Jackson and Mark Tushnet. (2014). Comparative Constitutional Law, Chapter VI, 3rd Edition, p-523, Foundation Press, United States of America.

appoints them. Therefore, this chapter explores why the judges cannot take part in the appointment process of the members of the FCC and how it is reasonable under German constitutionalism.

Germany is a democratic and federal state composed of sixteen Länder. The BL of the Federal Republic of Germany was enacted on 23 May 1949. It was not entitled 'constitution' because it was initially conceived as an instrument applicable until reunification became possible.[445] According to federalism, the Federation and Länder possess the state's sovereignty.[446] The BL defines the appropriate division of power between the Federation and Länder concerning exclusive and concurrent legislative powers.[447] There are separate CCs in the Länder, and here is the FCC for the Federation. The individual Länder as a federal state has adopted its constitution regulating its organisation and fundamental rights.[448] However, the authorities do not make equally distinct the judicial appointment process because of the federalism and parliamentary democracy. According to federalism, the Länder representatives can administer the justices of the FCC, while the Bundestag, a main constitutional organ, can select half of the sixteen judges in line with the essence of democracy. Thus, the BL prescribes the composition of the FCC in Article 94.[449] Another fundamental principle of the BL is that of federalism.[450] The determination of rules that govern the formation of the land's constitutional organ, function and competencies are exclusively concerned with the land.[451]

On the other hand, the authorities ignore judges' participation in selecting the justices of the FCC. This research aims to identify the German way of sharing power as influenced by political notions and beyond the international standard of judicial independence from the qualitative approach method. 'Germany seems practicable John Lock's theory of division of powers between the legislature, executive and the federative.' This has some confirmation later after studying the other scholars' views on the composition of CC.

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[445] Council of Europe. (2004). Constitutions of Europe: Texts Collected by the Council of Europe Venice Commission. Vol-1, Martinus Nijhoff Publishers, Leiden Boston, p-760.
[446] Art 20 (1-2), the BL, 1949.
[447] Art 70, the BL, 1949.
[448] Paul Bovend' Eert and Marten Burkens. (2014). The Federal Republic of Germany, Leonard Besselink, Paul Bovend's Eert, Hansko Broeksteeg, Roel de Lange and Win Voermans (Eds:), *Constitutional Law of the EU Member States*, Deventer, Kluwer, p-650.
[449] These constitutional provisions seem reliable for the national reconciliation between the Federation and Länder.
[450] Arts 20, 28 and 30, the BL, 1949.
[451] Vicki C. Jackson and Mark Tushnet. (2006). p-630.

Separation of powers under the German concept emphasises the protection of the interests of citizens and prevents the state from becoming all powerful. State power is divided into three functions, and they are allowed the competencies to limit and control each other.[452] The allocation of powers means the constitution binds the legislature. The law binds the executive, and justice binds the judiciary. Therefore, separation of powers has included the concept of the rule of law. The assignment of the functions to the German law-making body, administrative organs and judicial courts for the administration of justice means that the Germans apply the horizontal separation of powers. Besides this, the federal–state principle goes together with the vertical separation of powers between the Federation and the Länder.[453]

German constitutionalism is famous for the Weimar and the BL because there are several great changes and differences between those two laws depending on the times and circumstances. The first wholly democratic and liberal constitution was the Weimar Republic. The Weimar Republic was a federal state, although the centralisation of powers was remarkable.[454] The Weimar Constitution made points of the Republic of Reich, the composition of government with the President, a Chancellor, and a Parliament; the minimum voting age is twenty, the seven-year term of office for the President, fundamental human rights and so on.[455] The existing BL integrates with the continental European and North American legal tradition.

The BL establishes representative democracy. In a representative democracy, the three branches practice the various government functions for the people. Only the Länder and their territories have direct democracy.[456] The people elect the members of parliament to form the Bundestag. The Bundestag elects the Federal Chancellor who can appoint the federal ministers. In this way, the German Parliament becomes the supreme body in this democratic legitimacy.

Judicial power is practiced by the lower courts and six federal courts:

1. The Federal Constitutional Court [457]
2. The Federal Court of Justice in Karlsruhe (civil and criminal cases)

[452] Federal Ministry of the Interior. (2014). The Federal Public Service, p-14. (Accessed on 29 Oct 2020). Retrieved from www.bmi.bund.de/download/publikationen/federal-public-service.pdf.
[453] Paul Bovend' Eert and Marten Burkens. (2014). p-652.
[454] Werner Heun. (2011). The Constitution of Germany: A Contextual Analysis, Hart Publishing, United Kingdom, p-17 (pp 1-241).
[455] History. (2020). The Weimar Republic. (Accessed on 23 Oct 2020). Retrieved from https://www.history.com.
[456] Arts 29 and 118, the BL, 1949.
[457] Art 92, the BL, 1949.

3. The Federal Labor Court in Erfurt (labour cases)
4. The Federal Administrative Court in Leipzig (administrative cases)
5. The Federal Social Court in Kassel (social security and social welfare cases)
6. The Special Finance Court in Munich (tax cases)[458]

The subject matters organise the German court system. Five supreme federal courts are intended to ensure uniform application of the law by the lower courts in all sixteenth German Länder. Only the FCC can decide the constitutionality of statutes to ensure uniformity in the law. Therefore, the FCC is a purely constitutional court concerned only with the interpretation and implementation of the BL. It is not an appellate court, and there is separate law governing how to bring a suit before the FCC.[459]

The judicial powers are vested in the judges and shall be exercised by the FCC, by the federal courts established by the BL and by the courts of the Länder.[460]

Despite all courts having the authority and the responsibility to review the constitutionality of government actions and the legislation within their competencies, only the FCC in Karlsruhe can pronounce the unconstitutionality of legislation. Other courts shall suspend the proceedings if they find a statute is against the BL, and the case must be submitted to the FCC.[461]

The FCC is famous in Europe and the EU because of its independence in constitutional adjudication in political affairs within the legal framework.[462] The classical area in which to examine the relationship of judges to politics is constitutional review.[463]But the FCC is not a political body on the grounds that its sole standard of review is the fundamental law.[464] Likewise, the FCC is very famous for its discretionary power to adjudicate human rights protection and the

[458] Art 95(1), ibid. See also Fiano O' Connell & Ray McCaffrey. (2012). Judicial Appointment in Germany and the United States, Research and Information Service, Northern Ireland Assembly. Retrieved from www.niassembly.gov.uk/globalassets/Documents/ RalSe/
[459] Christian Bumke and Andreas Voßkuhle. (2019). German constitutional Law: Introduction, Cases and Principles, p-22-23.
[460] Federal Ministry of the Interior. (2014). Retrieved from www.bmi.bund.de/download/publikationen/federal-public-service.pdf.
[461] Britannica, Germany – Justice. (Accessed on 27 Oct 2020). Retrieved from https://www.britannica.com.
[462] Prof. Dr. Jur. Thomas Henne. (2019). The History and Structure of German Basic Law – The Fundamental Structural Principles of the Federal Republic of German. Introduction to German basic Law Lectures (6-10/5/2019), University of Debrecen, Faculty of Law.
[463] John Bell. (2006). Judiciaries within Europe, Cambridge University Press, p-5. (This book is downloaded from the John Bell Online Library).
[464] The Federal Constitutional Court. (2020). Retrieved from www.bundsverfassungsgericht.de.

interpretation of the BL of Germany. Moreover, the BL describes the structure and jurisdiction of the FCC in broad terms but the composition of the court, the appointment process, the tenure of the terms and numbers of justices are left to the legislature by enacting the Act on the FCC in 1951.[465]

In Europe, Austria established a separate CC in 1920 and Italy followed in 1946. The German FCC was set up in 1951, and it is the highest tribunal and an apex court under the judicial hierarchy.[466] Furthermore, it is the first court of the republic and the unique constitutional organ that can protect the violation of fundamental rights guaranteed by the BL of Germany. [467]After the exhaustion of his or her legal process through the ordinary courts of law, any citizen may claim a legal remedy from the FCC. The decisions of the FCC have a binding effect on the constitutional institutions of the Federation, the Länder, other federal and ordinary courts and authorities as well.[468] German democracy has given a new elite role to the judiciary as the guardian of fundamental rights.[469]After the legal concepts in the former constitution were changed, the FCC sector became crucial with the emergence of the new BL 1994. The drafters of the BL already had the experience of good and bad to create a new constitution. They knew very well to change the Weimar constitutional notions to sophisticated ideology. Therefore, the aims and purposes of the original framers are always taken into consideration in interpreting the BL in Germany, and their contributions are still honourable and memorialised up to the present in German legal history.

3.2 Structure of the Federal Constitutional Court

The FCC is both a court and a constitutional organ composed of two senates. The president of the court chairs one senate, and the vice-president chairs the other. Each senate has eight judges, and half of them are elected by the Bundestag and Bundesrat. They may not be from the

[465] Georg Vanberg. (2000). Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of Powers, Comparative Politics, Vol 32(3), p-336 (pp 333-353).
[466] Hans G. Rupp. (1969). The Federal Constitutional Court in Germany: Scope of its Jurisdiction and Procedure. *Notre Dame Law Review*, Vol- 44:4(3), p-548. Retrieved from http://scholrship.law.nd.edu/ndlr/vol44/iss4/3.
[467] Hans-Ernst Bottcher. (2004). The Role of the Judiciary in Germany. *German Law Journal,* Vol-5, No-10, p-1328 (Pp 1317-1330).
[468] Art 31(1), Act on the FCC, 1951.
[469] John Bell. (2006). Judiciaries within Europe, Cambridge University Press, p-109.

Bundestag, Bundesrat, federal government or related land bodies.[470]The first senate is called the fundamental rights senate and it deals with constitutional complaints. The second senate is the court for state matters and is concerned with the Federation and Länder as well as proceedings on disputes between constitutional organs and constitutional complaints.[471] The Act governing the FCC mentions that the competencies of the First Senate are for judicial review proceedings. The main issues are the alleged incompatibility of a legal provision with fundamental rights of equal citizenship, a ban on special courts, fair trial, deprivation of liberty under the BL and constitutional complaints with some exceptions under the laws relating to the FCC. The Second Senate has competence for judicial review proceedings and constitutional complaints not assigned to the First Senate. If there is doubt as to which senate has jurisdiction in a case, a plenum comprising the president and vice president of the court and two judges from each senate decides.[472] Both panels have different competencies, and they are independent of each other. Each judge is elected to one panel only, and each panel requires a quorum of at least six justices in attendance.[473] The entire body decides the crucial cases.

Nevertheless, the decisions of each senate are always decisions of the FCC.[474]The essential competencies concerning the control of government and parliament are an abstract and concrete judicial review and the constitutional complaint. *Justice Wiltraut Rupp v. Brunneck* recommended that the court is a political organisation of the state on the same level as the federal executive and legislative branch (Bundestag and Bundesrat). Thus, the court's highly responsible task is only one part of the whole functioning of the state organisation and requires cooperation with these other organs of state. Such a view does not diminish the FCC's importance as an institution to safeguard

[470] Art 94(1), the BL, 1994.
[471] The Federal Constitutional Court. (2019). Allocation of Competences – German Federal Constitutional Court. Retrieved from www.bundsverfassungsgericht.de.
[472] Constitutional Law of 15 EU Member States. (2004). Lucas Prakke, Constantijn Kortmann (Eds.), Kluwer, Deventer, p-357.
[473] Art 15, the Act on the FCC, 1951.
[474] The Federal Constitutional Court. (2020). Allocation of Competences – German Federal Constitutional Court. Retrieved from www.bundsverfassungsgericht.de.

the separation of powers and protect individual rights.[475] The FCC is presumed to be a faithful guardian of the constitution of Germany's modern democracy to defend fundamental rights.[476]

The current allocation of competencies between the senates is subject to the statutory framework and modifying orders of the plenary.

3.3 Appointment and Nomination of the Judges

The appointment and nomination procedure of Supreme Court or CC judges is one critical measurement of the independence of the judiciary and its interest in the constitutional law of a given state. In the constitutional history, the appointment and nomination processes had mainly been conducted by the Bundesrat and Bundestag.[477] The models of judicial appointment in Germany are subject to political involvement at various levels. [478]As a result, the judiciary is seemed not to be independent of the influence of the legislature and executive. Nevertheless, judicial power is theoretically vested in the judges and the federal courts provided for in the BL and the courts of the Länder.[479] According to the author Werner Heun, 'this provision is construed as reserving all judicial authority for judges, and it seems like administration'. Another definition considers judicial power as a means of conflict resolution. He again concluded that judicial power is often comparable with the functions of the other branches.[480]

The four systems of appointment examined by the United States Institute of Peace are:

1. Appointment by political institutions
2. Appointment by the judiciary itself
3. Appointment by a judicial council (which may include laymen)
4. Selection through an electoral system [481]

[475] Wiltraut Rupp-v. Brunneck. (1972). Germany: The Federal Constitutional Court, The American Journal of Comparative Law, Vol 20(3), p-401(pp 387-403). Retrieved from https://www.jstor.com/stable/89311.
[476] Konrad Adenauer Stiftung. (2020). Landmark Decision of the Federal Constitutional Court in the Area of Fundamental Rights. (Accessed on 7 Oct 2020). Retrieved from kas.de/de/einzeltitel/-/content/landmark-decisions-of-the-federal-constitutional-court-in-the-area-of-fundamental-rights-v2.
[477] Art 94, the BL,1949.
[478] Alex Stone Sweet. (2007). pp-915-916.
[479] Art 92, the BL, 1949.
[480] Werner Heun. (2011). The Constitution of Germany: The Contextual Analysis, Hart Publishing, p-160.
[481] United States Institute Peace. (2009). Judicial Appointment and Judicial Independence. Retrieved from www.usip.org.

The modes mentioned above are the procedures of appointment discovered by the United State Institute of Peace and are in addition to those of the Italian legal scholar, G. Oberto, who studied the four typologies of appointments as follows:

(1) Nomination by the executive
(2) Election
(3) Co-option
(4) Appointment by a committee consisting of judges and academics following a competitive process.[482]

According to Professor John Bell's remark relating to the appointment process of Germany, 'there is a split between those which has a judicial appointments committee and those which have appointments by the Minister of Justice. In consequence, judges are elaborated in an advisory capacity by way of their representative organ'.

There is no exact norm concerned with the appointment of CC judges in Europe. The approaches of judicial appointments cannot be the same depending on the different legal systems.[483] However, the legislature and the executive take part in judicial selection in most countries, whether they are parliamentary systems or non-parliamentary systems. The appointment procedure of the highest court or CC should be given enormous consideration because of its pivotal position in the interpretation and safeguarding of the constitution and protection of constitutional rights. Even though some European countries have established a judicial council to independently make judicial appointments, assisting in the composition of the CC under the international standard, some constitutional conflicts can still happen, such as the Polish constitutional crisis in 2015.

Jean Michael's opinion on the appointment of judges is based on the very fundamental principle of the German Constitution: federalism and democracy. The Bundesrat selects half of the sixteen judges. The Federal Council represents the German Länder in the federal legislative process. Hence, the representatives of the Länder governments elect half of the judges. A German legal scholar concluded that it is in essence the principle of federalism. The Federal Parliament

[482] John Bell. (2006). Judiciaries within Europe: A Comparative Review, Cambridge University Press, Cambridge.
[483] Paul Bovend'Eert. (2018). Recruitment and Appointment of Judges and Justices in Europe and the US: Law and Legal Culture. (Accessed on 7 Sep 2020). Retrieved from www.nvvr.org.

selects the rest. Bundestag stands for democracy as it is a constitution's main democratic organ.[484] The notable thing is that the main parties need to reach a consensus on judiciary appointments to make sure a nominee gets a majority.[485]

Dieter Grimm recommended that 'the election requires a two-thirds majority, and it has opened into an informal agreement between the two big political parties of the Christian Democrats (CDU) and Social Democrats (SPD). They agree informally to elect judges, and the small political parties can transfer their powers of nomination judges to the big ones following the coalition governments' system. The nomination is followed by negotiation among the big political parties. And it has been criticised. However, setting up the high qualifications to become a Constitutional Court justice is a constitutional standard to avoid at most participation of the partisan persons in the constitutional adjudication'.[486]

The President appoints the federal judges after being elected. The judges are elected for life tenure by the Judges Election Committee formed based on the Länder and the Bundestag. The legislature elects the justices of the FCC, and there is no judicial council in this case. Hence, the legislature and executive as so-called political institutions manage the appointment proceeding in Germany. Under the Act on the FCC, a selection committee formed by the Bundestag proposes a list of the justices. They need to get the majority vote of the members of the Bundestag to become members of the FCC. The requirement of a two-thirds majority prevents a politically one-sided composition of the FCC and even of each panel.[487]The Bundestag shall elect a selection committee composed of twelve members from itself.[488] This selection committee can be considered as unconstitutional because the composition of judges must be determined by the Bundesrat and Bundestag under the first paragraph of Art 94. The FCC declared that the appointment of judges by the selection committee on behalf of the Bundestag was constitutional as the court wanted to

[484] Martin Heidebach. (2014). The Election of the German Federal Constitutional Court's Judges – A Lack of Democracy? *Ritsumeikan Law Review,* No.31, p-153 (pp153-160). Retrieved from www.ritsumei.ac.jp.
[485] Jean-Michel Hauteville. (2018). Why even Germany's Federal Constitutional Court has a political problem. Retrieved from www.handelsblatt.com/English/politics/handelsblatt.
[486] Dieter Grimm. (2017). Federal Constitutional Court of Germany (Bundesverfassungsgericht), Oxford University Press (2020). (Accessed on 30 Oct 2020). Retrieved from https://oxwn.ouplaw.comlaw.com/10.1093/law-mpeccol/law-mpeccol-e528.
[487] Rudolf Streinz. (2014). The Role of the German Federal Constitutional Court, *Ritsumeikan Law Review*, No 31, p-102 (pp94-118). Retrieved from www.ritsumei.ac.jp/acd/cg/law/rlr31/09streinz.pdf.
[488] Art 6, Act on the FCC, 1951.

avoid issuing a ruling that its formation had been unconstitutional for many years.[489] The FCC declared the appointment of judges by the selection committee on behalf of the Bundestag as constitutional because the FCC wanted to avoid a ruling that its formation was unconstitutional.

In this way, the FCC makes politics in the spirit of consensus, it decides in harmony with the influential factors of political life, according to the finding of Preuss.[490] The appointment by political bodies like Bundestag and Bundesrat makes the FCC democratically legitimate.[491] Nonetheless, the FCC has limited democratic legitimacy only when it decides on policymaking and constitutional interpretation.[492] There were some complaints after the selection process from those who were not chosen by the Bundestag.[493]The judiciary wanted to remove political interference from the process.

The legislature set aside that approach to avoid the worry that the judiciary would be insulated from the democratic concerns of the democratic authorities.[494] This was connected to the promotion of federal judges by the consent of the federal minister with an advisory opinion by the judicial council. Several scholars pointed out that an advisory board conducting the process by which judges appointed the federal judges did not seem transparent. Emphasising again the previous authors, Fiona O'Connel and Ray McCaffrey, the core political parties and the legislature rejected the judges' proposal of judicial self-government by showing that it violated the fundamental principles of the parliamentary regime and the democratic responsibility of the judicial function.[495]

In Europe, the legislatures appoint judges of the CC in Germany, Poland and Hungary. Regarding the German appointment system, the Bundestag and Bundesrat appoint all sixteen

[489] Rudolf Streinz. (2014). The Role of the German Federal Constitutional Court, p-102-103.
[490] Christian Landfried. (1994). The Judicialization of Politics in Germany, *International Political Science Review*, Vol 15(2), p-118(pp 113-124). (Accessed on 10 Nov 2020). Retrieved from https://www.jstor.org/stable/1601559.
[491] Rudolf Streinz. (2014). The Role of the German Federal Constitutional Court, p-103.
[492] Christine Landfried. (1994). The Judicialization of Politics in Germany, p-119.
[493] Jenny Gesley. (2016). How Judges are selected in Germany. (Accessed on 4 November 2020). Retrieved from www.blogs.loc.gov/law/2016/05/how-judges-are-selected-in-germany/
[494] Fiona O' Connel and Ray McCaffrey. (2012). Judicial Appointments in Germany and the United States, Research and Information Service Research Paper, Northern Ireland Assembly, p-9. (Accessed on 4 Nov 2020). Retrieved from www.niassembly.gov.uk/.../2012/justice/6012pdf.
[495] Carlo Guarnieri. (2006). Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-government, p-175. (pp 169-187).

judges. Each senate appoints three judges who must be one of the federal supreme judges[496] to ensure that judges of the FCC have well-established experience.[497] The president and vice president of the court are elected in the same manner alternately by the Bundestag and Bundesrat. They may not both reside on the same panel.[498] The other federal judges are appointed by a committee formed by the Ministry of Justice and Consumer Protection, all state ministers of justice and an equal number of members elected by the Bundestag.[499] Due to the career nature of judges, they habitually start their occupations at a first instance court in the employment of one of the Länder. The Ministry of Justice within the Länder organises the recruitment process for the appointment of the social and labour courts. Because they are under the Ministry of Labor and Social Affairs jurisdiction, some legal scholars have remarked that the advisory boards, including judges, may take part in the appointment of the justices of the FCC.

According to author Katalin Kelemen, the appointment of CC judges is a point to secure the independence of the judiciary. But in practice, judges rely on political parties to become CC justices. In this case, the political beliefs of the judges should be the same as the parties and judges who chose them. Even in the U.S., a Supreme Court judge directly appointed by President Trump did not follow the President's policy after selection but took initiative for the public benefit.[500]The judges retain and demonstrate their independence after their election.[501] Nevertheless, the judges the politicians have appointed are protected by the constitutional laws at the domestic level and European legal standards in Europe and the EU.[502] However, there were some conflicts with the independence of the judiciary in Poland and the violations of the principle of irremovability of judges in Hungary.

The Venice Commission recommended the split or mixed model of appointment, giving an example of the German style of selection conducted by the representatives from the sixteen Länder

[496] Katalin Kelemen. (2013). Appointment of Constitutional Judges in a Comparative Perspective – With a Proposal for a New Model for Hungary, *Acta Juridica Hungarica*, Vol 54(1), p-17 (pp 5-23). Retrieved from www.akjournals.com
[497] Dr. Gotthard Wohrmann. (2001). The Federal Constitutional Court: An Introduction. (Accessed on 27 Oct 2020). Retrieved from https://www.iuscomp.org/gla/literature/inbverfg.htm.
[498] Art 9 and 15, the Act on the FCC, 1951.
[499] Art 95(2), the BL, 1949.
[500] BBC News. (Accessed on 5 Oct 2020). Retrieved from www.bbc.co.uk.
[501] Rudolf Streinz. (2014). The Role of the German Federal Constitutional Court, p-103.
[502] Katalin Kelemen. (2013). Appointment of Constitutional Judges in a Comparative Perspective – With a Proposal for a New Model for Hungary, p-6.

of Bundesrat and a two-third majority of Bundestag even though the judiciary cannot participate in the appointment mechanism.[503] The authentic style should be an equal appointment between the legislature, executive and judicial branches, and it can be named the split model.[504]

The Council of Europe's recommendation on the independence, efficiency and role of judges is that 'all decisions concerning the professional career of judges should be based on objective criteria. Besides, the selection and career of judges should be based on the career of merits, having regard to qualifications, integrity, ability, and efficiency. Furthermore, the authority deciding on the selection and career of judges should be independent of the government and administration. Rules should ensure to safeguard its independence that the judiciary elects its members, and that the authority decides itself on its procedural rule'.[505]

Regarding the separation of powers, James Madison, the famous U.S. justice, concluded that the accumulation of all abilities, legislative, executive and judiciary in the same hands, whether one, few, or many, and whether hereditary, self-appointed, or elective may justly be pronounced the very definition of tyranny.[506]

There are qualifications that are fundamentally important to selecting and appointing FCC justices. Hence, Arthur T. Vanderbilt stated, 'The Law as administered cannot be better than the judge who expounds it […] the best organization of the courts will be ineffective if the judges who man it are lacking the necessary qualifications'.[507] Therefore, the FCC judges are nominated by the Bundestag and Bundesrat (the legislature) because Germany practices federal parliamentary democracy, and they are appointed by the federal president.[508]

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[503] Katalin Kelemen. (2013). p-9.
[504] According to Katalin Kelemen, there are three models of appointment, namely the split, the collaborative and the parliamentary. I have tried to combine her great creation of the methods of appointment with my thoughts on the equivalence of separation of powers among the governmental organs.
[505] Para C, Recommendation No. R 94(12). (Accessed on 7 December 2021). Retrieved from https://www.barobirlik.org.tr/dosyalar/duyurular/hsykkanunteklifi/recR(94)12e.pdf.
[506] James Madison. (1788) Federalist No.47, the Particular Structure of the new Government and the Distribution of Powers Among its Different Parts, *The New York Packet*. Retrieved from https://guides.loc.gov/federalist-papers/text 41-50.
[507] Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, The Netherlands, and Spain. (2005). in Giuseppe Di Federico (Ed.), Bologna, Italy. (No page number, I just referred to the quote of the author and it is the page before the preface.)
[508] Art 5 and 10, the Act on the FCC, 1951.

German notions are based on John Locke's theory of division of the sovereignty between the legislature and executive and the federative; not absolutely shared to the judiciary. This corresponds to Montesquieu, France's founding father of the separation of powers. The scholars explored and focused on that the three prime branches should not interfere and should not take a seat on more than one branch. This means that they did not express the separate functions and responsibilities of the judiciary to independently appoint and select their own members to the highest court. Other legal scholars proved no absolute separation among the three great branches; they seem primarily meant for the judiciary than the others. Thus, the legislature and executive are political institutions because of they exist before a government can be formed by political parties. For the judiciary, judges appointed as justices of the highest or CC are also the judges who came from the different layers of subordinate courts, prosecutors, judicial officers and law professors from a university serving their occupations. As a result, the judiciary's role usually stands for legal justice, and the rest, namely the legislature and executive, naturally represent political justice.

The necessary qualifications to be a judge of the FCC are provided in the Act on the FCC. The justice must have reached the age of forty, be eligible for election to the Bundestag and declare in writing that they are willing to be a member of the FCC. They must be qualified to hold judicial office under the German Judiciary Act. They must be the holder of the Diplom-Jurist degree awarded before 3 October 1990 in the territory referred to in Article 3 of the Unification Treaty and must be allowed to assume a regulated legal profession following the provisions of the Unification Treaty. They may neither be members of the Bundestag, the Bundesrat, the federal government nor any of the corresponding organs of a land. The judicial office shall be incompatible with any other professional occupation other than that of a professor of law at a German higher educational institution. The office of justice of the FCC shall take precedence over the service as a professor.[509]

The judiciary may be consistently behind the other branches in the hierarchy. This can also lead to the lack of complete separation of powers for the judiciary to participate in the selection of judges for the members of the FCC in most countries and in Germany. In conclusion, the federal state’s powers in Germany between the legislature, executive and judiciary have been deemed to

[509] Sec 3(1,2,3, and 4), the Act on the FCC, 1951.

lack sharing. Hence, legal and political scholars have criticised that Germany only accepts the cooperation of powers.

3.4 Analysis on the Theoretical Independence of the Judiciary in the Appointment Process

Judicial independence in Germany is guaranteed in the chapter on the judiciary, such as judges shall be independent and subject only to the law; judges shall not be dismissed, suspended or transferred involuntarily; they cannot be forced to retire before the expire of their official term of office, only by the cause of a judicial decision and by the laws. On the other hand, judges may be transferred from one court to another court and removed from the office with the full salary if the court structure is changed.[510] Consequently, the impeachment procedure is prescribed for federal judges.[511] The majority vote is called for the commitment of the impeachment procedure.

On the other hand, judicial independence can be understood as part of a separate power scheme that guarantees law.[512] Judicial independence can also result in the freedom of the individual judges from fear, coercion, reward or any other undue influence that might interfere with the judges' actions.[513] Many European countries have given judges a more significant role in administering the court system and its resources. Judicial independence and judicial self-government are often connected. The European Judges Charter provides that ‘’the administration of the judiciary must be carried out by the judges and independent of any other authority’.[514] The degree of judicial independence will be more significant if judges hold a majority of seats and are directly elected by the judiciary.

Similarly, the guarantee of judicial independence would be far reaching if the higher judicial councils were entrusted with enough authority.[515] The independence of the judiciary is one of the foundations of the rule of law.[516] The standard of judicial independence should be measured

[510] Art 97 (1) and (2), the BL, 1949.
[511] Art 98 (1 to 5), the BL, 1949.
[512] International IDEA. (2017). Judicial Appointments. 2nd edition, Stockholm, Sweden. (Accessed on 3 Nov 2020). Retrieved from http://www.idea.int
[513] International IDEA. (2017). Judicial Appointments.
[514] John Bell. (2006). Judiciaries within Europe: A Comparative Review, Cambridge University Press, Cambridge, UK, p-22.
[515] Ibid.
[516] Judges Charter in Europe (European Association of Judges), 1997. Retrieved from www.icj.org.

with the International Convention of the UDHR, which is the first and central convention to protect the fundamental freedoms of human beings in the age of civilization. In Europe, the ECHR is also based on the UDHR, and it is the most reliable law for the protection of citizens in Europe. One thing that distinguishes the UDHR regarding the independence of the judiciary is that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.[517] The independent and impartial tribunal can finally be defined as the supreme court or CC of a state. And that kind of court has jurisdiction to hear the cases of constitutional complaint that arise because of the violation of constitutional rights by a public authority or organisation, including the ordinary courts.

Conclusion

In summary, the appointment procedure in Germany is distinguished to show that there is no transparency, and it is expressly consistent with the international standard of judicial appointment recommended in the basic principles of the UN and the Universal Declaration on the Independence of Justice (Montreal Declaration). According to Ginsburg, 'Appointment mechanisms are designed to insulate judges from short-term political pressures yet ensure some accountability'.[518] In the study of the International IDEA, the appointment process should include (1) the independence of the judiciary from the legislature and executive, (2) securing the representativeness and inclusiveness of the judiciary, especially about gender, status, ethnicity, or origin and (3) judges should be qualified.[519] Regarding point (2), Justice Susanne Bear became a judge of the First Senate, which is also uniform with the UN basic principle on the independence of the judiciary.[520] She is the first lesbian to work at the FCC. Also, she is a Professor of Public

[517] Frans van Dijk and Geoffrey Vos. (2018). A Method for Assessment of the independence and Accountability of the Judiciary, *International Journal for Court Administration*, Vol 9(3), p-3 (pp 1-21). (Accessed on 26 Oct 2020) Retrieved from www.researchgate.net/publication/330224643/A-Met.
[518] Tom Ginsburg & Nuno Garoupa. (2011). Building reputation in Constitutional Courts: Political and Judicial Audiences, *Arizona Journal of International and Administrative Law*, Vol 28, No.3, p-541 (pp 539-568). (Accessed on 23 Jan 2021). Retrieved from http://chicagounbound.uchicago.edu/journal_article_
[519] Frans van Dijk and Geoffrey Vos. (2018). A Method for Assessment of the independence and Accountability of the Judiciary, p-3.
[520] Principle 10, Basic Principle of the Independence of Judiciary, 1985. (Accessed on 6 Nov 2020). Retrieved from https:// www.ohchr.org./EN.

Law and Gender Studies with the law faculty at Humboldt University of Berlin.[521] She is one of the judges who prohibited the wearing the headscarves in German classrooms. Her opinion on expressing religious belief by outer appearance is not consistent with freedom of faith and freedom to profess belief.

Furthermore, judicial independence requires that a legal system protect its judges from governmental, business, personal or social pressures that could force a judge to deviate from his or her interpretation and application of the law.[522] This is related to the competencies of the court and its independence in applying them to the appointment procedure. If the appointment is political, there is no campaigning process for a specific judge or judicial philosophy.[523] The BL itself places the FCC at the epicentre of the Federal Republic's political system.[524] A CC's composition is another relevant variable that affects the extent to which it cares about achieving supremacy. Career judges might be less inclined to sacrifice the dominance and power of the supreme court in favour of their own employment guarantee because they may return to the ordinary courts after their tenure is finished.[525] The stabilised political appointment has permitted the development of doctrines to emphasise the judicial role over short-term ideological gains. Stability has led to effective subordination of the ordinary courts.[526]

The funding of the FCC is significantly independent as the plenary of the court has the power to submit the budget annually, and the FCC has organisational autonomy. Furthermore, the term and tenure of the judges is twelve years, and it remains stable. There are no noted cases related to the violation of the norms of judicial independence at the international level and in the European context.

In my opinion, the FCC is well-known for the federal composition of the court with the absence of getting equal power in the process of appointment. Because the FCC has the main

[521] Michael Wrase (2019). Gender Equality in German Constitutional Law, Discussion paper, WZB Berlin Social Science Center, Berlin, Germany, p-9. (Accessed on 3 Nov 2020). Retrieved from www.bibliothek.wzb.eu/pdf/2019/p19-005.pdf.
[522] Michael Wrase (2019). p-6.
[523] Tom Ginsburg & Nuno Garoupa. (2011). p-541.
[524] Donald P. Kommers. (1994). The Federal Constitutional Court in the German Political System, *Comparative Political Studies*, p-471 (pp 470-491). (Accessed on 25 Jan 2021). Retrieved from https://scholarship.law.nd.edu/law_faculty_scholarship/1366.
[525] Tom Ginsburg and Nuno Garoupa. (2011). p-553.
[526] Tom Ginsburg and Nuno Garoupa. (2011). p-558.

competencies, the technical solutions to protect human dignity at its best are by lively interpretation of the BL.

The significant issues analysed by eminent scholars Vicki C. Jackson and Mark Tushnet which dealt with the jurisdiction and composition of several major CCs are:

(1) whether and how appointment mechanisms for judges and the composition of the CCs relate to the types of jurisdiction exercised by the court;
(2) The relative mix of 'careerist' and 'recognition' elements in the various selection mechanisms;
(3) The benefits and costs of life tenure for CC judges, and the relationship of life tenure to the independence of the judiciary;
(4) Whether there are different 'packages' of provisions concerning appointment, advancement, tenure, salary or retirement that will foster judicial independence;
(5) The role of other institutions outside the judiciary in affecting its independence; and
(6) Whether an independent judiciary is necessary for a constitutional system (and, if not, what role an institutionally subordinate judiciary might play).[527]

There are two constitutional laws in Germany. The first was the Weimar Constitution 1919, and the second and current is the basic law for the Federal Republic of Germany. Under the Weimar Constitution, constitutional adjudication in Germany was not as developed, and the constitutional concepts were different from the current ones. The FCC is famous for protecting its citizens' fundamental rights. The court can handle the political problems within the legal framework or change the political issues to constitutional solutions. These are the landmarks that make constitutional adjudication prominent. The important thing is that the FCC's discretionary power is mighty and independent to interpret the concept of human dignity and solve the violations of human rights claims when the constitution does not mention the exact definitions of some new rights and freedoms. The FCC is famous for its practical competencies for protecting human rights and constitutional interpretation of the current political affairs within the constitutional framework. Nevertheless, the formation of the court is not consistent with the international recommendation of judicial independence because the judiciary cannot participate in the appointment procedure of the FCC's judges even under the BL 1949. The legislature, Bundestag, and Bundesrat select the judges, and the federal president appoints them.

[527] Vicki C. Jackson and Mark Tushnet. (2006). Comparative Constitutional Law, 3rd Edition, Foundation Press, United States of America, p-537.

Germany is a democratic and federal state composed of the sixteen Länder. According to federalism, the Federation and Länder possess the state's sovereignty. The BL defines the appropriate division of powers between the Federation and Länder concerning exclusive and concurrent legislative powers. There are separate CCs in Länder and the FCC for the Federation. However, sovereignty does not make the judicial appointment equally distinct because of federalism and parliamentary democracy systems. According to federalism, the representatives from the Lander and Bundesrat can administer the selection of federal CC justices, while the Bundestag, a main constitutional organ, is able to select half of the sixteen judges in line with the essence of democracy. Thus, the BL prescribes the composition of the FCC in Art 94. In addition, the state structure is democratic and federal due to Art 20(1). These constitutional provisions seem reliable for the national reconciliation between the Federation and Länder to build political stability. On the other hand, the authorities ignore the sharing of power with the judges in selecting FCC justices. But they make the role of the FCC significant by recognising the court's innovative interpretation of the BL.

Chapter III
Part II
Competences of the German Federal Constitutional Court

3.5 Introduction: Jurisdiction of the Federal Constitutional Court

Germany has six federal supreme courts as mentioned in the previous chapter. Each court has its competencies, and the FCC's adjudication distinguishes is distinct among them. The other courts, however, can also review the constitutionality of statutes. The FCC's exclusive responsibility for overturning statutes only extends to federal laws, not decrees.[528] The BL, however, allows the FCC to have broader jurisdictions than the top courts under the Weimar Constitution.[529]

The German legal system is based on the civil law tradition instead of the common law system. Civil law systems are characterised by codifications and a deductive method of legal reasoning. Furthermore, constitutional interpretation and jurisprudence are strongly framed by German legal traditions.[530] The Federal Republic of Germany is based on the rule of law. The idea

[528] R. Jaeger and Dr. S. Brob. (2002). Report of the Constitutional Court of the Federal Republic of Germany, Conference of European Constitutional Courts XII Congress. (Accessed on 17 March 2021). Retrieved from https://www.confeuconstco.org/reports/rep-xii/Duitsland-EN.pdf.
[529] Gerhard Leibholz. (1952). The Federal Constitutional Court in Germany and the 'Southwest Case', The *American Political Science Review*, Vol-46(3), p-723 (pp 723-731). (Accessed on 22 December 2021). Retrieved from http://www.jstor.org/stable/1952280.
[530] Werner Heun. (2011). The Constitution of Germany: A Contextual Analysis, Hart Publishing, United Kingdom, p-3-4 (pp 1-241).

to establish a CC is an attempt to uphold the rule of law principles and provide maximum protection for democracy and the human rights of citizens.[531] An essential element of the rule of law principle under the constitution is the division of powers, and it implies a distinction between legislative, executive and judicial functions.[532] The political system that aspires to law considers judicial independence indispensable.[533] The FCC's jurisdiction is detailed in Art 93 of the BL and the FCC Act. The combination of the BL Law 1949 in 1990 led to the occasion of German reunification.[534] Concrete judicial review is explicitly mentioned in Art 100. The most crucial governmental and parliamentary control of jurisdiction is in the abstract and concrete judicial review and constitutional complaint.[535] Abstract judicial review has been increasingly criticised.[536] The FCC must precisely follow the jurisdictions and functions conferred by the BL.[537] The FCC has two senates that have been discussed in Chapter I. The first senate decides ordinary litigation, and the second senate resolves disputes among branches at the government level.[538]

The BL lists sixteen constitutional disputes over which the FCC has jurisdiction. The most critical functions are federal–state, separation of power conflicts, abstract and concrete judicial review proceedings and constitutional complaints based on democracy.[539]

Thus, the critical and brief functions of the FCC according to the BL are the following:

(1) Interpretation

(2) Abstract judicial review

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[531] I Dewa Gede Palguna. (2017) Constitutional Complaint and The Protection of Citizens Constitutional Rights, Constitutional Review, Vol-3, No-1, p-3 (pp 1-23). (Accessed on 2 April 2021). Retrieved from https://media.neliti.com/media/publications/226564-constitutional-complaint-and-the-protect-2ed11961.pdf.

[532] Dr. Gotthard Wohrmann. (N. D). The Federal Constitutional Court: An Introduction. (Accessed on 25 Feb 2021) Retrieved from https://germanlawarchive.iuscomp.org/?p=363.

[533] Federalist No.78, The Judiciary Department, Alexander Hamilton. See also Tomas Plank (1996). The Essential Element of Judicial Independence and the Experience of Pre-Soviet Russia, *William and Merry Will of Rights Journal*, Vol-5, Issue-1, p-2(pp 1-74). (Accessed on 1 March 2021). Retrieved from https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1465&context=wmborj.

[534] Venice Commission, CDL-JU (2003)18. (Accessed on 3 March 2021). Retrieved from https/www.venice.coe.int/

[535] Christine Landfried. (1985). The Impact of the German Federal Constitutional Court on Politics and Policy Output, Government and Opposition, Vol-20, No-4, p-523 (pp 522-541), Cambridge University Press. (Accessed on 22 January 2021). Retrieved from https://www.jstor.org/stable/44483259.

[536] Christine Landfried. (1985). p-541.

[537] Jutta Limbach. (2000). The Role of the Federal Constitutional Court, *SMU Law Review*, Vol 53(2), p-435(pp 429-442). (Accessed on 22 Jan 2021). Retrieved from https://scholar.smu.edu/smulr/vol53/iss2/3.

[538] Donald Kommers. (1994). The Federal Constitutional Court in the German Political System, *Comparative Political Studies*, p-471-2 (pp 470-491). (Accessed on 20 Feb 2021). Retrieved from https://scholarship.law.nd.edu/law_faculty_scholarship/1366.

[539] Donald P. Kommers. (2006). The Federal Constitutional Court: Guardian of German Democracy, The Annals of the American Academy, p-115 (pp 111-128). DOI: 10.1177/0002716205283080. (Accessed on 24 Jan 2021) Retrieved from https://core.ac.uk/download/pdf/268224374.pdf.

(3) Constitutional disputes between the governmental organs

(4) Constitutional complaints

(5) Concrete judicial review

(6) Other assignments by federal law[540]

The variety of the FCC's jurisdiction according to the literature reviews are:

(1) Forfeiture of basic rights

(2) Prohibition of a party

(3) Scrutiny of elections

(4) Impeachment of the federal president and judges

(5) Constitutional disputes between the governmental organs

(a) Disputes between organs

(b) Disputes between the Federation and the Länder

(c) Disputes within a land

(6) Review of law

(a) Review of law in general

(b) Review of specific rules

(7) Constitutional Complaints[541]

The major categories of the FCC as identified by Vicki C. Jackson and Mark Tushnet in comparative constitutional law are constitutional complaints, abstract reviews of the law, concrete judicial review, separation of powers disputes, federalism conflicts and prohibitions on political parties.[542]

In my opinion, and in line with the provisions mentioned above, the FCC has two main functions in legal and political matters. CC are not political organs, but they must be involved in the political issues according to their competencies.[543] Interpretation of the FL is related to abstract judicial review, concrete judicial review and constitutional complaint. All of these are legal competencies. Furthermore, the FCC's workload related to forfeiture of human rights is unique from the other CC abilities.

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[540] Art 93, the BL, 1949.

[541] Art 13, Act on the FCC, 1950, see also; Dr. Gotthard Wohrmann. (2013). The Federal Constitutional Court: An Introduction, German Law Archive. (Accessed on 29 Jan 2021). Retrieved from www.iuscomp.org.

[542] Vicki C. Jackson and Mark Tushnet. (2006). Comparative Constitutional Law, 3rd Edition, Foundation Press, United States of America, p-569-572.

[543] Retrieved from https//www.venice.coe.int/WCCJ/Rio/Papers/GEO_Constitutional_Court_E.pdf.

According to the International Institute for Democracy and Electoral Assistance (IDEA), contemporary CCs possess the four main types of power:

(1) constitution drafting jurisdiction (controlling the constitution itself);

(2) judicial review of legislative acts (controlling the legislature);

(3) jurisdiction over officials and agencies (controlling the executive); and

(4) jurisdiction over political parties and elections (controlling elections).[544]

The FCC is established with the extraordinary power of judicial review. In Germany, all constitutional organisations must respect and enforce human rights. Only the FCC can interpret the federal constitution (the BL) with final, binding force. If another court finds a law unconstitutional, it must first submit it to the FCC. The FCC has the last word on the meaning of the BL, and its word is the law.[545] Furthermore, the FCC can declare a political party unconstitutional and dissolve it, impeach the federal president and dismiss judges if they intentionally violate the BL. The FCC announced as unconstitutional the Socialist Reich Party in 1952 and the Communist Party of Germany in 1956.[546]

The first case of the FCC was the Southwest case. The FCC (a) examined that a law enacted by the federal legislature infringed the BL, (b) asserted that its legal reasoning for invalidating the law was enforcing the law on all other governmental institutions and (c) raised the possibility that an amendment to the BL would itself be unconstitutional.[547] In the opinion of the court, the federal state may not interfere with the affairs of member states so long as the constitutional order of the latter conforms to the constitutional mandates of the federal constitution. Further, the FCC established that under the Bonn Basic Law, the German Federal Republic is a true federal republic. Therefore, the federal states are endowed with sovereign

[544] International IDEA Constitution Brief. (2017). The Fundamentals of Constitutional Courts, p-3(pp 1-8). Available at www.idea.int
[545] Pro. Dr. Jutta Limbach. (N.D). How a Constitution can Safeguard Democracy: The German Experience. (Accessed on 7 December 2021). Retrieved from https://ccpl.law.hku.hk/content/uploads/2018/03/Pub/Conf%20&%20Seminar/JuttaLimbach.pdf
[546] Pro. Dr. Jutta Limbach. (N.D). How a Constitution can Safeguard Democracy: The German Experience.
[547] Vicki C. Jackson and Mark Tushnet. (2006). Comparative Constitutional Law, p-628.

power. This means that a power of their own is not derived from the Federation but acknowledged by the Federal Republic.[548]

3.6 Constitutional Courts in Länder

The jurisdiction of German state CC includes between six (CC of Schleswig–Holstein) and eleven (Bavaria and Saarland) proceedings. Five jurisdictional categories exist in all sixteen German state CCs: abstract and concrete judicial review, disputes between state organs, checks on parliamentary elections and popular initiatives and referenda. Furthermore, except for the city-states of Hamburg and Berlin, in all other German states, local constitutional complaints can be brought to the courts. Individual constitutional complaints can be raised in twelve states. The additional ten proceedings in at least one of the states are rarely called upon and play hardly any role in the daily routine of the courts. However, there are no identifiable patterns concerning the types of proceedings. This overview shows that subnational CCs are pivotal institutions for German federalism, German democracy and the rule of law. [549]

All sixteenth states have established their state CC, the last being Schleswig-Holstein in 2008. State CC have jurisdiction to determine disputes which arise under their respective state constitutions. The procedures in which they exercise their constitutional jurisdiction are often modelled on the complementary competencies of the FCC at the federal level apart from those competencies which relate to federative disputes and the verification and the status of international law in the domestic legal system. [550]

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[548] Gerhard Leighonz. (1952). The Federal Constitutional Court in Germany and the 'Southwest Case', *American Political Science Review*, Vol 46(3), p-726 (pp 723-731). (Accessed on 22 Dec 2021).
[549] Werner Reutter. (2020). Subnational Constitutional Court and Judicialization in Germany, *European Political Science*. DOI https://doi.org/10.1057/41304-020-00293-8. (Accessed on 25 April 2021). Retrieved from https://link.springer.com/content/pdf/10.1057/s41304-020-00293-8.pdf.
[550] Rainer Grote. (2017). Constitutional Courts in Federal States: The case of Germany, Fédéralisme Regionalism, V-17, p-11(1-14). DOI: 10.25518/1374-3864.1691. (Accessed on 7 May 2021). Retrieved from https://popups.uliege.be/1374-3864/index.php?id=1691.

3.7 Interpretation of the Basic Law

German interpretation is doctrinal; the judges first interpret the literal meaning, and later they favour the systematic elucidation, the objective reasoning and the history of the rule.[551] According to the FCC's decisions, 'No single constitutional provisions should be taken out of its context and interpreted by itself, and it should be in such a way as to render it consistent with the fundamental principles of the BL and the intentions of its framers'.[552] The FCC has suggested the unity of the constitution as a logical-teleological entity.[553]

Interpretation is part of the FCC's jurisdiction, and it is the first and foremost task of the court. The extensions of the rights and duties of a supreme federal body or other parties vested by the BL or by the rule of procedure of the highest federated body are dependent on the analysis of the provisions of the BL by the FCC. The other competencies are abstract review, constitutional complaint and concrete judicial review.[554] Nonetheless, they are also the FCC's unique functions based on the interpretation of the BL. This is also significant because of the FCC's pivotal role in Germany's performance, as the EU nations practice civil law. Generally, civil law countries prefer the application of codified rules to discretionary power. The FCC stated from the beginning that no provision could be construed in isolation. Each requirement must be understandable in the light of the whole constitution. Constitutional interpretation aims to give the best possible effect to the concept of constitutional values and the function constitutional norms are supposed to play in society according to the changing situations.[555] The FCC interprets primary rights as part of a system of values laid down in the BL. The forfeiture of misused fundamental rights[556] and the declaration of unconstitutionality of political parties also fit into this pattern.[557]

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[551] Geraldina Gonzalez de la Vega. (2007). Two Different Approaches in Constitutional Interpretation with Special Focus in Religious Freedom: A Comparative Study between Germany and the United States. (Accessed on 20 Oct 2020). Retrieved from www.scielo.org.
[552] Geraldina Gonzalez de la Vega. (2007). Two Different Approaches in Constitutional Interpretation with Special Focus in Religious Freedom: A Comparative Study between Germany and the United States.
[553] Donald P. Kommers. (1991). German Constitutionalism: A Prolegomenon, *Emory Law Journal*, p-851 (pp 837-873). (Accessed on 4 Dec 2020) Retrieved from www.scholarship.law.nd.edu/cgi/viewcontent .cgi.
[554] Art 93 and 100, the BL, 1949.
[555] Dieter Grimm. (2006). Constitutionalism Past, Present and Future, Oxford University Press, p-180.
[556] Art 18, the BL, 1949.
[557] Constitutional Law of 15 EU Member States. (2004). Lucas Prakke and Constantijn Kortmann (Eds.), Kluwer Legal Publishers, p-359.

Regarding the ECtHR concept, the living instrument requires the minimum standard of seriousness to be in harmony with societal progress.[558] According to Professor Kommers, from a comparative point of view, the FCC generally draws on the priority of sources, including unwritten principles, the written constitutional text, the practice of German constitutionalism, the history of the constitution, judicial precedents, academic writings and comparative and international material other than the intentions of the original framers.[559] Professor Goldsworthy commented that the 'constitutional interpretation process is guided everywhere by similar considerations. They include the originalism or technical-legal meaning of words, evidence of their original intentions or purpose, underlying principles, judicial precedents, scholarly writings, comparative international law, contemporary understandings of justice, and social needs'.[560] The significant role of primary rights would be unthinkable without the FCC's jurisprudence. Nevertheless, the existence of a CC alone cannot be a sufficient illustration of the developed role of fundamental rights. A good understanding of the meaning and function of fundamental rights and the opportunity to improve the understanding of the decisions of the cases and judgements is required.[561]

Nonetheless, the first case regarding the concept of human dignity before the ECtHR was *Tyrer v United Kingdom* (25 April 1978) in which the judges recalled the Convention as a living instrument that was interpreted inconsistently with present day situations and the requirements of the society.[562] In this case, the applicants claimed the violation of inhuman or degrading treatment or punishment before the Commission.[563]

3.7.1 Principle of Proportionality

The principle of proportionality is used to measure the legitimacy of all the state organs. It became a constitutional principle of general importance because of the FCC.[564] Proportionality

[558] Yutaka Arai-Yokoi. (2003). Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR, Netherlands Quarterly of Human Rights, Vol.21(3), p-387 (pp 385-421). (Accessed on 2 Jan 2021). Retrieved from http://www.corteidh.or.cr/tablas/r30903.pdf.
[559] Vicki C. Jackson. (2006). Constitution as 'Living Trees'? Comparative Constitutional Law and Interpretative Metaphors, Vol 75(2), *Fordham Law Review*, p-932, (pp 921-960). (Accessed on 3 Jan 2021) Retrieved from https://dash.harvard.edu/bitstream/handle/1/12942290/Constitutions%20as%20Living%20Trees_.pdf;sequence=1.
[560] Vicki C. Jackson. (2006). p-938.
[561] Dieter Grimm. (2006). Constitutionalism Past, Present and Future, Oxford University Press, p-180.
[562] Para 31, Application No. 5856/72. Retrieved from http://hudoc.echr.coe.int/eng?i=001-57587.
[563] Art 3, the ECHR, 1950.
[564] Yutaka Arai-Takahashi. (1999). Proportionality – A German Approach, Amicus Curiae, Issue-19, p-11. (pp11-13). (Accessed on 27 Dec 2020) Retrieved from www.sas.space.sas.ac.uk/3907/1/1458-1702-1-SM.pdf.

indicates a requirement of constitutional law that appeared in 1954 with respect to the constitutionality of a state election law.[565] According to Dieter Grimm, a former justice of the FCC, 'the proportionality principle was first mentioned by the FCC in BVerfGE 3, 383(1954), and it was consolidated in some cases. Since then, it has been used constantly by the court'.[566]

Concerning the measurement of proportionality, the FCC developed a four-step assessment. First, the statute of limitation's purpose with respect to fundamental rights must be ascertainable. A constitutionally barred goal cannot justify a violation of a fundamental right. The second and third tests deal with the relation between means and ends. The final evaluation is detached from the means-end connection.[567]

Proportionality has two stages. The first is to establish that the governmental action has violated a right. Second, the government needs to show that it pursued a legitimate end, and that the infringement was proportional. Proportionality requires (1) suitability, (2) necessity and (3) proportionality in the strict sense.[568] Even a complainant can lodge a constitutional complaint with the FCC, and it is sometimes admissible and other times not. This is because of the proportionality based on the facts of the cases. In this case, human dignity shall be protected and respected, but it does not include priority over others. 'Human dignity is inviolable and thus not subject to proportionality'.[569] The invocation of human dignity has two interconnected ideas: (1) an ontological claim that all human beings have an equal and intrinsic moral worth and (2) a normative principle that all human beings are entitled to have this status of equal worth respected by others and also have a duty to respect it in all others.[570] Nobody should be discriminated against in their human dignity based on sex, race, colour, and religion and even whether poor or rich.

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[565] Gertrude Lubbe-Wolff. (2014). The Principle of Proportionality in the Case lLw of the German Federal Constitutional Court, *Human Rights Law Journal*, Vol- 34(6), p-12(pp12-17). (Accessed on 28 Dec 2020) Retrieved from https://www.researchgate.net/publication/326782433.

[566] Note 15, Dieter Grimm. (2006). Constitutionalism Past, Present and Future, Oxford University Press, p-172.

[567] Dieter Grimm. (2016). Constitutionalism Past, Present and Future, Oxford University Press, p-171.

[568] Moshe Cohen-Eliya and Iddo Porat. (2010). American Balancing and German Proportionality: A Historical Origins, International Journal of Constitutional Law, Vol.8(2), p-267(pp 263-286). (Accessed on 27 Dec 2020). Retrieved from www.academia.oup.com/icon/article/8/2/263/699991.

[569] AC Steinmann. (2016). The Core Meaning of Human Dignity, Potchefstroom Electronic Law Journal, Vol-19(1), p-20 (pp 1-32). Doi https://doi.org/10.17159/1727- 3781/2016/v19i0a1244 (Accessed on 10 Jan 2021) Retrieved from http://www.scielo.org.za/pdf/pelj/v19n1/23.pdf.

[570] Paolo G. Carozza. (2011). Human Dignity in Constitutional Adjudication, in Tom Ginsburg and Rosalind Dixon (Eds.), Comparative Constitutional Law, Edward Elgar, Cheltenham, United Kingdom, p-460 (pp 459-472).

Human beings have equality before the law[571] and the right to a hearing before an independent and impartial tribunal.[572]

The second sentence of the FCC ruling stated that the judgement of the federal administrative court of 4 July 2002, the judgement of Baden Wurttemberg Higher Administrative Court of 26 June 2001, the determination of the Stuttgard Administrative Court of 24 March 2000 and the ruling of the Stuttgard High School Authority of 10 July 1998 in the form of the decision on an objection of 3 February 1999 infringed the complainant's rights of equal citizenship in conjunction with the freedom of faith and conscience.[573] The complainant's articles relied on that every German shall be equally eligible for any public office according to his or her aptitude, qualifications and professional achievements. Neither the enjoyment of civil and political rights nor eligibility for public office nor rights acquired in the public service shall depend on religious affiliation. No one may be disadvantaged because of adherence or non-adherence to a particular religious denomination or philosophical creed.[574] Freedom of faith and conscience and freedom to profess a religious or philosophical dogma shall be inviolable. The practice of religion shall be guaranteed.[575]

In the *Omega* case, a case referred to the Court of Justice by the Federal Administrative Court of Germany, Omega was a German company established in 1994 that installed laser sports in Bonn by means of the British company's technology and equipment supplies known as 'Pulsar'. Bonn's police authority ordered Omega to supply an exact illustration of how the game was intended to work in the laser drone. Its intention was possibly to play at killing people in Omega. The police authority issued an order against Omega to pay a fine for each game played in breach of the order.[576] The Federal Administrative Court decided that banning the game was compatible with the BL because human dignity would be respected according to Article 1(1).[577]

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[571] Art 20, EU Charter of Fundamental Rights, 2000.
[572] Arts 7 and 10, UDHR, 1948.
[573] Para-1, BVerfG, Judgment of the Second Senate of 24 September 2003- 2 BvR 1436/02.
[574] Art 33 (2/3), the BL, 1949.
[575] Arti 4 (1/2), ibid.
[576] Paras 3/4/5, Case C 36/02. (Accessed on 2 Dec 2020) Retrieved from www.eur-lex-europa.eu/legal-content/en/TXT/
[577]Omega Spielhallen and Automatenaufstellungs – *GmbH v. Oberburgermeisterin der Bundesstadt Bonn* (2004), C-36/02, European Court Reports 2004 1-09609.

Omega claimed that a prohibition on setting up a ‘laser drone' in which people fire at each other with fake laser guns was an unlawful restriction on the free movement of services.[578] Nevertheless, the ECJ declared that ‘Community law does not preclude economic activities consisting of the commercial exploitation of games if it can affront human dignity’.[579]

The BL is prominent because of the critical explanation of the FCC to protect human rights. Its significant function is interpreting the political issues within the legal framework.[580] In this way, the concept of human dignity became crucial as a constitutional principle, a human right itself and, finally, human dignity as the right to have rights.[581] There is a ground that the FCC explores for new human rights to meet modern society's requirements. Therefore, it is not necessary to repeatedly amend the BL. The case study approach is essential to research the clarification of the BL by the technical interpretation of the FCC.

There was a case against the state related to respecting citizens' right to life. It was an aircraft shooting case and there was a conflict between the right to life and protecting community peace. The FCC focused on the second paragraph of personal freedom which described the right to life in conjunction with human dignity. The FCC then decided that Section 14(3) of the Air Safety Act was incompatible with Arts 1(1) and 2(2) of the BL insofar as it affected the innocent passengers and crew of an aircraft.[582] The Act was intended to protect similar terrorists in response to the 9/11 attacks in New York City. In Germany, the minister of defence is the commander in chief of the armed forces due to the Act and can order a hijacked aircraft to be shot down.

The principle of proportionality has extremely high prominence to protect the breach of fundamental rights in Germany. Therefore, when the FCC strikes down a statute, the reason will be an infringement of the principle of proportionality. Thus, the discretion of the legislature has been lessened.[583]

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[578] Freedom to Provide Services, Arts 46 EC and 49 EC.
[579] Para 42, C-36/02.
[580] Prof.Dr. Jur. Thomas Henne. (2019). The History and Structure of German Basic Law- The Fundamental Structural Principles of the Federal Republic of German. Introduction to German Basic Law Lectures (6-10/5/2019), University of Debrecen, Faculty of Law.
[581] Christoph Enders. (2010). The Right to have Rights: The Concept of Human Dignity in German Basic Law, *Revista de Estudos Constitucionais,Hermenêutica e Teoria do Direito* (RECHTD), 2(1),p-3, (pp 1-8). (Accessed on 5 Jan 2021). Retrieved from http://revistas.unisinos.br/RECHTD/article/view.
[582] Bverfg. (2006). 1 BvR 357/05.
[583] Dieter Grimm. (2006). Constitutionalism Present, Past, Future, Oxford University Press, p-172.

3.7.2 A New Human Right within the Constitutional Interpretation of the FCC

The right to life is a universal and absolute right within the domestic and international legal framework. Therefore, some developed countries have abolished the death penalty and others have not. Nonetheless, sentences of the death penalty are rarely given even when they are legally allowed. It is the criminal law point of view regarding the right to life implementation. There is also a conflict between the right to life and pregnancy relating to abortion. Thus, abortion is not permitted; criminal laws prohibit it worldwide. Nevertheless, it is sometimes an unavoidable situation for some women. Like an unwanted pregnancy because of a rape case, sexual assault or child abuse.[584]

In the latest case, the FCC allowed the self-determined death in February 2020. This was a judgement interpreting the term 'personal freedoms' in conjunction with human dignity.[585] From a critical point of view, personal freedom is also significant because self-determined death is the opposite of the right to life. The case mentions in the first paragraph that the right to life is in the second hierarchy.[586] The FCC declared that the assisted suicide service's criminalisation was inconsistent with constitutional law. This can be an exception to the right to life contrary to the international and European protection of human rights. The Criminal code banned helping another person to commit suicide or to provide, procure or arrange a chance for that person to do so. They shall incur a penalty of imprisonment for a term not exceeding three years or a fine.[587]

The Bundestag prescribed the law in 2015 to prohibit the purchase of deadly drugs.[588] The court construed that the first paragraph of personal freedom is in line with human dignity and allowed assisted suicide services at the beginning of 2020.[589] As several Germans wanted to stop their lives, they went abroad to countries like the Netherlands and Switzerland.[590] The FCC's

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[584] Termination of Pregnancy. AOK. (Accessed on 6 Dec 2020) Retrieved from www.aok.de/pk/uni/inhalt/schwangerschaftsabbruch/.
[585] Bverfg. (2020). BvR 2347/15, 651/16, 1261/16, 1593/16, 2354/16, 2527/16.
[586] Art 2(1), the BL, 1949.
[587] Sec 217, Criminal Code, 1971.
[588] DW. (2015). Bundestag Votes Against 'Commercial' Assisted Suicide. (Accessed on 1 Dec 2020) Retrieved from www.dw.com/en/Bundestag-votes-against-commercial-assisted-suicide/a-18831510.
[589] Press Release No.12/2020 of 26 February 2020. (Accessed on 25 Jul 2020) Retrieved from www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg.20-012.html.
[590] BBC News. (2020). Germany Overturns Ban on Professionally Assisted Suicide. (Accessed on 30 Nov 2020) Retrieved from www.bbc.com/news/world-europe-51643306.

permission for assisted suicide of a third party and services can remind people of the holocaust. Germany became one of the few European countries that allowed a right to die according to the principle of self-determination. In Europe, a few states like Belgium, the Netherlands, Switzerland and Luxembourg accepted a request to stop human life in two ways: euthanasia and assisted suicide. The Netherlands legally recognised both.

However, there are controversies with the religious, cultural, social and public health sectors. Universalism protects the right to life as a fundamental right that is unique to human being.[591] Euthanasia and assisted suicide services are allowable for patients who may have no hope to live with dignity in the future. Germany also recognised assisted suicide for German citizens who suffered from cancer, coma, disability and severe pain[592] within the legal framework of self-determination of personal freedom. Self-determination is a human right in line with the International Covenants,[593] and it is a principle in the UN Charter.[594] According to the covenant, 'All people have the right of self-determination'.

Consequently, they freely determine their political status and freely pursue their economic, social, and cultural development.[595] It is concerned with a state's self-determination to independently choose its political, economic, social and cultural systems.[596] Thus, self-determination is a right that belongs to people but not to minorities.[597] It became a guiding principle for the reestablishment of Europe after World War I. The Atlantic Charter and Dumbarton Oaks proposal inserted it. They also developed the UN Charter. This has two points of view; one is the political principle, and the other is a human right. In the opinion of Wolfgang Danspeckgruber, 'No other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and

[591] Art 3, UDHR, 1948.
[592] Kalaivani Annadurai, Raja Danasekaran and Geetha Mani. (2014). Euthanasia: Right to Die with Dignity, *Journal of Family Medicine and Primary Care*, Vol:3(4), p-477, (pp 477-478). (Accessed on 2 Dec 2020). Retrieved from www.ncbi.nlm.nih.gov/pmc/articles/PMC4311376.
[593] Hurst Hannum. (1998). The Right of Self-Determination in the Twenty-First century, *Washington and Lee Law Review*, Vol-55(3), p-773 (pp 773-780). (Accessed on 30 Dec 2020). Retrieved from https://scholarlycommons.law.wlu.edu/wlulr.
[594] Art 1, UN Charter, 1945.
[595] Art 1(1), International Covenant on the Civil and Political Rights 1966 and International Covenant on the Economic, Social and Cultural Rights, 1966.
[596] Art 55, UN Charter, 1945.
[597] *See supra note* 42, p-774.

hopes as self-determination'. However, it depends on the situations, needs, interests and conditions of concerned persons.[598]

The plaintiffs submitted constitutional complaints to the FCC to implement their self-determined death.[599] The right to a self-determined end of life involves the freedom to take one's own life. The FCC concluded that the state and society must respect individual points on the quality of life and meaningful existence when someone decides to end their life. The freedom of one's life includes seeking and getting assistance provided by third parties for this purpose. Accordingly, some medical practitioners are also related to the right to self-determined death.

According to para (4) of Art 20 or under Arts 33, 38, 101, 103, or 104, constitutional complaints are a constitutional remedy for German citizens when public authority violates their fundamental rights.[600] Therefore, the complaints can be directly submitted by the damaged persons before the FCC.[601]

The right to stop someone's life within the legal framework of self-determination and personal freedom at the domestic levels in Europe could not be successful, and the applicants brought their cases before the ECtHR. They proposed their right to respect private and family life under Arts 2 and 8 of the ECHR.[602] The first case of the ECtHR regarding human dignity was *Pretty v. United Kingdom* (2002).[603]

3.7.3 Protection of Asylum Seekers' Rights

The court protected asylum seekers' benefits by interpreting Art 20 of the BL in conjunction with the first paragraph of Art 1.[604] The first paragraph mentions that Germany is a democratic and

[598] Unrepresented Nations & Peoples Organization. (2017). Self-Determination (Accessed on 31 Jan 2020) Retrieved from www.unpo.org/article/4957#:~:text=Essentially%2C%20the%20right%20to%20self,economic%2C%20cultural%20and%20social%20development.
[599] Art 93 (1/4a), the BL, 1949.
[600] Art 93 (1/4a), the BL, 1949.
[601] Sec 90(1), Act on the FCC, 1951.
[602] Daria Sartori. (2018). End-of-life Issues and the European Court of Human Rights. *Question of International Law Journal,* Zoom In, p-25 (pp 23-43). (Accessed on 6 Jan 2021) Retrieved from www. http://www.qil-qdi.org/wp-content/uploads/2018/06/03_End-Life_SARTORI_FIN.pdf
[603] Chamber Judgement in the case of *Pretty v. The United Kingdom* (2346/02)
[604] 1 BvL 10/10 and 1 BvL 2/11.

social federal state. The FCC focused on the word 'social' to protect the social benefits of asylum seekers. Then the FCC declared that Article 3 of the Asylum Seekers' Benefits Act was incompatible with the BL because it was too long and thus not amendable since 1993 it is in line with the current cost of living. Art 1 (1) of the BL defines human dignity as human rights, including a human being's physical existence and a minimal degree of participation in social, cultural and political life. German and foreign nationals who reside in the Federal Republic of Germany are entitled to the first to twenty fundamental rights[605] and similar rights in line with the BL 1949 by submitting constitutional complaints. A minimum dignified existence emerges as a fundamental right in the combined understanding of human dignity and the social welfare state's principles.[606] The FCC determined that 'the Basic Law does not oblige the legislature to reset benefits retroactively. Still, it is appropriate to retroactively apply the transitional rule by the first of January 2011 concerning the Asylum Seekers Benefits Act at the latest with the FCC's decision of the ninth of February 2010'.[607]

The BL does not contain any fundamental social rights contrary to the constitutions of most other countries. Nonetheless, the principle of democratic and federal social states guarantees social rights.[608] It cannot be amendable according to Art 79(3). The social norm plays a part in the case law of the FCC in its interpretation of the constitution and statutory regulations favouring the public interests. [609] The German constitutional law protects the rights of German citizens and asylum seekers. The EU provides a Common European Asylum System to amalgamate minimum standards related to asylum, leaving discretion to EU Member/s to establish and withdraw international protection.[610]

The self-imposed duty to do so interprets the BL's help to minimize the conflicts between the legislature and judiciary.[611]

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[605] Para 2, 1 BvL 10/10 and 1 BvL 2/11.
[606] Para 62, 1 BvL 10/10 and 1 BvL 2/11.
[607] Paras 111 and 112. 1 BvL 10/10 and 1 BvL 2/11.
[608] Art 20(1), the BL, 1949.
[609] Constitutional Law of the 15 EU Member States. (2004).
[610] European Commission. (2006). Reforming the Common European Asylum System: Frequently Asked Questions. (Accessed on 6 Dec 2020) Retrieved from www.ec.europa.eu/commission/presscorner/detail/en/MEMO_16_2436.
[611] Donald P. Kommers. (1994). The Federal Constitutional Court in the German Political System, *Comparative Political Studies*, p-477 (pp 470-491). (Accessed on 22 Jan 2021). Retrieved from https://scholarship.law.nd.edu/law_faculty_scholarship/1366.

3.8 Judicial Review

Many European countries exercise a centralised judicial review system by establishing separate CCs. The system is characterised by having only a single state organ acting as a constitutional tribunal. The FCC and the youthful Hungarian CC are the most frequently mentioned examples of centralised judicial bodies. In a decentralised system like that of the U.S., judicial review is an inherent competence of almost all courts. In short, the judicialisation of politics is derivative first and foremost of political, not judicial, factors. [612]

The central CCs function is constitutional review to maintain the proper democratic process to protect constitutional rights by checking the constitutionality of the three branches[613] In Germany, elected officials may challenge proposed legislation through the abstract a priori review.

The FCC is a unique CC for reviewing judicial and administrative decisions and legislation to determine whether they accord with the BL. The Länder has their respective CCs, and it will be established if there is a new land in Germany.[614] As a specialised court of constitutional review, the FCC is the only tribunal in Germany empowered to declare statutes and other governmental actions unconstitutional.[615]

The FCC not only influences the political process by invalidating laws. For example, during the legislative decision-making process, members of parliament adjust their bills according to former decisions of the court and anticipate possible future judicial review.[616]

Historically, the courts under the constitution of the German Empire (1871) had a limited power of judicial review. However, all courts were responsible for reviewing land legislation with

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[612] Ran Hirschl. (2013). The Judicialization of Politics, in Robert E. Goodin (Ed.), Oxford Handbook of Political Science, (Accessed on 12 Feb 2021). Retrieved from https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013?print=pdf.

[613] I Dewa Gede Palguna. (2007). Constitutional Complaints and Protection of Citizens Constitutional Rights, Constitutional Review, Vol-3, N0-1, p-3 (pp 1-23). (Accessed on 28 February 2021). Retrieved fromhttps://media.neliti.com/media/publications/226564-constitutional-complaint-and-the-protect-2ed11961.pdf.

[614] The Editors of Encyclopedia Britannica, Federal Constitutional Court. (Accessed on 19 Feb 2021). Retrieved from https://www.britannica.com/topic/Federal-Constitutional-Court.

[615] Donald P. Kommers. (2006). The Federal Constitutional Court: Guardian of German Democracy, p-115(pp 111-128). Retrieved from https://core.ac.uk/download/pdf/268224374.pdf.

[616] Christine Landfried. (1985). The Impact of the German Federal Constitutional Court on Politics and Policy Output, Government and Opposition, Vol-20, No-4, p-528 (pp 522-541). (Accessed on 18 Feb 2021) Retrieved from https://www.jstor.org/stable/44483259.

the land constitutions and Reich legislation with the Reich constitution.[617] So it was until the Weimar Republic.[618]

3.8.1 Abstract Judicial Review

The FCC has the authority (1) in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or land law with this BL or the compatibility of land law with other federal law, on the application of the Federal Government, of a land government, or one-third of the members of the Bundestag and (2) in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72, on the application of the Bundesrat or of the government or legislature of a land.[619] Abstract judicial review is the formal or substantive compatibility of federal or land laws with other federal laws. It is different from a concrete judicial dispute. There are some contraries to that as a whole series of other procedures can also lead to judicial review of legislation. For example, the differences between organs and between federations and individual states may lead to judicial review of legislation.[620] Constitutional complaints can also lead to judicial review of legislation. The direct constitutional complaint is directly or indirectly against a legislative action by an incidental review.[621]

Abstract means that the submission does not require a 'concrete' case at point. Later, a quarter of the Bundestag could submit a claim for abstract review.

According to abstract review, the court may examine a statute or a piece of ordinary legislation in the abstract and invalidate them with general effects if they contradict the constitution.[622] The abstract review of the legislation refers to reviewing a statute's constitutionality before its application or enforcement.[623] The FCC is asked to decide different opinions about the compatibility of federal or land law with the BL. The requesting party must submit written briefs, and the relevant national bodies or land governments are asked to participate.[624]

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[617] Paul Bovend' Eert and Marten Burkens. (2014). The Federal Republic of Germany, P-691.
[618] Paul Bovend' Eert and Marten Burkens. (2014). The Federal Republic of Germany, P-692.
[619] Art 93 (1) (2), the BL, 1949.
[620] Werner Heun. (2011). The Constitution of Germany: The Contextual Analysis, Hart Publishing, p-171.
[621] Werner Heun. (2011). The Constitution of Germany: The Contextual Analysis, Hart Publishing, p-171.
[622] Ján Mazák. The European Model of Constitutional Review of Legislation (I). (Accessed on 29 Jan 2021). Retrieved from www.venice.coe.int/SACJF/report_mazak.
[623] Alec Stone Sweet. (2003). Why Europe Rejected American Judicial Review – And Why It May Not Matter, Michigan Law Review, Vol-101, Issue 8, p-2772 (pp 2744-2780). (Accessed on 31 Jan 2021). Retrieved from https://repository.law.umich.edu/mlr/vol101/iss8/8.
[624] Venice Commission, CDL-JU (2003) 18.

Several leading democracies feature a combined a priori, abstract and concrete review system. Most countries that practice abstract judicial review systems grant the right to public officials, legislators, cabinet members and states to initiate judicial scrutiny of proposed laws and hypothetical constitutional scenarios. Abstract judicial review is recognised as a means of eliminating unconstitutional legislation and practices before they can cause harm. The most important role of the modern CC is the protection of rights by constitutional review. According to Sadurski, abstract judicial review is 'the textual dimension of the rule'. It is also called preventive review since it aims to filter out unconstitutional laws before they can harm anyone.[625] It is mainly a political weapon of the minor parties and opposing Länder, which have lost their case in the legislative process.[626] Only federal laws enacted by Parliament may be subjected to such a review. There is no time limitation for this proceeding.[627] Abstract judicial review is also an extraordinary function of the FCC comparable to the abilities of the Supreme Court of the US.[628]

The essential competencies concerning the control of government and parliament are abstract and concrete judicial review and the constitutional complaint.[629] The most crucial functions of the FCC's policymaking are the abstract judicial review, concrete judicial review and constitutional complaints. The abstract judicial review procedure is linked to the disputes between the federal and state governments.[630] Although the FCC is included in the judiciary sector, it has been vested with legal functions and political adjudications. The significant overall competence is that the FCC handles the political issues within the legal framework. But the court could not do so if the other branches did not recognise the binding effect on them.

The constitutions of many parliamentary democracies provide for abstract judicial review, which allows a specific parliamentary minority to initiate judicial review against legislation in the

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[625] Michel Rosenfeld and Andras Sajo (Eds.). (2012). Comparative Constitutional Law, Oxford University Press. (Accessed on 15 Feb 2021). Retrieved from https://core.ac.uk/download/pdf/72834934.pdf.
[626] Werner Heun. (2011). The Constitution of Germany: The Contextual Analysis, p-172.
[627] Bundesverfassungsgericht. (2021). Abstract Judicial Review of Statutes. (Accessed on 18 Feb 2021). Retrieved from https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Abstrakte-Normenkontrolle/abstrakte-normenkontrolle_node.html;jsessionid=AF1D6D292ACB2E6AF8BC357ED893410C.2_cid386.
[628] Martin Borokswi. (2003). The Beginnings of the Germany's Federal Constitutional Court, Ratio Juris, Vol-12, No-2, p-180, (pp 15-186). (Accessed on 16 May 2021).
[629] Christine Landfried. (1985). The Impact of German Federal Constitutional Court on Politics and Policy Output, Government and Opposition, Vol 20(4), Cambridge University Press, p-522, (pp 521-541). (Accessed on 14 Feb 2021). Retrieved from https://www.jstor.org/44483259.
[630] Christine Landfried. (1994). Judicialization of Politics in Germany, *International Political Science Review*, Vol-15, No-2, p-113, (pp 113-124). (Accessed on 9 Feb 2021). Retrieved from https//www.jstor.org/stable/1601559.

absence of a concrete case.[631] The CC cannot refuse to hear a case brought under abstract review. Significantly, it is a weapon for the minority opposition parties to check the majority actions in making laws.[632] The federal government, state governments and one-quarter of parliament can initiate the FCC's abstract judicial review. An excellent example of proceedings is abortion cases. In 1974 and again in 1992, the Bundestag passed abortion reform statutes. Both times, several members of the Bundestag and the land government of Bavaria petitioned the FCC to review Section 218a of the Abortion Reform Act because it violated several provisions of the BL, including its clauses on human dignity and the right to life.[633]

The Act on the FCC expressly regulates the declaration of nullity in proceedings that involve the abstract review of statutes: 'If the FCC concludes that Federal law is incompatible with the BL or that Land law is incompatible with the BL or other Federal law, it declares the law to be null and void. Moreover, suppose further provisions of the same law are incompatible with the BL or other Federal law for the same reasons, the FCC may also declare them to be null and void'.[634]

In general, the statute is declared null and void in its entirety, but partial declarations of nullity of specific parts of a law are also possible.[635]

The FCC controls the legislature by concrete judicial review and the constitutional complaint rather than by abstract judicial review.[636]

3.8.2 Concrete Judicial Review

The judiciary initiates concrete judicial review during litigation in the courts. Ordinary judges send questions to the CC if two conditions are met: (1) the constitutional question is material to litigation at the bar and (2) there is reasonable doubt in the judge's mind about the constitutionality of the controlling norm.[637] Only judges may ask the FCC questions if they

[631] Georg Vanberg. (1998). Abstract Judicial Review, Legislative Bargaining, and Policy Compromise, *Journal of Theoretical Politics*, Vol-10 (3), Sage Publications, p-299, (pp 299-326). (Accessed on 29 Jan 2021). Retrieved from https://sites.duke.edu/georgvanberg/files/2018/07/Abstract-Judicial-Review-Legislative-Bargaining-and-Policy-Compromise.pdf.
[632] Georg Vanberg. (1998). Abstract Judicial Review, Legislative Bargaining, and Policy Compromise, p-300.
[633] Venice Commission, CDL-JU (2003)18.
[634] Sec 78, Act on the FCC, 1950.
[635] Venice Commission, CDL-JU (2003) 18.
[636] Christine Landfried. (1985). The Impact of the German Federal Constitutional Court on Politics and Policy Output, Government and Opposition, Cambridge University Press, Vol-20, No-4, p-523 (Pp 522-541). (Accessed on 3 March 2021). Retrieved from https://www.jstor.org/stable/.
[637] Art 100, the BL, 1949.

seriously suspect that they are called upon to enforce or interpret the constitutionality of law or laws.

Concrete judicial review is a kind of violation of the BL by federal or land law applied in judicial proceedings. These proceedings could also concern the compatibility of land law with federal law. Only the court in question can bring a case before the FCC by calling for a preliminary decision.[638]

If a court concludes that a law on which its decision depends is unconstitutional, the proceedings shall stay implementation of the law. The decision shall be obtained from the land court that has jurisdiction over constitutional disputes where the constitution[639] of a land is held to be violated or from the FCC if his fundamental right is violated. This provision shall also apply if the BL is held to be broken by land law and where a land law is incompatible with federal law. For example, suppose during litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual. In that case, the court shall obtain an FCC decision. Suppose a CC of the land in interpreting this BL proposes to derogate from the FCC's decision or of the CC of another land. In that case, it shall obtain a decision from the FCC.[640]

Constitutional law in politics and constitutional adjudication is necessary for the political process. Therefore, the relation between law and politics is not likely to be clear in constitutional review.[641]

3.8.3 Constitutional Complaints and Human Rights Protection

The FCC has jurisdiction over both abstract review of laws and concrete review that can arise out of ordinary litigation. Nevertheless, most cases brought before the FCC are derived from constitutional complaints.[642] According to the individual, the constitutional complaint is a remedy

[638] Lucas Prakke and Constantijn Kortmann (Eds.). (2004). p-356.
[639] Donald P. Kommers. (2006). *The Federal Constitutional Court: Guardian of German Democracy*, Annals of Am. Acad. of Pol. & Soc. Sci, p-115, (pp 111-128). (Accessed on 17 Feb 2021). Retrieved from https://scholarship.law.nd.edu/law_faculty_scholarship/1377/.
[640] Art 100 (1/2/3), the BL, 1949.
[641] Tom Ginsburg and Nuno Garoupa. (2011). Building Reputation in Constitutional Courts: Political and Judicial Audiences, Arizona Journal of International and Administrative Law, Vol 28, No.3, p-550 (pp 539-568). (Accessed on 23 Jan 2021). Retrieved from http://chicagounbound.uchicago.edu/journal_article.
[642] Vicki C. Jackson and Mark Tushnet. (2006). Comparative Constitutional Law, 3rd Edition, Foundation Press, United States of America, p-569.

to have his or her grievances before the CC.[643] A constitutional complaint may be lodged by any natural or legal persons claiming that an act of the German public authority has infringed their fundamental rights or certain rights that are equivalent to fundamental rights.[644] The reasons for the complaint shall specify the right which has allegedly been violated as well as the act or omission of the organ or authority which the complainant claims has violated his or her rights.[645] The complaint may be filed free of charge if the complaint is accepted. The complaints are first reviewed by a three-judge committee that can reject a complaint without any written reasons. It is a tool by which ordinary persons may challenge the validity of a law or any governmental action alleged to infringe a fundamental right secured by the BL.[646]

Individuals, groups and firms can submit constitutional complaints to the FCC when they believe their basic rights have been violated after all other remedies have been exhausted. According to Luth's decision, fundamental rights are not merely defensive rights against the state, but they are rights among themselves.[647] Municipalities and associations of municipalities may lodge a constitutional complaint claiming that federal or land law violates Article 28 of the BL.[648] Ordinary citizens may file constitutional complaints after exhausting all other legal remedies.[649]

Most of the constitutional complaints are appeals from a final judicial ruling. As stated by author Jutta Limbach, 'A complaint must be accepted if: (i) it is of fundamental constitutional importance; (ii) the claimed infringement of fundamental rights is of special severity or (iii) the complainant would suffer particularly severe detriment from failure to decide the issue'.[650]
Constitutional complaints have four characteristics:

(1) They provide a judicial remedy against violation of constitutional rights.
(2) They lead to separate proceedings concerned only with the constitutionality of the act in question.

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[643] Hans G. Rupp. (1969). Federal Constitutional Court in Germany: Scope of its Jurisdiction and Procedure, *Notre Dame Law Review*, Vol-44, Issue-4, p-552 (pp 548-549). (Accessed on 24 February 2021) Retrieved from http://scholarship.law.nd.edu/ndlr/vol44/iss4/3.
[644] Bundesverfassungsgericht. (2021). Constitutional Complaints. (Accessed on 18 Feb 2021) Retrieved from https://www.bundesverfassungsgericht.de/EN/.
[645] Sec 92, Act on the FCC, 1950.
[646] See *supra note 643.*
[647] Jutta Limbach. (2000). The Role of the Federal Constitutional Court, *SMU Law Review*, Vol-53, Issue 2, p-431 (pp 429-442). (Accessed on 4 March 2021). Retrieved from https://scholar.smu.edu/smulr/vol53/iss2/3.
[648] Sec 91, Act on the FCC, 1950.
[649] Donald P. Kommers. (2006). The Federal Constitutional Court: Guardian of German Democracy, p-115. Retrieved from https://core.ac.uk/download/pdf/268224374.pdf.
[650] Jutta Limbach. (2000). The Role of the Federal Constitutional Court, *SMU Law Review*, Vol-53(2), p-440 (pp 429-442). (Accessed on 7 March 2021). Retrieved from *https://core.ac.uk/download/pdf/147631664.pdf* · PDF file.

(3) They can be lodged by the person adversely affected by the act in question.
(4) The court which decides the constitutional complaint has the power to restore to the victim his or her rights.[651]

Someone who claims a violation of one of his or her fundamental rights or one of his or her rights under Article 20(4), Articles 33, 38, 101, 103 and 104 of the BL by a public authority may lodge a constitutional complaint with the FCC. [652]

According to German law, a constitutional complaint must be filed within one month of being notified of the decision. It must be submitted in writing and have general constitutional significance. The constitutional complaint serves a dual function. First, it is a means of extraordinary judicial relief, giving an individual the possibility of defending their fundamental rights. Second, it preserves the objective constitutional order and aids in the interpretation and development of constitutional law.[653] A constitutional complaint is a part of a constitutional review.[654] The FCC has transformed the constitutional complaint into a method of comprehensive constitutional control of all state authority.[655]

The FCC has two panels. The first panel is authorised to examine laws, constitutional reviews and constitutional complaint cases.[656] The First Senate shall be competent for legal review proceedings in which a lawful provision is claimed to be largely incompatible with fundamental rights and most constitutional complaints (it is, therefore, also called the Senate for Basic Rights).[657] The Second Senate has jurisdiction over impeachment trials of the President of the Republic, the settlement of disputes between the constitutional organs of the Federal Republic involving their rights and duties under the BL, conflicts between the federal government and the

[651] Gerhard Dannemann. (1994). Constitutional Complaints: European Perspective, Vol-43, No.1, *International and Comparative Law Quarterly*, p-142(pp 142-153). (Accessed on 25 March 2021) Retrieved from https://www.jstor.org/stable/pdf/760826.pdf?refreqid=excelsior%3A724f6a1f685b6b234c13ff3847b9eed5.
[652] Sec 90(1), Act on the FCC, 1950.
[653] M.A. Hanna Wiczanowska. (2008). The Adequacy of the Constitutional Complaint as 'Extraordinary Means of Human Rights Protection – A Comparison of Polish and German Solutions', p-17-18. DOI: http://dx.doi.org/10.12775/TIS.2018.001 (Accessed on 11 March 2021). Retrieved from https://ww.researchgate.net.
[654] I Dewa Gede Palguna. (2007). Constitutional Complaint and the Protection of Citizens Constitutional Rights, Constitutional Review, Vol-3, No-1, p-4(pp 1-23). (Accessed on 3 April 2021) Retrieved from https://media.neliti.com/media/publications/226564-constitutional-complaint-and-the-protect-2ed11961.pdf.
[655] Werner Heun. (2011). The Constitution of Germany: The Contextual Analysis, p-173.
[656] Sec 14(1), the Act on the FCC, 1950.
[657] Rudolf Streinz. (2014). The Role of the German Federal Constitutional Court Law and Politics, Ritsumeikan Law Review, No-31, p-97 (pp 95-118). (Accessed on 6 April 6, 2021). Retrieved from http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr31/09streinz.pdf.

Länder, especially over the execution of federal laws by the states and the exercise of federal supervision, the impeachment of judges and the review of international treaties and conventions.[658]

The Second Panel is authorised to examine cases in which there was a denial of human rights; the constitutionality of political parties; complaints on judgements of the Bundestag related to the legality of a general election or the filling of a vacancy of a deputy at the Bundestag; impeachment of a federal president by the Bundestag or Bundesrat; GG interpretation in cases of a dispute on the scope of rights and obligations of the highest federal organisation or other relevant parties whose rights are granted by GG or rules of procedure of the highest federal organisation; disagreements on rights and obligations of the Federation and states (Länder) – particularly the implementation of a federal law by states and federal supervision as regulated in Article 93 paragraph (1) (3) and (4) second sentence of the GG (BL) and other disputes involving public laws – or between states or within a state (unless there is a remedy regarding another court's implementation of authority); impeachment of a federal or state judge; cases on an application of a law as a federal law; and constitutional complaints regulated in Article 91 of the BVerfGG and complaints within the domain of a general election law (Article 14 paragraph (1) and (2) of the BVerfGG). Those two panels will appoint several chambers consisting of three justices with the judges holding a one-year tenure. This chamber's composition may only be maintained for a maximum of three years (Article 15a paragraph (1) of the BVerfGG).[659] The Second Senate shall be competent for matters of governmental structure and for legal review proceedings and constitutional complaints not assigned to the first panel (also called the Senate for State Law).

In brief, the First Senate has jurisdiction over fundamental rights; the Second Senate decides all questions of political disputes.[660] But in general, violations of fundamental rights and political problems are not always separated.

In common law countries, there is no constitutional complaint system. Nonetheless, there are constitutional remedies that are similar to constitutional complaints. For example, five kinds

[658] Taylor Cole. (1958). The West German Federal Constitutional Court: An Evaluation after Six Years, *Journal of Politics*, Vol-20(2), p-284 (pp 278-307). (Accessed on 21 April 2021). Retrieved from https://www.jstor.org/stable/pdf/2127041.pdf?refreqid=excelsior%3Ad4a69079048d8a62da2ab1312d376dd0.
[659] Taylor Cole. (1958). The West German Federal Constitutional Court: An Evaluation after Six Years, p-284.
[660] Christine Landfried. (1985). The Impact of the German Federal Constitutional Court on Politics and Policy Output, *Government and Opposition*, Vol-2(4), p-522 (pp-522-541). (Accessed on 21 April 2021). Retrieved from https://www.jstor.org/stable/pdf/44483259.

of prerogative writ, such as habeas corpus, certiorari, mandamus, quo warranto and prohibition, are effective constitutional remedies in most common law countries.

In conclusion, the FCC competencies are promulgated in Arts 93 and 100. The detailed procedures are mentioned in the Act on the Federal Constitutional Court. In brief, the FCC has legal and political functions. The FCC is distinguished by its ability to handle political issues within the constitutional framework. The prominent competencies of the FCC are the abstract and concrete forms of judicial review to check the constitutionality of legislation. The disputes between the Federation and Länder are also included in the abstract judicial review function. In addition, the constitutional complaint procedure is reliable to obtain legal remedies for the infringement of the fundamental rights by the public authorities and the private sectors. The constitutional complaint is notably much more related to judicial decisions. It is necessary to solve the social difficulties and supplement the needs of society over time.

Regarding the assessment of the implementation of the independent judiciary, especially for the composition of the FCC, Germany is also not that different from the targeted countries in this dissertation because only the Bundestag and Bundesrat and the legislature select the FCC judges. The reason is the separation of powers and federalism. Article 20 of the BL supports that Germany is a democratic and social federal state. According to the legal reasonings of the FCC, Bundestag represents democracy and Bundesrat stands for federalism. This is acceptable and reasonable due to their state structure. Moreover, Germany applies John Lock's theory of cooperation of powers. In these ways, composition of the FCC is already under the traditional method of appointment of judges by the legislature with the approval of the executive. Nevertheless, the composition of the FCC is inconsistent with both the EU's legal norms[661] and international standards[662] for the establishment an independent judiciary.

[661] Venice Commission. (2008). European Standards on the Independence of the Judiciary: A Systematic Overview. {CDL-JD (2008) 002}.
[662] Value 1, The Bangalore Principles of Judicial Conduct 2002.

Chapter IV
Contribution of the German Federal Constitutional Court to Legal Norms and Standards of the European Union

4.1 The Basic Principles of the EU and Germany

Germany plays a fundamental role in the economic and political stability of the European continent. Moreover, the Federal Republic of Germany today has been crucial in determining the balance of power in Europe because of its constitutional politics and FCC.[663] The creation and maintenance of a unified state, the structure of communal life, the oversight of state organs and the protection of citizens must be specific to be a successful constitution. In addition, a constitution must be stable and open to future developments, and it must give certain guarantees to political and social actors.[664] The FCC contributes to stabilising the liberal order through the integration process within the EU legal community.[665]

The EU was founded on respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of minorities. These values are common to the Member/s in a society in which pluralism, non-discrimination, tolerance, justice, solidarity

[663] Dr. Miguel Otero-Iglesias. (2015). Germany and Political Union in Europe: Nothing Moves without France. Paper presented at the 14th Biennial Conference of the European Union Studies Association (EUSA), Boston, 5-7 March 2015. (Accessed on 6 June 6, 2021). Retrieved from http://aei.pitt.edu/79456/1/Otero-Iglesias.pdf.
[664] Christian Bumke and Andreas Voßkuhle. (2019). German Constitutional Law: Introduction, Cases and Principles, First Edition, Oxford University Press, United Kingdom, p-6 (pp 1-581).
[665] Christian Bumke and Andreas Voßkuhle. (2019). German Constitutional Law: Introduction, Cases and Principles, p-11.

and equality between women and men prevail.[666] The EU Charter of fundamental rights identifies the fundamental rights in detail. The EU is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is mainly the basis of democracy and the rule of law.[667] Germany is a founding member of the European communities. Its determination to promote world peace and to be an equal partner in a united Europe has been highlighted in the preamble of the BL ever since it entered into force in 1949.[668] It is necessary to approach a normative legal text and a historical document to understand the BL.[669] The adoption of the Weimar constitution followed the ratification of the Versailles Treaty. Several weaknesses of the Weimar constitution were identified to support the Republic's demise.

Nullification of the rule of law and democracy by a two-third majority in the Parliament were defined as constitutional. The most dangerous aspect was that an unconstitutional law passed by majority votes was accepted as constitutional.[670] As profits, the imperfections of the Weimar constitution were corrected for the BL. The three foundations of the German BL are the principles of democracy, the rule of law and the federal–state system.[671] The core feature which is significant in the BL is federalism. It was strengthened by extending the power of the Länder, while the president's power was weakened. The BL sets up a solid parliamentary system. This means that the parliament can remove the cabinet by a constructive vote; in addition, the BL has excluded any legislation by popular votes.[672] The BL focusses on the supremacy of the constitution, and the FCC can enforce it by its broad functions. The FCC can invalidate the legislation if it breaches constitutional law. In the first article, the BL mentions human dignity as inviolable as a source of every human right. It emphasises that human rights are the basis of every community, peace and justice. The BL does not recognise the idea of social rights which were guaranteed by the Weimar constitution.[673] Nevertheless, Article 20 of the BL establishes Germany as a social, federal and democratic republic.

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[666] Art 2, Consolidated Version of the Treaty of European Union, 1992.
[667] Preamble of the Charter of the Fundamental Rights of the European Union, 2016.
[668] Dieter Grimm. (2019). European Constitutionalism and the German Basic Law, National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law, ASSER Press, p-410 (pp 407-49).
[669] Christian Bumke and Andreas Voßkuhle. (2019). German Constitutional Law: Introduction, Cases and Principles, p-1.
[670] Werner Heun. (2011), The Constitution of Germany: The Contextual Analysis, p-19.
[671] Martin J. Schermaier. (2006). German Law, in Jan M. Smits (Ed.), *Elgar Encyclopedia of Comparative Law*, Edward Elgar Publishing Limited, United Kingdom, p-277.
[672] Werner Heun. (2011), The Constitution of Germany: The Contextual Analysis, p-20.
[673] Werner Heun. (2011), The Constitution of Germany: The Contextual Analysis, p-21.

The essential principles of EU law are direct effect, supremacy, subsidiarity and proportionality. Moreover, some other provisions contain important principles of non-discrimination, including Arts 18, 45 and 157 TFEU. However, several important principles of EU law still have no Treaty basis and remain based on the case law of the ECJ. These unwritten principles include direct effect, supremacy and effectiveness, three of the most distinctive principles of EU law.[674]

The principle of direct effect enables individuals to invoke a European provision before a national or European court. These principles only relate to certain European acts. It means that no domestic legislation is needed to implement provisions on some issues. This would thus take priority over inconsistent national legislation.[675]The ECJ expects national judges to operate as agents of the community order. This means that when they adjudicate disputes in domains governed by EC (European Community) law, they are obliged to make decisions with reference and deference to that law.

Nevertheless, it is a fundamental principle of European law. Peace, liberty, democracy, the rule of law and respect for human rights are core norms. At the same time, social solidarity, antidiscrimination, sustainable development and good governance are minor norms. However, the EU Charter of Fundamental Rights describes human dignity, freedom and equality as values and democracy and the rule of law as principles.[676]

The direct effect principle thus ensures the application and effectiveness of European law in EU countries. However, the ECJ defined several conditions for a European legal act to be immediately applicable. In addition, the direct effect may only relate to relations between an individual and an EU country or the extension to relations between individuals.[677]

The importance of EU law has developed over time through the case law (jurisprudence) of the ECJ. However, it is not enshrined in the EU treaties, although there is a brief declaration in this regard annexed to the Lisbon Treaty. In the case of *Van Gend en Loos v Nederlandse Administratie der Belastingen*, the court declared that the laws adopted by European institutions

[674] Armin Cuyvers. (2017). General Principles of EU Law, p-218/19.
[675] *NV Algemene Transport-en Expeditie Orderneming Van Gen den Loos v Nederlandse Admiistratie Der Belastingen*. (Accessed on 12 December 2021) Retrieved from https://eu.vlex.com/vid/nv-algemene-transport--expeditie--86942812.
[676] François Foret and Oriane Calligaro. (2018). 'European Values'. Challenges and Opportunities for EU Governance, p-8.
[677] EUR-Lex. (N.D). The Direct Effect of European Law. (Accessed on 27 May 2021). Retrieved from https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=LEGISSUM:l14547.

must be integrated into the legal systems of EU countries, which are obliged to comply with them.[678] EU law, therefore, has primacy over national laws.[679] Jack Parrock said, 'One of the cornerstones of EU Memberships is that EU law has primacy over all other laws and that the ECJ is the highest court within the EU and what these judges are saying is that in that aspects they do not believe that this is the case' (referring to judges of the case in Poland.)

4.2 The Legal Values of the European Union

Article 2 of the TEU promulgates the legal values of the EU. Those are the basic requirements that the countries must implement to be a member of the EU. The values are essential for the EU itself and its members to implement economic, social and political integration and settle EU matters between the EU institutions and the Member/s, between individuals and the Member/s and between individuals. The institutionalisation of human rights and the conditionality of EU membership call on democracy. Norms and values are entrenched in post-World War II history and the history of democratisation. In Germany, the concrete constitutional rights granted by the BL and safeguarded by the FCC resulted from Hitler's violations of human rights in the past.

The EU needs to protect the cornerstones of European integration. In Europe, human dignity is inviolable. It must be respected and protected, and it constitutes the objective basis of fundamental rights. It lies at the core of basic ethical questions about life and death which is the first value mentioned in the EU Charter of Fundamental Rights, 2000. The Charter's Title is 'Dignity', and its article states: 'Human dignity is inviolable. It must be respected and protected.' It is also the first value mentioned in article 2 of the TEU. Beyond legal texts, human dignity has become a buzzword to tackle policy issues as different as abortion, stem cell research, euthanasia, the commodification of the human body, gender relationships, humanitarian aid, justice and security, working conditions and social rights; and a buzzword to rally around competing flags according to liberal or traditional interpretations of this value.[680]

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[678] DW. (2021). Poland's Top Court Rules Against Primacy of EU law. (07/10/2021). (Accessed on 21 December 2021). Retrieved from https//www.dw.com/en.polands-top-court-rules-against-primacy-of-eu-law/a-59440843.

[679] EUR-Lex. (N.D). Primacy of EU Law. (Accessed on 27 May 2021). Retrieved from. https://eur-lex.europa.eu/summary/glossary/primacy_of_eu_law.html.

[680]François Foret and Oriane Calligaro. (2018), 'European Values'. Challenges and Opportunities for EU Governance, p-25.

Human dignity is a crucial principle in Germany to adjudicate constitutional disputes and protect human rights. It has been discussed in detail in Chapter II. The theme is that human dignity is inviolable.[681] According to the German Basic Law, 1949, it can be said that the provision about human dignity in the EU Charter of Fundamental Rights emphasised the German notion of human rights protection.

Freedom

Freedom of movement is also a distinguished right that is well known, and it gives citizens the right to move and reside freely within the EU. The EU Charter of Fundamental Rights protects individual liberties, such as respect for private life and freedom of thought, religion, assembly, expression and information. Nonetheless, the *Omega* case study has some legal exceptions which apply to the freedom of movement of things, persons and services.[682]

The EC (European Community) Treaty determines the freedom to provide services but is undoubtedly necessary to also consider the freedom to receive services. This is about the right of the service receiver to travel to the state of the service provider to receive service there under the same conditions as domestic citizens.[683] The restrictions on freedom to provide services within the EU shall be prohibited with respect to nationals of the Member/s that are established in a Member/s other than that of the person for whom the services are intended.[684]

Democracy

The term democracy as understood by Thomas Paine and Abraham Lincoln is 'government of the people, government by the people and for the people'.[685] The functioning of the EU is founded on representative democracy. Democracy is exceptionally liberal democracy in

[681] Art 1(1), the BL, 1949.
[682] C 36/02.
[683]Nada Bodiroga-Vukobrat and Hana Horak. (N.D). Freedom to Provide Services in European and Croatian Law, p-4 (1-14). (Accessed on 8 June 2021). Retrieved from https://poseidon01.ssrn.com/.
[684] Art 56, Consolidated Version of the Treaty on Functioning of the European Union, 2012.
[685] Jo Eric Khushal Murkens. (2009). Identity Trump Integration: The Lisbon Treaty in the German Federal Constitutional Court, p-529 (pp 517-534). (Accessed on 10 October 2021). Retrieved from https://www.jstor.org/stable/43747806.

everything in the EU. Court independence is crucial to maintaining constitutional rights and liberties, an active society and media freedom. All of this is connected to democracy. [686]

Being a European citizen also means enjoying political rights. For example, every adult EU citizen has the right to stand as a candidate and vote in the European parliamentary elections. In addition, EU citizens have the right to stand as candidates and vote in their country of residence or their country of origin. [687]

The Lisbon Treaty includes explicit provisions on democratic principles. It indicates that the establishment of a specific norm is necessary to implement the overarching value of democracy. Participatory democracy and transparency are listed among these democratic principles which are subordinated to realising the core values. 'Every citizen has the right to participate in the democratic life of the Union'.[688] 'The institutions shall, by appropriate means, allow citizens and representative associations to make known and publicly exchange their opinions in all areas of Union action'.[689] Participatory democracy is derivative, a reformulation and even a substitute for democracy.[690]

Germany is a democratic and social federal state. Democracy represents the people, meaning that the state authority belongs to the people. The leaders of Germany are derived from the people. The elections processes are based on the people's votes. The legislature elected by the people is responsible for law and justice.[691] According to the FCC, the principle of democracy is open to integrating Germany into the EU. Thus, the EU is 'not schematically subject to the requirements of a constitutional state applicable on the national level'.[692] The EU is not subject to a state's democratic requirements but assesses that the EU is based on state-centred democratic standards.

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[686] European Commission, {SWD (2020) 300-326}, 2020 Rule of Law Report. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602583951529&uri=CELEX%3A52020DC0580.
[687] Art 10, Consolidated Version of the Treaty on European Union. Retrieved form https://www.legislation.gov.uk/eut/teu/article/10.
[688] Art 10(3), Lisbon Treaty, 2007.
[689] Art 11(1), Lisbon Treaty, 2007.
[690] François Foret and Oriane Calligaro. (2018). 'European Values'. Challenges and Opportunities for EU Governance, p-26.
[691] Art 20(1/2/3), the BL, 1949.
[692] Erich Vranes. (2013). German Constitutional Foundation of and Limitation to EU Integration: A Systematic Analysis, *German Law Journal*, Vol-14(1), p-86 (76-112).

The German concept of democracy substantially amounts to the proposition that the principle of democracy and the sovereignty of the people (Article 20(1) and (2) of GG) are based on the individual right to political self-determination, which itself is based on human dignity (Article 1(1) of GG).[693]

Democracy in the broadest sense is more and more understood to be a 'global good' that international organisations should protect. In this way, it will be possible to counter national anti-democratic tendencies.[694]

Equality before the Law

Equality is about equal rights for all citizens before the law. The principle of equality between women and men underpins all European policies and is the basis for European integration. It applies in all areas. For example, the concept of equal pay for equal work became part of the Treaty of Rome in 1957. Although inequalities still exist, the EU has made significant progress.

The ECHR prohibits discrimination, and European citizens can enjoy the rights and freedoms outlined in the Convention without differences between men and women. The ECHR follows Art 2 of the UDHR. 'Everyone is entitled to all the rights and freedoms outlined in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. Furthermore, no distinction shall be made based on the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing, or under any other limitation of sovereignty'.[695]

The *Mangold* case was a leading and vital case related to equality before the law concerning age discrimination. It was between the ECJ and Germany. 'The Mangold case concerned an age-based exception to the general provisions of the German Labour Code that concern fixed-term contracts. The Code provides that the use of fixed-term employment contracts of more than two years duration, or renewed more than three times within two years, must be shown by the employer

[693]Peter M. Huber. (2015). Federal Constitutional Court and European Integration, The European Public law, 21(1), p-96.
[694] Dr Günter Wilms. (2017). Protecting Fundamental Values in the European Union through the Rule of Law, p-26.
[695] Art 2, UDHR, 1948.

to be objectively justified. These general provisions were amended to encourage greater employment of older workers, in 2002 by legislation which gave employers the freedom to conclude fixed-term contracts in certain circumstances that were not subject to these limits with workers over the age of 58 (and with workers over the age of 52 until December 2006) without having to show objective justification'.[696]

The Rule of Law

According to the Diceyan perspective, 'the rule of law', like 'democracy', has no single meaning: it is not a legal rule but a moral principle. It has a sense of different things according to an individual's moral positions. The author mentioned that the rule of law is a vehicle for expressing people's preferences about two essentially political issues. 'Firstly, it is a substance of the relationship between citizens and government. Secondly, it is a process through which that relationship is conducted'.[697] The rule of law depends on three characteristics of English law as stated by Dicey, which excludes 'the exercise by persons in authority of broad, arbitrary or discretionary powers of constraint'. The second is universal subjection to 'the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. The third is a system whereby the 'general principle of the constitution is developed as the result of a judicial decision determining the rights of private persons in the particular case brought before the courts.[698]

The rule of law is intertwined with the common law and its development through judicial law making. The same issues in common law and the rule of law include finding and justifying the requisite source of law and securing adequate means to foster predictability and sources of law.

The rule of law primarily contains four principles:

- Fundamental rights (basic laws; constitutional laws)
- Separation of powers
- Calculability of governmental actions

[696] Colm O'Cinneide. (N.D). Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age. (Accessed on 25 June 2021). Retrieved from https://www.echr.coe.int/documents/convention_eng.pdf.
[697] Ian Lovelang. (2017). Constitutional Law, Administrative Law and Human Rights; The Rule of Law and the Separation of Powers, 8th edition, Oxford University Press, United Kingdom, p-45 (pp44-76).
[698] Martin Krygier. (2012). Rule of Law, in Michel Rosenfeld and Andras Sajo (Eds.), Comparative Constitutional Law, Oxford University Press, United Kingdom, p-236 (pp 323-368).

- Security mechanisms[699]

The authors Paul Bovend'Eert and Marten Burkens concluded that ''the rule of law principle is in the notion of the separations of powers between the legislature, executive, and judiciary'.[700] Horizontal separation of powers can be seen among the three main governmental organs. This means that the legislature shall be bound by the constitutional order and the executive and the judiciary by law and justice.[701] Vertical separation of powers is established between the Federation and the Länder.[702]

The core of the rule of law principle is autonomous and independent courts. [703] Finally, the rule of law means that independent courts have the power to control whether the state complies with the laws that bind its activity. [704] The concept of the rule of law, which is key to the Western understanding of liberal democracy, requires judicial review of legislative and executive action criteria to ensure the principles of supremacy of the constitution and legality.[705]

The FRG (Federal Republic of Germany) explicitly mentioned 'the rule of law' in its BL 1949, and it is perhaps the principle most strongly enshrined and most detailed in the BL.[706] The constitutional order in the Länder must meet the regulations of a republican, democratic and social state governed by the rule of law.[707] The book on the German constitutional law written by the two authors expressed the formal rule of law and the substantive rule of law. The former applies mainly to the separation of powers, the definition of laws and the independence of courts. Therefore, it can be seen in the criteria of statute-based legality, the clear distribution of powers, oversight

[699] European Values.info. (N. D). Definition of the Most Basic European Values, p-15(pp 1-46). (Accessed on 30 May 2021). Retrieved from http://europaeischewer te.info/fileadmin/templates/Documents/ewdef_en.pdf.
[700] Paul Bovend'Eert and Marten Burkens. (2014). The Federal Republic of Germany, In Leonard Besselink, Paul Bovend' Eert, Hansko Broeksteeg, Roel de Lange and Wim Voermans (Eds.), *Constitutional Laws of the EU Member States*, Wolters Kluwer Business, p-652 (pp 647-770).
[701] Art 20(3), the BL, 1949.
[702] Bundesrat. (2022). A Constitutional System Body within a federal system. (Accessed on 4 June 2022). Retrieved from https://www.bundesrat.de/EN/funktionen-en/funktio-en/funktion-en-node.html.
[703] EU2019FI. (2019). Common Values and the Rule of Law: Cornerstones of EU Action. (Accessed on 8 June 2021). Retrieved from https://eu2019.fi/en/priorities/values-and-the-rule-of-law.
[704] Dieter Grimm, Mattias Wendel and Tobias Reinbacher. (2019) European Constitutionalism and German Basic Law, ASSER Press, p-435. (Accessed on 1 June 1, 2021). (Check the previous chapters and citations).
[705] European Parliament. (2021). European Court of Justice Case Law on Judicial Independence. (Accessed on 18 September 2021). Retrieved from
https://www.europarl.europa.eu/RegData/etudes/ERIE/2021/696173/EPRS_BRI(2021)696173_EN.pdf
[706] Paul Bovend'Eert and Marten Burkens. (2014). The Federal Republic of Germany, In Leonard Besselink, p-652.
[707] Art 28(1), the BL, 1949.

capability and the effective system of justice. The characteristics of the substantive understanding of the rule of law includes guarantees of fundamental rights and their direct applicability, constitutional provisions establishing a state as a social state founded on the rule of law and the idea of the constitution as a system of values.[708]In essence, democracy and the rule of law are necessary elements of the constitutional order of the Länder.[709] One year later, the ECHR also explained this in its preamble. The ECtHR has highlighted the close relationship between the rule of law and the democratic society through different expressions, uch as 'democratic society subscribing to the rule of law', democratic society based on the rule of law' and 'rule of law in a democratic society'.[710] By 2008, however, 15 out of 27 Members had already expressly provided for the rule of law in their constitutions.[711]

German legal practice and science in fundamental rights and the rule of law are different. According to German jurisprudence, fundamental rights from Article 1 to 20 guarantees individualism and governs even private law. This is opposite to the communist systems that preferred collective rights. According to the rule of law, every administrative act and judicial decision must have legal grounds based on the constitution. The interrelationship of rules, interpretation of statutes, and subsumption. The hierarchy of the legal system developed by Markel and Kelsen is that 'the basic rights take priority over the ordinary constitutional law, constitutional law takes priority over the original statute law, and federal statutes also take priority over the constitutional law of the states.[712] The interpretation of the rule is the prerequisite of subsumption. Subsumption is taking the relevant and important facts and removing the unnecessity to link with a rule. The German jurists think about the rules which could be appropriate.[713]

[708] Para 1402, Christian Bumke and Andreas Voßkuhle. (2019). German Constitutional Law: Introduction, Cases and Principles, p-347(pp1-581).
[709] Dr Günter Wilms. (2017). Protecting Fundamental Values in the European Union through the Rule of Law, p-19.
[710] Venice Commission of the Council of Europe. (2016). Rule of Law Checklist. (Accessed on 7 January 2022) Retrieved from https://venice.coe.int.
[711] Dr Günter Wilms. (2017). Protecting Fundamental Values in the European Union through the Rule of Law, p-18.
[712] Martin J. Schermaier. (2006). German Law, in Jan M. Smits (Ed.), p-280 (pp 273-288), *Elgar Encyclopedia of Comparative Law*, Edward Elgar Publishing Limited, UK.
[713] Martin J. Schermaier. (2006). German Law, p-281.

Human Rights

Human rights are first, moral; second, universal; third, fundamental; fourth, abstract; and fifth, prioritise all other norms. Human rights exist if they are valid and justifiable.[714] Human rights are internationally and domestically protected. The international treaty is the Universal Declaration of Human Rights which was developed after World War II. It is also known as universalism. The other treaties that protect human rights are the ICCPR and ICESC. Constitutional law must be drawn based on the minimum standards of international treaties, which means constitutional rights are not coincidental to international human rights. This is because of the diversity of cultural and heritage-based states, but Art 2 of the UDHR is the most important fundamental right that everyone should enjoy.

The EU Charter of Fundamental Rights protects human rights. These cover the right to be free from discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, the right to the protection of your private data and the right to have access to justice. Moreover, fundamental rights can be opposed to specific EU policies failing to protect minorities, asylum seekers or social groups affected by neoliberal reforms. Values can therefore become instruments of resistance to the EU as a political and economic order.[715]

In Germany, fundamental rights or human rights guaranteed by the BL are promulgated in the first chapter. The BL expresses only the provisions, and the implementation is significant because of the FCC. It is related to the correlated interpretation of the BL focused on human dignity.

The FCC construes fundamental rights as part of the values set up in the BL. However, it does not mean that fundamental rights directly affect all areas of social life. Instead, they address the relationship between the state and the public.[716]

[714] Robert Alexy. (2012). Rights and Liberties as Concepts, in Michel Rosenfeld and Andras Sajo (Eds.), The Oxford handbook of Comparative Constitutional Law, Oxford University Press, UK, p-290 (pp 283-297).
[715] François Foret and Oriane Calligaro. (2018). 'European Values'. Challenges and Opportunities for EU Governance, p-29.
[716] Paul Bovend'Eert and Burkens. (2014). The Federal Republic of Germany, p-698.

4.3 European Convention on Human Rights (1950)

The origins of the jurisdiction of the ECHR and the ECtHR to adjudicate complaints filed by individuals against their own governments dates to the Congress of Europe convened in the Hauge in May 948 by the International Committee of Movements for Union Unity.[717] The ECHR is not concerned with the EU organisation itself, but the EU's citizens can submit a complaint against their state authorities based on violations of their human rights guaranteed by the Convention, for example, in *Baka v Hungary*. In my opinion, the ECJ can give some instructions to the Member/s on how to practice EU law. However, it cannot directly protect an individual's rights.

The most significant normative influence on the drafters of the Convention was the UDHR, a resolution of the UN General Assembly.[718] As a result, the Convention protects the right to life; prohibits torture, slavery and forced labour; protects freedom of thought, conscious, religion, expression, assembly and association; prohibits discrimination; protects the right to marry, the right to liberty and security and so on. [719] In addition, fundamental rights derived from other common sources and as the result of the Member States' constitutional traditions are recognised as legal principles.[720]

The related articles of judicial independence are that the ECHR guarantees fair trial rights and the right to an effective remedy.[721] These are necessary to safeguard judicial independence and protect individual rights against the respective Member/s. The introductory comments by the author William A. Schabas regarding the right to a fair trial in Art 6 are 'the right to a fair trial is important in and of itself. Otherwise, it is the main part of the enforcement and vindication of the other fundamental rights. The rule of law cannot exist if there is no fair trial. The ECtHR is the significant court held in a democratic society by the right to a fair trial.[722] Art 6 (1) is composed of two elements: a hearing must occur 'within a reasonable time'; and it must be held before an

[717] William A. Schabas. (2015). The European Convention on Human Rights, Oxford University Press, UK, p-3.
[718] William A. Schabas. (2015). The European Convention on Human Rights, p- 1.
[719] Section I, Rights and Freedoms, ECHR, 1950.
[720] Art 6(3), TEU, 1992.
[721] Arts 6 and 13, ECHR, 1950.
[722] William A. Schabas. (2015). The European Convention on Human Rights, p-265.

independent and impartial tribunal established by law.[723] The Grand Chamber has explained, 'it is of fundamental importance in a democratic society that the courts inspire confidence in the public and above all, as far as criminal proceedings are concerned, in the accused'.[724]

According to the Plenary court of the ECtHR, a 'tribunal' is characterised by its judicial function, determining matters within its competence based on rules of law and after proceedings conducted in a prescribed manner.[725] Requirements to be independent mean executive, impartiality, duration of its member terms of office.[726] The independence of a tribunal points to a separation of powers, which is fundamental to the rule of law. Specific features of judicial independence include enough remuneration for the judges, protection against dismissal and a term of office. The Basic Principles on the Independence of the Judiciary was adopted in 1985 by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and was subsequently endorsed by the UN General Assembly.[727]

A court or tribunal must be independent of the executive and the parties to the case. Security of tenure or the principle of the irremovability of judges should be a result of their independence. The Grand Chamber explained that the concept of the separation of powers between the political organs of government and the judiciary has assumed growing importance in the court's case law.[728] In the case of *Maktous and Damjanovic v. Bosnia and Herzegovina*, the first applicant complained that the state court was not independent in line with Art 6(1) because two of its members had been appointed by the Office of the High Representative in Bosnia and Herzegovina for a renewable period of two years.[729]

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[723] William A. Schabas. (2015). The European Convention on Human Rights, p-287.
[724] William A. Schabas. (2015). The European Convention on Human Rights, p-294; see also note 269 in the same book.
[725] William A. Schabas. (2015). The European Convention on Human Rights; see also *H. v. Belgium*, 30 November 1987, S 50, Series A no. 132. (The case credit is also given to William A. Schabas, 2015).
[726] William A. Schabas. (2015). The European Convention on Human Rights; see also *Belilos v. Switzerland*, 29 April, S 64, Series A no. 132. (The case credit is also referred to William A. Schabas, 2015).
[727] William A. Schabas. (2015). The European Convention on Human Rights; see also UN Doc. A/RES/40/32 and UN Doc. A/Res/40/146. (The case credit is also given to William A. Schabas, 2015).
[728] William A. Schabas. (2015). The European Convention on Human Rights. p-295; see also *Maktous and Damjanovic v. Bosnia and Herzegovina [GC]*, nos 2312/08 and 34179/08, S 49, ECHR 2013, citing *Stafford v. the United Kingdom [GC]*, no. 46295/99, S 78, ECHR 2002-IV; *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08 S 46, 30 November 2010. (The cases credited to the author William A. Schabas).
[729] Judgement18.7.2013 [GC].

In the case, the courts (state court) convicted both applicants of Bosnia and Herzegovina of war crimes committed against civilians during the 1992–1995 war. War crimes chambers were set up within the state court in early 2005 as part of the International Criminal Tribunal for the former Yugoslavia's completion strategy. The state court consists of international and national judges who can decide to take over war crime cases because of their sensitivity or complexity and can transfer less sensitive and complex issues to the courts of the two entities of Bosnia and Herzegovina.[730]

In determining whether a court is impartial within the legal framework of Art 6(1), the subjective and objective tests are applied. The first includes determining whether the personal convictions of a particular judge in a specific case are relevant.[731] The second focuses on hierarchical or other links between the judge and participants in the proceedings that justify misgivings about impartiality.[732]

The ECtHR expressed that the 'appointment of judges by the executive or legislature is permissible, but the appointees are free from influence or pressure when carrying out their adjudicatory role.[733] However, it is not enough to say the judiciary is free from the legislative and executive; the public trust in the judiciary is also important to measure the degree of independence. Therefore, 'justice must not only be done but it must also be seen to be done'.[734]

In Europe, there is no exact format related to the appointment of the CC judges, and the appointment procedures in most countries are inconsistent with international legal norms.

The Convention protects citizens from the Members of the Council of Europe. The Council of Europe in 1949 consisted of Belgium, Denmark, Ireland, Italy, Luxemburg, the Netherlands, Norway and the United Kingdom. Greece, Iceland, Turkey and West Germany later joined.

[730] Judgement 18.7.2013 [GC].
[731] William A. Schabas. (2015). The European Convention on Human Rights, p-295.
[732] William A. Schabas. (2015). The European Convention on Human Rights, p-296; see also *Micallef v. Malta [GC]*, no. 17056/06, S 97, ECHR 2009; *Miller and Others v. the United Kingdom*, 10 June 1996, nos. 45825/99, 45826/99, and 45827/99, 26 October 2004; *Meznaric v. Croatia* no. 71615/01, S 31, 15 July 2005. (The case credits are also given to William A. Schabas).
[733] Judgement 18.7.2013 [GC]. See also *Flux v. Moldova* (no.2), no. 31001 /03, S 27, 3 July 2007.
[734] William A. Schabas. (2015). The European Convention on Human Rights A Commentary, p-296; see also *De Cubber v. Belgium*, 26 October 1984, S 26, Series A no. 86; *Meznaric v. Croatia*, no. 71615/01, S 32, 15 July 2005; *Micallef v. Malta*, no. 17056/06, S 75, 15 January 2008. (The cases credited to William A. Schabas).

Finally, it became extended to 47 members, including the EU Member/s. The Convention does not have binding power on the EU institutions but on the members of the Council of Europe.[735]

The ECHR was ratified in Germany on 5 December 1952 and came into force on 3 September 1953. Consequently, the ECHR in Germany has the status of a statute subordinate to the BL. Nevertheless, the FCC interprets the fundamental rights in the BL following the ECHR.[736]

Art 13, the right to an effective remedy, does not guarantee a remedy allowing a challenge to primary legislation before a national authority on the ground of being contrary to the Convention.[737] Moreover, it means that the ECHR does not impose any obligation to be incorporated into domestic. Finally, Art 13 is bound up with the principle of subsidiarity.[738]

The requirement of an 'effective remedy' means that it is in addition to the payment of compensation. There must also be a thorough and effective investigation capable of identifying and punishing those responsible, including adequate access for the complaint to the investigatory procedure.[739]

4.4 European Charter of Fundamental Rights (2000)

The EU Charter of Fundamental Rights (the Charter) brings together the fundamental rights of everyone living in the EU. It was introduced to bring consistency and clarity to the rights established at different times and in different ways in the individual EU M/s.

The Charter establishes civil, political, economic and social rights based on the:

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[735] European Union Accession to the European Convention on Human Rights. (2021). Council of Europe (Accessed on 24 August 2021). Retrieved from https://www.coe.int/en/web/portal/eu-accession-echr-questions-and-answers.
[736] Elgar Encyclopedia of Comparative Law. (2006). in Jan M. Smits (Ed.), Edward Elgar Publishing Limited, UK, pp 276-277.
[737] William A. Schabas. (2015). The European Convention on Human Rights, p-551; see also *A. and Others v. the United Kingdom [GC]*, no. 3455/05, S 135, ECHR 2009. (The case credits are also given to William A. Schabas).
[738] William A. Schabas. (2015). The European Convention on Human Rights, p-551; see also *M.S.S. v. Belgium and Greece [GC]*, no. 30696/09, S 288, ECHR 2011; *Kudla v. Poland [GC]*, no. 30210/96, S 152, ECHR 2000-XI; *Handyside v. the United Kingdom*, 7 December 1976, S 48, Series A. no. 24. (The cases credited to William A. Schabas).
[739] William A. Schabas. (2015). The European Convention on Human Rights, p-552.; see also *Husayn (Abu Zubaydah) v. Poland*, no 7511//13, S 542, 24 July 2014. (The case credited to William A. Schabas).

(1) fundamental rights and freedoms recognised by the European Convention on Human Rights
(2) the constitutional traditions of the EU Member/s
(3) the Council of Europe's Social Charter
(4) the Community Charter of Fundamental Social Rights of Workers
(5) other international conventions to which the EU or its Member States are parties

The Charter became legally binding on the EU Member/s when the Treaty of Lisbon entered into force in December 2009.[740] The Treaty of Lisbon introduced it, and therefore, it is binding on the Member/s at the same level as the EU treaties. The six main titles of the Charter cover dignity, freedoms, equality, solidarity, citizens' right and justice for the people based on democracy and the rule of law.[741]

The justice guaranteed by the Charter is that 'Everyone whose rights and freedoms guaranteed by the law of the Union have violated the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Furthermore, everyone shall have the possibility of being advised, defended, and represented'.[742] Therefore, it is related to the independence of the judiciary to give adequate judicial protections to the EU's citizens before the ECJ through the interpretation process.

The ECJ is not designed to decide the violation of human rights cases like the ECtHR. Instead, the role of the ECJ is to examine whether the EU institutions themselves have failed to comply with EU law or to guide the national courts on how national authorities should interpret the meaning of EU law.[743]

[740] What is the Charter of Fundamental Rights of the European Union? (2021). Equality and Human Rights Commission. (Accessed on August 8, 2021) Retrieved from https://www.equalityhumanrights.com/en/what-are-human-rights/how-are-your-rights-protected/what-charter-fundamental-rights-european-union
[741] Charter of Fundamental Rights. (2021). Thomson Reuters. (Accessed on 8 August 2021). Retrieved from https://uk.practicallaw.thomsonreuters.com/6-503-0145?transitionType=Default&contextData=(sc.Default)&firstPage=true.
[742] Art 47, the EU Charter of Fundamental Rights. (2000/C 364/01). Retrieved from https://www.europarl.europa.eu/charter/pdf/text_en.pdf.
[743] Israel Bulter. (2013). The EU Charter of Fundamental Rights: What Can It Do? The Open Society European Policy Institute. (Accessed on 9 August 2021). Retrieved from https://www.opensocietyfoundation.org.

4.5 The Core Values of German Constitutionalism

The central values of the BL are found in Arts 1 to 19. Most of them are coincident with the legal values of the EU. The famous values of the BL are human dignity, personal freedoms, equality before the law, freedom of faith and conscience, freedom of expression, freedom of movement, right of asylum, etc. All these legal values are supported by the constitutional principles promulgated in Art 20, namely democracy, federalism, separation of powers, the social state and the rule of law.[744] Political scientist and legal scholar Prof. Donald P. Kommers has stated that 'human dignity', 'democracy' and 'social state' are vague constitutional terms, and they possess the ability to kill legislation and even to compel certain forms of state action.[745]

In the German legal system, the constitutional text presents a complex array of values propounded as corresponding to an objective moral order.[746] The BL1949 represents the foundation of the German legal system, and its earlier statutes have been construed and applied along with its principles.[747]

According to Joachim Detjen, there are 24 core values of the BL, and the legitimising ones are human dignity, right to life and personal freedoms, domestic security, individual freedom, equality before the law, social justice, popular sovereignty and democracy.[748]

The Bavarian State Ministry of Justice declared the basic principles and values of the German legal system to be the following.

1. Germany is a constitutional democracy.
2. Germany is a nation of freedom and equality.
3. Every person has the right to physical integrity.

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[744] Dieter Grimm, Mattias Wendel and Tobias Reinbacher. (2019). p-409.
[745] Donald P. Kommers. (1991). German Constitutionalism: A Prolegomenon, *Emory Law Journal*, Vol- 40, p- 848-849 (pp 837-873). (Accessed on 22 December 2021). Retrieved from https://scholarship.la.nd.edu/law_faculty_scholarship.
[746] William Joseph Wagner. (1996). The Role of Basic Values in the Contemporary Constitutional Hermeneutics of Germany and United States, p-180 (pp 178-204). (Accessed on 3 June 2021). Retrieved from https;//www.zareov.de/56_1996_1_2_a_178_204.df.
[747] Martin J. Schermaier. (2006). German Law, Edward Elgar Publishing Limited, United Kingdom, p-276.
[748] Joachim Detjen. (N.D). Core Values of the German Basic Law: A Source of Core Concepts of Civic Education, p-3(1-12). (Accessed on 2 June 2021). Retrieved from https://www.civiced.org/pdfs/GermanAmericanConf2009/Paper_JDetjen.pdf.

4. Every person is equal before the law.
5. Men and women are equal.
6. Everyone has the freedom of choice of his or her faith and religion.
7. Everyone has the right to free speech.
8. Only the German authorities have the right to enforce the law.[749]

The main concern in Germany up until the 1990s with respect to European integration was the protection of fundamental rights. After 1949, the Federal Republic tried to optimise the rule of law and succeeded by interpreting the whole legal order in light of the BL and its fundamental rights.[750] In Germany, the FCC has engaged in broad interpretations of the constitutional text.[751]

4.6 Regional Integration

Regional integration is when two or more nation–states agree to cooperate and work closely together to achieve peace, stability and wealth. Cooperation usually begins with economic integration and political integration is included later.[752]

According to the UN, 'regional integration organization shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the present Convention. In their formal confirmation or accession instruments, such organizations shall declare the extent of their competence concerning matters governed by the present Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence'.[753]

[749] Bavarian State Ministry of Justice. (N.D). Basic Principles and Values of the German Legal System. (Accessed on 2 June 2021). Retrieved from https://www.integrations-mediathek.de/2016/05.
[750]Peter M. Huber. (2015). Federal Constitutional Court and European Integration, The European Public law, 21(1), p-94.
[751] Roderick A. Macdonald and Hoi Kong. (2012). Judicial Independence as a Constitutional Virtue, in Michel Rosenfeld and Andra Sajo, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, UK, p-852 (pp 831-873).
[752] EU Learning. (2021). Extension: What is Regional Integration? (Accessed on 27 June 2021) Retrieved from https://carleton.ca/ces/eulearning/?p=279.
[753] Art 44, Convention on the Rights of Persons with Disabilities (CRPD). Retrieved from https://ww.un.org.

The integration process began with the European Coal and Steel Community (ECSC) and the European Communities (EC).[754] These came into force on 23 July 1952 with the first treaty of European integration. The Treaty Establishing the European Economic Community (EEC) for the four freedoms of the common market and the European Atomic Energy Community (Euratom) for the peaceful use of nuclear energy entered into force on 1 January 1958. The purposes of the three treaties are to build a shared future and to work together.[755] The essential feature of the European integration is the reaction to the National Socialist dictatorship and the catastrophe of World War II.[756]

Regional integration processes provide a peaceful arena in which sovereign countries voluntarily combine their efforts in areas of mutual concern, creating common regional interests and objectives. Regional integration processes aspire to become a space of conciliation between the creation of regional common goods and national interests, cultures, practices and policies.[757] Therefore, the EU needs to protect the cornerstones of European integration: peace, security, stability, democracy and prosperity. [758] In the European Union, the five most essential organisations which play a role in shaping human rights policy are the European Council, the Council of the European Union, the European Commission, the European Parliament and the Court of Justice.[759]The highest court at the European level is the ECJ, but the situation is still vague at the national level.[760]

European integration is the industrial, economic, political, legal, social and cultural integration of states wholly or partly in Europe or nearby. Two theories of integration are

[754] Kiran Klaus Patel. (2013). Provincializing European Union: Cooperation and Integration in Europe in a Historical Perspective, *Contemporary European History*, Vol-22(4), p-651 (pp 649-673). (Accessed on 7 June 2021). Retrieved from https://www.jstor.org/stable/pdf/43299409.pdf.
[755] European Parliament. (2021). The First Treaties. (Accessed on 8 June 2021). Retrieved from https://www.europarl.europa.eu/factsheets/en/sheet/1/the-first-treaties.
[756] Elgar Encyclopedia of Comparative Law. (2006). in Jan M. Smits (Ed.), Edward Elgar Publishing Limited, UK, p-276.
[757] Jean Monnet Chair University of Miami. (2005). The European Union and Regional Integration, Joaquín Roy and Roberto Domínguez (Eds.), p-7. (Accessed on 7 June 2021). Retrieved from https://eucenter.as.miami.edu/_assets/pdf/the-eu-regiional-text-cover-final.pdf.
[758] EU2019FI. (2019). Common Values and the Rule of Law: Cornerstones of EU Action.
[759] Icelandic Human Rights Center. (N.D). The Role of the European Union (EU). (Accessed on 27 June 2021). Retrieved from https://www.humanrights.is/.
[760] J.H.H Weiler. (2003). European Integration: The New German Scholarship, Jean Monnet Working Paper, Max Planck Institute for Comparative Public Law and International Law, Heidelberg. (Accessed on 29 June 2021). Retrieved from https://www.jeanmonnet.org.

neofunctionalism and intergovernmentalism. European integration comes from the EU and its policies.[761]

Neofunctionalism is an eminently political theory of integration which asks not whether artificial barriers to exchange are decreasing, resources are more efficiently distributed or people are growing to like each other more and more but rather what kinds of strategy are politically relevant actors likely to adopt in a specific context. These additional economic and social integration conditions form essential elements in the model but as independent and intervening.[762] A further interpretation of neofunctionalism is that 'Neo-functionalism is generally associated with the political and economic goals, as well as the integration strategies, of the founding fathers of the European Coal and Steel Community. Jean Monnet, one of the chief architects of European unity, believed that in achieving integration in one sector of common policy amongst sovereign states, this would eventually lead to a 'spill over' into other policy areas.[763]

On the other hand, supporters of intergovernmentalism might state that the interests of individual nation–states play a more critical role nowadays and that neofunctionalism is an outdated idea. They would argue that the state still plays a more central role in external affairs and foreign policies of the Member/s than the EU itself.[764] Intergovernmentalism treats national governments as the primary actors in the integration process. It is different from realism and neorealism because it recognises the significance of institutionalisation in international politics and the impact of domestic politics upon governmental preferences.[765]

The Treaty of Lisbon clarifies the powers of the EU. It distinguishes between three types of competencies: exclusive competence, in which the EU alone can legislate, and the Member/s only implement; shared competence, in which the Member/s can legislate and adopt legally binding measures if the EU has not done so; and supporting competence, in which the EU adopts measures to support or complement Member/s policies. EU competencies can now be handed back to the Member/s during a treaty revision.[766] The principles of subsidiarity and proportionality

[761] European Integration. (11 July 2021). (Accessed on 13 July 2021). Retrieved from https://en.wikipedia.org.
[762] J.H.H Weiler. (2003). European Integration: The New German Scholarship.
[763] Thomas M. Dunn. (2012). Neo-Functionalism and the European Union, p-1(1-3). ISSN 2053-8626. (Accessed on 16 July 2021). Retrieved from https://www.e-ir.info/2012/11/28/neo-functionalism-and-the-european-union/.
[764] Thomas M. Dunn. (2012). Neo-Functionalism and the European Union, p-2.
[765] Sensagent. (N.D). Definition Intergovernmentalism. (Accessed on 16 July 2021). Retrieved from Intergovernmentalism: definition of Intergovernmentalism and synonyms of Intergovernmentalism (English) (sensagent.com).
[766] European Parliament. (2021). Treaty of Lisbon. (Accessed on 8 June 2021) Retrieved from https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon.

govern the use of all EU competencies.[767] The allocation of competencies should be based on the principle of conferral, and the 'majority of functions and powers' must remain with the Member/s.[768] However, the relationship between EU law and domestic law is much more determined by the specific doctrines developed by the CC than by any constitutional theory underlying its case law. Constitutional authorisation, therefore, limits the supremacy of EU law.[769] In the *Solange I* decision, the FCC promulgated constitutional limits on the sovereignty of European law and reserved a right of judicial review to safeguard the fundamental rights guaranteed by the BL.[770] The case demands only the clarification of the relationship between the guarantees of fundamental rights in the BL and the rules of secondary community law of the EEC.[771]

The constitutional aim[772] of establishing a united Europe within the EU's framework is that 'to establish a united Europe, the FRG shall participate in the development of the EU that is committed to democratic, social and federal principles, to the rule of law, and the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this BL'.[773]

The federation may transfer the sovereignty by law to the international organisations with the consent of the Bundesrat.[774] Constitutional limits on the transfer of competencies to the EU through treaty amendments have been principally developed in the jurisprudence of the FCC. In the early rulings, *Solange I* and *Solange II*, which were rendered under Art 24 of the BL, there is no clear distinction between limits to the transfer of competencies through treaty amendments and

[767] Art 5(1), TEU 1992.
[768] Peter M. Huber. (2015). Federal Constitutional Court and European Integration, The European Public law, 21(1), p-92(83-108). (Accessed on 9 June 2021). Retrieved from https://heinonline.org/.
[769]Mehrdad Payandeh. (2011). Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice, *Common Market law Review*, p-12(pp 9-38). (Accessed on 10 June 2021) Retrieved from https://heinonline.org.
[770] See *supra note 623*. (J.H.H Weiler. (2003). European Integration: The New German Scholarship, Jean Monnet Working Paper, Max Planck Institute for Comparative Public law and International Law, Heidelberg).
[771] The University of Texas at Austin School of Law. (2021). BVerfGE 37, 2712 BvL 52/71 Solange I. (Accessed on 12 July 2021). Retrieved from https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588.
[772] Erich Vranes. (2013). German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis, *German Law Journal*, Vol- 14(01), p-84 (pp 75-112). (Accessed on 15 July 2021). Retrieved from https://www.researchgate.net/publication/331612128_German_Constitutional_Foundations_of_and_Limitations_to_EU_Integration_A_Systematic_Analysis.
[773] Art 23(1), the BL, 1949.
[774] Art 24(1), the BL, 1949.

barriers to the effects of EU secondary law.[775] The Treaty of Rome identified that regulations, directives and decisions are three core forms of secondary legislation.[776] The original texts in the Treaty Establishing the European Union state that 'the European Parliament cooperating with the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver an opinion. A regulation shall have general regulations, and it shall be binding in its entirely and directly applicable in all member states. A directive shall be binding upon each Member to which it is addressed. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force'.[777]

To maintain peace, the Federation may enter into a system of mutual collective security. It shall consent to such limitations based upon its sovereign power to bring about and secure a lasting peace in Europe and among the nations of the world.[778] Furthermore, the Bundestag and Bundesrat shall have the right to bring an action before the ECJ to challenge the legislative act of the EU for violation of the principle of subsidiary.[779] Subsidiary determines whether measures should be taken at the European level or a state level. [780]

The German constitutional order and EU law are different in principle and autonomous legal systems. The FCC and the ECJ are the supreme courts within their legal frameworks. Art 101 of the BL recognises the ECJ as the lawful judge and accepts the functions of the ECJ. Nonetheless, the FCC stated in the *Maastricht* decision that it would reserve the right to review if the ECJ acted *ultra vires* or if the protection of human rights had severe defects.[781] The FCC and its interpretation of the BL have been an essential element of constitutional development.[782]

European integration was incorporated into the constitutional system without friction. As European integration deepened, the list of duties of the ECJ has been assigned to national judges as de facto community judges and has continued to lengthen. The ECJ knows that it has no means

[775] Erich Vranes. (2013), German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis, p-81.
[776] Ian Loveland. (2018). Constitutional Law, Administrative Law and Huan Rights: Parliamentary Sovereignty within the European Union, 8th Edition, Oxford University Press, UK, p-287(pp 285-322).
[777] Art 189, Treaty Establishing the European Community. (Rome,2 March 1957). (Accessed on 15 October 2021). Retrieved from https://www.hri.org/docs/Rome57.
[778] Art 24(2), the BL, 1949.
[779] Art 23(1a), the BL, 1949.
[780] Reinhold Lopatka. (2019). Subsidiarity: Bridging a gap Between the Ideal and Reality, V-18(1), DOI 10.1177/1781685819838449. (Accessed on 29 June 2021). Retrieved from https://www.journal.sagepub.com.
[781] Werner Heun. (2011). The Constitution of Germany: A Contextual Analysis, p-187.
[782] Werner Heun. (2011). The Constitution of Germany: A Contextual Analysis, p-229.

of forcing national judges to accept its jurisdiction of legal integration. Instead, the various scholars tell us that legal integration has proceeded through persuasion, mutual empowerment and intergovernmental dialogue.[783]

4.6.1 The Principle of Subsidiary (Article 5(3) TEU)

The principle of subsidiarity comes from the TEU signed in 1992. Although it originally was not an explicit part of the BL, it has been inspired by the Maastricht Treaty. This principle constitutes a mandate for German governmental representatives to proactively control the exercise of supranational competencies in EU institutions and for the German legislature to exercise its control competencies. The principle protects the autonomy of the German Länder and communal self-administration, even though this can only be indirectly effectuated through the participation of German organs in the EU.[784]

This principle governs the exercise of the EU competencies. It can be said that the separation of powers is between the EU and its Members. Some commentators have argued that subsidiarity excludes centralisation. The principle of federalism leads the EU to respect national federal structures.[785] The EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member/s either at the central level or at the regional and local levels but can rather be better achieved at the EU level because of the scale or effects of the proposed action.[786] The principle of subsidiarity applies only to areas in which competence is shared between the EU and the Member/s. The general aim of the principle of subsidiarity is to guarantee a degree of independence for a lower authority with respect to a higher body or a local authority with respect to a central government. Therefore, it involves the sharing of powers between several levels of authority, a principle that forms the institutional basis for federal states.[787]

There are three preconditions for intervention by EU institutions under the principle of subsidiarity: (a) the area concerned does not fall within the EU's exclusive competence (i.e., non-exclusive competence); (b) the objectives of the proposed action cannot be sufficiently achieved

[783] Alec Stone Sweet. (2007). A *juridical coup d'état* and the Problem of Authority, p-925.
[784] Erich Vranes. (2013). German Constitutional Foundation of, and Limitations to EU Integration: A systematic Analysis, p-90.
[785] Erich Branes. (2013). German Constitutional Foundations of, and Limitations to, EU Integration: A Systematic Analysis, p-89-90.
[786] Art 5(3), TEU, 1992.
[787] The Principle of Subsidiarity. (2021). Fact Sheets on the European Union, p-2. (Accessed on 1 July 2021). Retrieved from www.europarl.europa.eu/factsheets/en.

by the Members (i.e., necessity); and (c) the action can be implemented more successfully by the Union because of its scale or effects.[788]

The Community is to act in areas that do not fall within its exclusive responsibility only if the Member cannot achieve the objectives of the proposed actions.[789] Any action taken shall not go beyond the purposes of the Treaty.[790]

Regarding the principle of subsidiarity, the amendment of the BL in 2008 authorises the Parliament to submit their opposition to the ECJ if the legislation of the EU is not in conformity with the subsidiarity principle. The Bundestag can start the procedure with the agreement of one-fourth of its members.[791]

4.6.2 The Principle of Proportionality from the EU Perspective

The justification for the principle of proportionality is a defining feature of the 'post-war paradigm' of constitutional rights protection that was first developed in Germany and has since spread worldwide.[792] Although it cannot be found in any other provisions of the BL, people accept it as a constitutional principle. It was developed historically in Prussian Police Law. It is the central standard of review for all acts of state authority and is applied in judicial review of parliamentary statutes.[793] It uses a test for the constitutional justification of the violation of fundamental rights.[794] It can reconcile the conflicts of rights and norms by considering their relative value and imposing requirements such as necessity and the use of the least restrictive means (LRM) test.[795] It is a part of the constitutional review to provide justice. Within EU legal boundaries, proportionality is a principle that mainly serves as a framework for determining whether or to what extent governmental intervention motivated by public interests can limit rights.[796] According to Chapter VII of the *Constitutional Court and Constitutional Adjudication* by Vicki C. Jackson and Mark

[788] Ibid.
[789] Art 3(b), para 2, EC Treaty.
[790] Cases 2 BvR 2134/92, 2 BvR 2159/92.
[791] Paul Bovend' Eert and Marten Burkens. (2014). The Federal Republic of Germany, p-654; see also Article 23 (1a), the BL, 1949.
[792] Philosophical Foundation of Constitutional Law. (2016). David Dyzenhaus & Malcolm Thorburn (Eds.), Proportionality, Malcolm Thorburn, p-305 (pp 1-332).
[793] Werner Heun. (2011). The Constitution of Germany: A Contextual Analysis, p-43.
[794] Venice Commission, CDL-JU (2019) 002, p-3. (Accessed on 9 August 2021). Retrieved from https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2019)002-e.
[795] Wolf Sauter. (2013). Proportionality in EU Law: A Balancing Act? p-439(439-466). (Accessed on 2 Sep 2021). Retrieved from https://www.researchgate.net/law/EUlaw.
[796] Wolf Sauter. (2013). Proportionality in EU Law: A Balancing Act? p-440.

Tushnet, proportionality is a more neutral theory than any other theory of constitutional interpretation based on text, original intent, protection of the political process or moral reasoning.[797] It is a universal criterion of constitutionality and an avoidable part of the very constitutional part.[798]

According to Stone Sweet and Matthews, 'the emergence of proportionality balancing as a master technique of judicial governance is the most important institutional innovation in the history of European legal integration'.[799]

Although the reasoning is a feature of common law constitutionalism, this form of constitutionalism operated for many years with a very narrow conception of what sorts of purposes it was legitimate for the state to pursue.[800] In the move from the early nineteenth century to the modern conception of legitimate state purpose as admitting a wide variety of public purposes, the understanding of the proportionality justification as permitting the state only to do what is necessary to secure individual rights in the most direct manner was developed. Proportionality reasoning is not just an adjustment to the courts to decide cases about constitutional rights; it is essential in the judicial role of overseeing the states' pursuit of legitimate aims.[801]

The first practice of proportionality regarding EU legislation was in the *Internationale Handelsgesellschaft* (*Solange I*) case in the context of common agricultural policy (CAP). The ECJ then converted fundamental rights and proportionality principles to constitutional credentials of the EU. In this way, proportionality became the EU legal principle to avoid national constitutional review on EU law and to reconcile fundamental rights and the supremacy of EU law.[802]

The second case was *Cassis de Dijon,* in which the Court held that minimum alcohol content requirements for spirits imposed by German law were disproportionate compared to labels which provided information to consumers. The application of proportionality regarded the invocation by a Member State of an exception to EU law. Two benefits emerged from the case: (a) the introduction of the principle of mutual recognition as well and (b) the concept of mandatory

[797] Vicki C. Jackson and Mark Tushnet. (2006). Comparative Constitutional Law, p-732.
[798] Ibid.
[799] Wolf Sauter. (2013). Proportionality in EU Law: A Balancing Act? p-444.
[800] Philosophical Foundation of Constitutional Law. (2016). David Dyzenhaus and Malcolm Thorburn (Eds.), Proportionality, Malcolm Thorburn, Oxford University Press, UK, p-318 (pp 1-332).
[801] Philosophical Foundation of Constitutional Law. (2016). p-319.
[802] Wolf Sauter. (2013). Proportionality in EU Law: A Balancing Act? p-446.

requirements for the public interest (also called the 'rule of reason') which are not listed in the Treaty.[803]

This principle is essential for the Members in treaty-based public policy or unwritten mandatory requirements on movement rules.[804] According to Wolf Sauter, 'the application of the proportionality principle in the EU can be characterized as a balancing act not just between principles but also between the levels of government, between the remaining responsibilities of the Members and integration, and between policies and individual rights.[805]

The ECJ recalled the relation between the proportionality and fundamental rights, stating that 'the community and its Members are required to respect fundamental rights. Accordingly, the protection of those rights is a legitimate interest a justifies a restriction of obligations imposed by community law'.[806]

4.6.3 The Principle of Conferral (Article 5 (1) sentence 1 TEU)

The principle of conferral is fundamental and horizontal in the Treaty of Lisbon. According to the principle, the EU shall act only within the limits of the competencies conferred upon it by the Member/s in the treaties to attain the objectives therein. Competences not conferred upon the EU by the treaties remain in the Member/s.[807]

The BL does not allow the institutions of the German states the power to transfer so that their exercise can independently establish other competences for the EU. It prohibits the transfer of competence to decide on its own competence. Therefore, the principle is kind of the EU's obligation to respect the Member/s national and constitutional identity.[808] The FCC warned that it would not accept an extension of the scope of the Charter to domestic measures that have only a blurred link with EU law in light of the principle of conferral in the case of the Counter-Terrorism

[803] Wolf Sauter. (2013). Proportionality in EU Law: A Balancing Act? p-447.
[804] Wolf Sauter. (2013). Proportionality in EU Law: A Balancing Act? p-453.
[805] Wolf Sauter. (2013). Proportionality in EU Law: A Balancing Act? p-466.
[806] Case C112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659
[807] Art 5, TEU, 1992.
[808] BVerfGE 123, 267, Lisbon Decision (Lissabon- Urteil). (Accessed on 22 October 2021). Retrieved from https://germanlawarchive.iuscomp.org.

Database.[809] Although Germany accepts the integration, it has two limitations based on its constitution and identity.[810]

The core principle determines the delimitation of competence between the Member/s and the EU. Besides, it directly impacts the relations between the EU and or its Member State/s with third countries and other international organisations as it underpin the limitation that may be placed on the legal personality of the EU.[811]

Transfer of sovereign power according to the BL means that 'the Federation may, by law, transfer sovereign powers to international organizations. The Länder may transfer the sovereign powers with the federal government's consent to transfrontier institutions in neighbouring regions. The Federation may enter into a system of mutual collective security to maintain peace. The Federation shall accede to agreements providing general, comprehensive and compulsory international arbitration'.[812]

4.6.4 Legal Certainty

The principle of legal certainty is one of the general principles of EU law. The general principles of EU law have constitutional status. This means that they have the same rank as the founding treaties.[813] This requires that the effect of a legal provision must be precise and predictable to those persons who are subject to it. It also requires that EU legislation enable those concerned to acquaint themselves with the accurate extent of the obligations imposed on them.[814]

Redbruch's post-war writing states, 'legal certainty is not the only value that law must effectuate, nor is it the decisive value. Legal certainty requires not only for the public benefit but

[809] BVerfGE 133,277.
[810] Jo Eric Khushal Murkens. (2009). Identity Trumps Integration: The Lisbon Treaty in the German Federal Constitutional Court, Vol 48(4), p-519 (pp 517-534). (Accessed on 22 October 22, 2021). Retrieved from https://www.jstor.org/stable/pdf/43747806.
[811] Inge Govaere. (2016). To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon, Research Paper in Law, 4/2016, European Legal Studies. (Accessed on 16 August 2021). Retrieved from www.coleurope.eu.
[812] Art 24, the BL, 1949.
[813] *Audiolux SA v Groupe Bruxelles Lambert SA (GBL)* (C-101/08) [2009] E.C.R. (The case is collected from the author Jeremie Van Meerbeeck). See also Jeremie Van Meerbeeck. (2016). The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust, *European Law Review*, Vol 41(41), p-275 (pp 275-288). (Accessed on 7 January 2022). Retrieved from https://hdl.handle.net/2078.3/177694.
[814] European Union. (2014). The Principle of Legal Certainty: Introduction. (Accessed on 6 January 2022). Retrieved from https://www.lexisnexis.co.uk/legal/coommentary/halsburys-law-of-england/european-union/the-principle-of-legal-certainty-introduction.

also for justice'.[815] He shows us that legal certainty is beyond the control of the individual alone; it necessarily involves the state, which is empowered by its recognition among the citizens.[816]

According to the ECJ, the principle requires that the rule of law be known, clear, precise, stable, specific and predictable.[817] The principle was first recognised in 1961.[818]The principle has been described as an umbrella principle because it covers the principles of legitimate expectations, vested rights and non-retroactivity.[819]

4.7 The Leading Cases between the European Court of Justice (ECJ) and the FCC: Primacy of EU Law

The ECJ comprises one judge from each EU country and eleven Advocate Generals. This can also be known as the Chief Justice of the European Union (CJEU). It originally had only seven judges. They would be eligible for high judicial office in their own countries or to be eminent legal scholars. The ECJ has two distinct jurisdictions of internal and external characters. The first is concerned with ensuring that the Community's institutions and officials act within the boundaries of the powers given to them by the treaty. Second, it focusses on whether the Member/s were properly affecting their Community obligations.[820] The ECJ has the responsibility to rule on actions brought by a Member/s, an institution or a natural or legal person; to give preliminary rulings at the request of courts or tribunals of the Member/s on the interpretation of EU law or the validity of acts adopted by the institutions; and to rule in other cases provided for in the treaties. The Members shall provide remedies sufficient to ensure adequate legal protection in the fields covered by EU law. [821]

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[815] Heather Leawoods. (2000). Gustav Radbruch: An Extraordinary Legal Philosopher, Vol-2, *Washington University Journal of Law & Policy*, p-499(pp 489-515). (Accessed on 6 January 2022). Retrieved from https://openscholarship.wustl.edu/law-journal-law-policy/

[816] Heather Leawoods. (2000). Gustav Radbruch: An Extraordinary Legal Philosopher, p-511.

[817] Jeremie Van Meerbeeck. (2016). The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust, *European Law Review*, Vol 41(41), p-275 (pp 275-288). (Accessed on 7 January 2022). Retrieved from https://hdl.handle.net/2078.3/177694.

[818] *Aciéries du Temple (SNUPAT) v High Authority* (42/59) [1961] E.C.R. See also Jeremie Van Meerbeeck. (2016). The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust, p-280.

[819] Ibid.

[820] Ian Loveland. (2008). Constitutional Law, Administrative Law and Human Rights: Parliamentary Sovereignty within the European Union, 8th Edition, Oxford University Press, United Kingdom, p-288 (pp 285-322).

[821] Art 19(1/2/3), TEU, 1992.

The primary duty of the ECJ is to interpret EU law. Accordingly, the ECJ has to ensure that 'the interpretation and application of this treaty of law is observed'.[822]

There are many ways in which cases can be brought before the ECJ:

(a) The Commission may bring a case against a Member when it has failed to comply with a treaty obligation.
(b) A Member may start proceedings against another Member/s that the former believes has failed to perform under the treaty.
(c) A Member can challenge the legality of a legal instrument in proceedings against an EU institution.
(d) In addition to proceedings against states and against EU institutions, a natural or legal person in some circumstances may also challenge decisions which are either addressed to them personally or are of direct and individual concern to him or her whether addressed to him or her or addressed to another.[823]

The ECJ asserted that the law stemming from the treaty as an independent source of law could not be overridden by domestic law. However, the law could not be deprived of its character as community law being called into question.[824] Therefore, it seems that the validity of a community measure within a Member cannot be affected by the constitution of the state. Nevertheless, respect for fundamental rights forms part of the general principle of law protected by the ECJ.[825] The FCC has declared that the provisions of the BL are adequate if the community still does not have the same rule to protect the fundamental rights of their citizens within the legal framework of the BL.

There are two sources of EU law, with prior law including the TEU and the TFEU. The Charter is now a part of primary EU law. [826] The secondary source is recommendations, opinions,

[822] A W Bradley and K D Ewing. (2011). Constitutional & Administrative Law, 15th Edition, Pearson Education Limited, England, p-122.
[823] Art 263, TFEU.
[824] Michael Allen and Brian Thompson. (2011). Cases & Materials on Constitutional and Administrative Law, 10th Edition, Oxford University Press, UK, p-377.
[825] These sentences are the remarks of the authors Michael Allen and Brian Thompson in their book cases & Materials on Constitutional and Administrative Law, 10th Edition, Oxford University Press, UK, p-377.
[826] European Council on Refugees and Exiles. (2017). The EU Charter of Fundamental Rights; An Indispensable Instrument in the Field of Asylum, p-2(1-6). (Accessed on 5 June 2021). Retrieved from https://www.ecre.org/wp-content/uploads/2017/02/The-EU-Charter-of-Fundamental-Rights.pdf.

decisions, regulations and directives. Some researchers define supplementary law as the third source of EU law.[827] A case before the CC related to EU values indicated that the state shall transfer that case to the ECJ for a preliminary ruling.

The ECJ has supremacy over the courts of Member/s in general, but this does not seem to be in their constitutional laws. Again, however, the importance of EU law was limited by the constitutional principles which are beyond the reach of European integration.[828]

On the German side, the FCC determined the independence of the judiciary as three pillars. Object independence, personal autonomy and organisational autonomy.[829] Objective independence guaranteed that the judges could decide cases free of instruction or orders from any avoidable external influence.[830] Personal liberty is that judges who are permanently appointed to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of the judicial decision and only for the reasons specified in the law.[831] According to the author, judges, at least in the minimum form, may be evolutionarily removed from their positions before their term expires only by utilising judicial decisions.[832]

There are three conditions which limit the supremacy of EU law, namely the *Solange II* conditions, the ultra vires condition and the constitutional identity condition. The *Solange II* conditions restrict the application of the primacy principle. Therefore, the FCC refrains from reviewing the EU measures that fully consider the human rights enshrined in the BL. The ultra vires condition was previously mentioned in the *Maastricht* judgement and was later extended to the *Lisbon, Honeywell, and Gauweiler* judgements. Finally, the identity condition developed in the *Lisbon* judgement protects a functional democracy: the ability of a constitutional state to shape

[827] Available at https://eur-lex.europa.eu
[828] Arts 23 (1) and 79, the BL, 1949.
[829] Christian Bumke and Andreas Voßkuhle. (2019). German Constitutional Law: Introduction, Cases and Principles, Oxford University Press, UK, Para 2448, p-551(pp 1-581).
[830] Christian Bumke and Andreas Voßkuhle (2019), para 2449.
[831] Christian Bumke and Andreas Voßkuhle (2019), para 2450.
[832] Christian Bumke and Andreas Voßkuhle (2019), para 2453.

it democratically.[833] The FCC then recalled that the primacy of EU law to guarantee human dignity was limited by the BL.[834]

***Solange 1* (1974):** The case arose out of the partial forfeiture of a deposit by the import-–export company Internationale Handelsgesellschaft. [835] The company argued that the EU standard on the agricultural licencing system was a disproportionate infringement of their right to conduct business due to the German constitution and challenged this in the administrative court, the Verwaltungsgericht.

[836]According to the evaluation of the administrative court, the system of deposits was contrary to certain structural principles of national constitutional law which must be protected within the framework of community law. Furthermore, the deposit method was counter to the economic liberty and proportionality arising from Arts 2(1) and 14 of the BL.[837]

The important provisions disputed in the case are about personal freedom. Every person shall have the right to be free to develop his or her personality insofar as he or she does not violate the rights of others or offend against the constitutional order or moral law.[838] Another legal point is that the property and the right of inheritance shall be guaranteed. The regulations shall define their content and limits. (1) Property entails obligations; therefore, its use shall also serve the public good. (2) Expropriation shall also be permissible for the public good. However, it may only be ordered by or according to a law that determines the nature and extent of compensation. Such compensation shall be determined by the establishment of an equitable balance between the public interest and the interests of those affected. In case of a dispute concerning the amount of compensation, recourse may be had to the ordinary courts.[839]

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[833] Clara Rauchegger. (2018). The Bundesverfassungsgericht's Human Dignity Review: Solange III and its Application in Subsequent Case Lpaw, p-100 (Pp 94-113). (Accessed on 2 October 2021). Retrieved from https://www.researchgate.net.
[834] BVerfG, 6 September 2016, BvR 890/16, para 31.
[835] Brewer Mark. (2001). The European Union and Legitimacy: Time for a European Constitution, *Cornell International Law Journal*, 34(3), p-567 (pp 555-584). (Accessed on 13 September 2021). Retrieved from http://shura.shu.ac.uk/23241/
[836] Case 11/70 Internationalis Handelsgesellschaft (Solange I) [1970] ECR 01125. (Accessed on 13 September 2021). Retrieved from http://www.schutze.eu.
[837] Michael Allen and Brian Thompson. (2011) Cases & Materials on Constitutional and Administrative Law, p-376.
[838] Art 2(1), the BL, 1949.
[839] Art 14, the BL, 1949.

The ECJ reasons that 'the export deposit system is a geared to the fact that the applications for licenses were made by the free decision of the undertaking. The forfeiture of the deposit is neither a fine nor a penalty, but security for the fulfilment of an obligation voluntarily assumed'.[840]

The Second Senate of the FCC considered the constitutionality of the obligation to export under Article 12(1) (iii) of the EEC Council Regulation 120/67 regarding the lodging of a deposit and its forfeiture if the export has not been processed during the period of validity, and Article 9 of EEC Regulation 120/67 issued EEC Commission Regulation 473/67 on the common organisation of the market in cereals.[841]

The FCC recognised that the principle of state structure contained in Art 20 of the BL limited the legislature's authority to pursue integration.[842]

The ECJ reaffirmed the primacy of EU law. Nonetheless, EU law can be challenged if it violates the fundamental human rights according to the *Solange I* case even though human rights were not engaged in the case.

The *Solange I* case could identify the weak points of community law that were not enough to protect human rights like a Member, especially provisions like those prescribed in the BL. 'Nonetheless, the guarantee of fundamental human rights in the constitution prevails as long as the competent organizations of the community have not removed the conflict of norms under the Treaty mechanism'.[843] On the other side, the FCC decided to keep a right to review community law pursuant to the fundamental rights under the BL as long as the European communities had no content on European fundamental rights. The European Parliament is responsible for adopting it, and it should be effective as remedies guaranteed by the German BL.[844] It is a leading case regarding the supremacy of EU law and the protection of human rights under Germany's BL. The other instances, such as the *Solange II* decision (1986), the *Banana Market* decision (2000), the

[840] The University of Texas at Austin. (2021). BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß (29 May1974). Retrieved from www.law.utexas,edu/transnational/foreign-law-translations/german/case/php?id=588.
[841] Ibid. and Regulation No. 120/667/ EEC of the Council of 13 June 1967 on the common organisation of the market in cereals.
[842] Christian Bumke and Andreas Voßkuhle. (2019). German Constitutional Law: Introduction, Cases and Principles, p-391.
[843] Oxford University Press. (2012). Solange I, 1974. (Accessed on 14 September 2021). Retrieved from https://learninglink.oup.com/static/5c0e79ef50eddf00160f35ad/casebook_96.htm
[844] Karl M. Meessen. (1993). Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany, *Fordham International Law Journal*, Vol-17(3), p-513 (pp 511-530). (Accessed on 1 December 2021). Retrieved from https://core.ac.uk/download/pdf.

Maastricht judgement (1993), the *Lisbon* ruling (2009), the *European Arrest Warrant* (2005) and the *Honeywell* decision (2010) were also connected to the presumption of human rights violations by the EU regulations in reliance on the BL.

***Solange II* (1983):** The facts of the case were that the appellant business included the importing of preserved mushrooms from the non-European community states into the Federal Republic, and such imports were subject to community regulations. The business applied in writing to the competent Federal Office for Food and Licence to import 1,000 tons of preserved mushrooms from Taiwan. Nevertheless, the application was refused with reference to the provisions of regulation 2107/74.[845]

The Frankfurt Administrative Court dismissed the application as not well-established on the ground that the refusal of the licence had to be in line with Regulation 2107/74 (Regulation of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms) and Article 39 of the EEC Treaty.[846]

Article 1 of the regulation expressed that 'each application shall be accompanied with the loading of a deposit of 1 unit of account per 100 kilograms net weight.' The importers also had an obligation to fulfil the measures that applied during the validity of their licences. Otherwise, their deposits must be wholly or partly forfeited unless *force majeure* applies.[847]

According to the regulation, the deposit shall be forfeited in whole when the obligation to import has not been carried out during the time allowed in the permission. If the quantity imported is more than 5% less than the quantity indicated in the licence, the deposit shall be forfeited in part.[848]

The objectives of the CAP to necessary to understand more about the *Solange II* case are the following:

(a) To increase agricultural productivity.

[845] BVerfGE 73, 339 2 BvR 197/83. (22 October 1986).
[846] BVerfGE 73, 339 2 BvR 197/83. (22 October 1986).
[847] Art 1 (3), Regulation 2107/74 of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms.
[848] Art 9 (a/b), Regulation 2107/74 of the Commission of 8 August 1974 laying down protective measures applicable to imports of preserved mushrooms.

(b) To ensure thereby a fair standard of living for the agricultural population, increasing the individual earnings of a person engaged in agriculture.
(c) To stabilise markets.
(d) To guarantee regular supplies.
(e) To ensure reasonable supply prices to consumers. In working out the common agricultural policy, due account shall be taken into consideration.
(f) To preserve the characteristics of the agricultural activities arising from the social structure of agriculture and from structural and natural disparities between the various agricultural regions.
(g) To gradually make the appropriate and necessary adjustments.
(h) To recognise the fact that in Member/s, state agriculture constitutes a sector closely related to the economic sector.[849]

In accordance with the provisions related to the case, the ECJ has the function to make a preliminary decision concerning the interpretation of the EU treaty involving the EEC treaty, the validity and interpretation by the institutions of the communities and the interpretations of the statutes of any bodies set up by an act of the Council for which such statute provides.[850]

The FCC recognised the ECJ as a lawful adjudicator of all issues growing out of the community, even when the conflict concerns basic personal rights guaranteed by the FCC.[851] The author criticised that 'the FCC has reserved its own precedent (*Solange I)* of more than a decade's standing and has signalled a new phased in the legal history of European economic integration'.[852]

In detail, the FCC stated that it would no longer evaluate the compatibility of EC law with German law. The European community did not have enough provisions to protect against human rights violations like in Germany. To clarify the previous sentence, Germany is one of the founding countries of the EU and the strengthening of the EU is also totally based on the legal notions of

[849] Art 39 (1/2), The Treaty Establishing the European Economic Community (Treaty of Rome), 1957.
[850] Art 177 (a/b/c), The Treaty Establishing the European Economic Community (Treaty of Rome), 1957.
[851] E.R. Lanier. (1988). Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Community as Lawful Judge, *Boston College International and Comparative Law Review*, Vol 11 (1), p-1(pp 1-29). (Accessed on 29 December 2021). Retrieved from https://lawdigitalcommons.bc.edu/viewcontent.
[852] E.R. Lanier. (1988). Solange, Farewell: The Federal German Constitutional Court and the Recognition of the Court of Justice of the European Community as Lawful Judge p-1 to 2.

the Members. Therefore, it seemed that the jurisdiction was under the BL rather than the community legal framework.[853]

However, the FCC accepted the doctrine of the supremacy of EU law, but its acceptance was conditional on the ECJ conforming to the BL.[854] Therefore, the CC claimed jurisdiction for the protection of human rights in Germany, not only against Germany but also against the acts of a European public authority in so far as the authority explicitly gives up its former position and challenges the authority of the ECJ.[855]

***Banana Market* Decision (2000):** The *Banana* decision by the FCC in 2000 has confirmed the notions concluded in *Solange II*. The Second Senate ordered that 'constitutional complaints and submissions by courts which asserts that fundamental rights guaranteed in the BL have been infringed by secondary European community law are inadmissible if their grounds do not state that the development of the European law. It means that the grounds for a constitutional complaint must state in detail that the protection of the fundamental rights unconditionally required by the BL is not secured in the respective case. It requires protection of fundamental rights on the national and the community level like *Solange II* decision'.[856] The FCC will no longer exercise its jurisdiction to decide the applicability of the secondary community law of the EU cited in the relevant case by a German court. It will no longer review such legislation by the standard of fundamental rights contained in the BL.[857] The Senate maintained this view in the *Maastricht* decision by giving a guarantee in cooperation with the Court of Justice of the European Communities for the adequate protection of German residents. The ECJ is also competent to protect the fundamental rights of German citizens against acts done by the German public authority on account of secondary community law.[858]

***Solange III* (2015):** Although this is not the real name of the case, the facts of the case were similar to the *Solange* cases between the FCC and ECJ. The FCC in its *Solange* judgements

[853] Mark Killian Brewer. (2001). The European Union and Legitimacy: Time for a European Constitution, *Cornell International Law Journal*, Vol 34 (3), p-571 (pp 555-584). (Accessed on 19 September 2021) Retrieved from https://www.shura.shu.ac.uk.Brewer_european_union.
[854] Mark Killian Brewer. (2001). The European Union and Legitimacy: Time for a European Constitution, p-573.
[855]Joachim Wieland. (1994). Germany in the European Union – The Maastricht Decision of the Bundesverfassungsgericht, 5 EJIL, p-260 (Pp 269-266).
[856] Paras 1 and 2, BVerfG, Order of the Second Senate of 7 June 2000- 2 BvL 1/97.
[857] Para 59, BVerfG, Order of the Second Senate of 7 June 2000- 2 BvL 1/97
[858] Para 60, BVerfG, Order of the Second Senate of 7 June 2000- 2 BvL 1/97.

had already interpreted the fundamental rights provisions of the BL as an element of constitutional identity.[859] The FCC ruled that the future development of the EU remains under the conditional acceptance of the FCC according to the ratification of the Maastricht treaty.[860] In this case, the FCC developed a new situation for the approval of the principle of priority.[861] The ECJ declared that the laws adopted by European institutions must be integrated into the legal systems of EU countries, which are then obliged to comply with them. This means that the EU has primacy over national laws.[862] The ECJ confirmed the primacy of EU law in the cases of *Costa v ENEL*, *Internationale Handelsgesellschaft mgH v Einfuhr-und Vorratsstelle fur Getreide und Futtermittel*, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* and *Marleasing SA v. La Comercial Internacional de Alimentacion SA*.[863]

The FCC innovated the constitutional identity condition into a safeguard mechanism for protecting human dignity in individual cases. The *Solange III* case could not replace *Solange II,* but it became complete because of a limitation to the supremacy of the EU by the constitutional identity. Human dignity and protection of human rights are determined as a constitutional identity of Germany.[864] They cannot be violated even by EU law or acts of the EU institutions, and it serves as a limit on European integration. Human dignity is a constitutive principle granted by the BL.[865]

European Arrest Warrant (EAW) in Constitutional Criminal Adjudication: The European Arrest Warrant (hereinafter: EAW) is a mechanism by which individuals wanted in connection with significant crimes are extradited between EU Members.[866] It is a simplified cross-border judicial surrender procedure. The EAW is a warrant issued by a judicial authority of the

[859] Clara Rauchegger. (N.D). The Bundesverfssungsgericht's Human Dignity Review: Solange III and its Application in Subsequent Case Law, p-101 (pp 94-113). (Accessed on 22 September 2021). Retrieved from https://www.diglib.uibk.ac.at.
[860] Nikos Lavranos (NL Investment Consulting). (2020). The CJEU German Constitutional Court Debate and Impact on Achmea and the Termination Agreement, Kluwer Arbitration Blog. (Accessed on 22 September 2021) Retrieved from https://www.arbitratioinblog.kluwerarbitration.com.
[861] Clara Rauchegger. (N.D). The Bundesverfssungsgericht's Human Dignity Review: Solange III and its Application in Subsequent Case Law, p-95. Retrieved from https://www.diglib.uibk.ac.at.
[862] *Van Gend en loos v Nederlandse Administratie der Belalstingen* (Case 26/62).
[863] Primacy of EU Law. (N.D). EUR-Lex. (Accessed on 28 Sept 2021). Retrieved from https://www.eur-lex.europa.eu.summary/primacy_of_eu_law.htlm.
[864] Clara Rauchegger. (N.D). The Bundesverfssungsgericht's Human Dignity Review: Solange III and its Application in Subsequent Case Law, p-102.
[865] Arts 1 and 79(3), the BL, 1949.
[866] European Arrest Warrant. (2021). National Crime Agency. (Accessed on 28 September 2021). Retrieved from https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-cap.

European Union Member/s to have another Member/s arrest and surrender a requested person to conduct a criminal prosecution or execute a custodial sentence or detention order. It was started because of the 9/11 attacks.[867] The main principle of the EAW is the mutual recognition of the judicial decisions in European Union criminal law. Furthermore, the main aim is to make the surrender procedure quick and straightforward.

The EAW has replaced the lengthy extradition procedure that existed in EU countries.[868] It is meant to herald a new era of judicial cooperation in criminal matters within the EU. Its primary intention is to remove the formal extradition process among EU Member/s by replacing it with a system of surrender between judicial authorities to simplify and speed up the extradition procedure.[869] The extraordinary feature of the EAW is the principle of mutual recognition. The EAW is the first and the most symbolic application[870] of the new integration instrument in EU justice and Home Affairs.[871] Mutual recognition of judicial decisions has dominated the development of criminal law in Europe. Mutual recognition of judicial decisions in criminal matters requires judicial authorities of the EU Member/s to execute the EAW. This is why the EAW process can be determined and executed by the appropriate judicial authority between the Member States.[872]

Conflicts of law appeared throughout the EU in the implementation of the EAW. Some of the national implementing provisions were found to be unconstitutional in Poland, Germany and Cyprus in 2005.[873]

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[867] Dr Wouter van Ballegooi. (2020). European Arrest Warrant, European Parliamentary Research Service, p-3 (pp 1-107). (Accessed on 5 October 2021) Retrieved from https://www.fairtrails.org/european-arrest-warrants.

[868] European Arrest Warrant. (2020). European Commission. (Accessed on 28 September 2021). Retrieved from https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en#howworks.

[869] Nicolas Nohlen. (2007). Germany, the European Arrest Cases, *International journal of Constitutional Law*, Vol 6(1), (Pp153-161). (Accessed on 6 October 2021)

[870] Para 1, Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, COM (2005) 63 final, Brussels, 23.02.2005. Retrieved from https://eur-lex.europa.eu.

[871] Libor Klimek. (2012). European Arrest Warrant: Procedural Instrument for Public Order Enforcement in the EU Area of Freedom, Security and Justice, *Czech Yearbook of International Law*, p-11 (pp 1-18). (Accessed on 23 October 2021). Retrieved from https://papers.ssrn.com/sol3/paper.cfm?abstract_id=2067338.

[872] Libor Klimek. (2012). European Arrest Warrant: Procedural Instrument for Public Order Enforcement in the EU Area of Freedom, Security and Justice, p-12.

[873] Libor Klimek. (2012). European Arrest Warrant: Procedural Instrument for Public Order Enforcement in the EU Area of Freedom, Security and Justice, p-14.

On 18 July 2005, the Second Senate of the FCC declared the EAW Act to be contrary to the freedom from extradition[874] for German nationals and the guarantee of recourse to a court[875] enshrined in the German Constitution and thus void.[876] A German citizen who has committed crimes on German territory will almost never be surrendered to another EU Member/s. First, in almost all cases, it is reasonable to think that the German judicial authorities will start criminal proceedings against the person concerned and, second, that the authorities will not execute a possible arrest warrant,[877] because the BL and the principle of proportionality prohibit them from doing so.[878] The EAW represents a legal mechanism that shows a high confidence level in the EU Members. The framework decision does not allow a Member to refuse to surrender its own nationals merely because of their nationality.

According to the FCC's decisions in the former cases, the principle of individual guilt comes from the right to human dignity. For this reason, its infringement is at the same time a violation of the constitutional identity of the BL.[879] Constitutional identity nowadays plays a vital role against the EU's actions in politics and the economy. In theory, EU law ranks superior to the domestic laws of the Members. In practice, the constitutional laws of each Member/s seem much more applicable when EU law could not support the adequate protection of fundamental rights as was the case with the German BL.

***Maastricht Treaty* Case:** In 1993, the FCC issued its *Maastricht* decision. The FCC declared that it would examine whether legal acts of the European institutions and organs are within or exceed the sovereign power transferred to them. Again, the FCC, not the ECJ, decided

[874] Daniel Sarmiento. (2008). The European Union: The European Arrest Warrant and the Quest for Constitutional Coherence, *International Constitutional Law Journal* (I•CON), Vol 6(1), p-173 (171-183). (Accessed on 9 Oct 2021). Retrieved from https://academic.oup.com/icon/article/abstract.
[875] Art 19(4) mentions that 'Should any person's rights be violated by public authority; he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph'.
[876] Nicolas Nohlen. (2007). Germany, the European Arrest Warrant Cases, p-153.
[877] Art 16 (2) mentions that no German may be extradited to a foreign country. The law may provide otherwise for extraditions to a Member State of the European Union or to an international court, provided that the rule of law is observed.
[878] Nicolas Nohlen. (2008). Germany: The European Arrest Case, (I•CON) Vol-6(1), p-158 (pp 153-161). (Accessed on 7 October 2021). Retrieved form https://www.academia.com.
[879] Clara Rauchegger. (N.D). The Bundesverfssungsgericht's Human Dignity Review: Solange III and its Application in Subsequent Case Law, p-104.

the limit on European power with respect to Germany.[880] The most crucial notion limited by the FCC is that legal acts of the EU which exceed the competencies outlined in the treaty as interpreted by the FCC will not be legally binding in Germany.[881] The organisational structure of the European community (EC) seemed too weak, and the remaining power of the Member/s was considered too strong.[882]

The headnotes of the FCC on the reasoning in the decision related to the Maastricht treaty with the federal republic, democracy and the competence of parliament are:

(1) Article 38 of the BL forbids the weakening of state power gained through an election and of the influence on the exercise of such power and of the impact on the exercise of such power by means of a transfer of duties and responsibilities of the Federal Parliament to the extent that the principle of democracy, declared as inviolable in Art 79 para 3 in conjunction with Art 20 para 1 and 2 of the BL, is violated.
(2) The principle of democracy does not prevent the Federal Republic of Germany from becoming a member of a compound of states. However, the legitimation and influence derived from the people will be preserved within the alliance of states.
(3) The vital factor is that the democratic foundations upon which the EU is based are extended concurrent with integration and that a living democracy is maintained in the Member/s while integration proceeds.
(4) Art. 38 of the BL is violated if a law that subjects the German legal system to the direct validity and application of the law of the supranational EC does not give a sufficiently precise specification of the assigned rights to be exercised and of the proposed programme of integration[883]

[880] Steve J. Boom. (1995). The European Union after the Maastricht Decision: Will Germany be the 'Virginia of Europe'? Vol 43(2), *The American Journal of Comparative Law*, p177 (pp 177-226). (Accessed on 1 December 2021). Retrieved from https://www.jstor.org/stablee/840514.
[881] Ibid.
[882] Karl M. Meessen. (1993). Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany, Vol-17(3), *Fordham International Law Journal*, p-528(pp 511-530).
[883] Judgment of 12 October 1993- 2 BvR 2134/92, 2 BvR 2159/92. The full text in German is reported in 89 Official Court Reports 155 [BVerfGE 89, 155].

The Treaty of Maastricht should be understood as a political compromise in European integration rather than as a definitive legal document.[884]

The main argument and conflict regarding the Maastricht Treaty is the principle of democracy: especially the right to vote, transfer of power limited to the EC in line with Article 38 of the BL and the integration process.[885]

The complainants claimed that the amendments to the BL and the law transforming the Treaty of Maastricht into national law violated the following: (i) the right to human dignity; (ii) the right to free development of personality; (iii) the right to form associations and societies; (iv) the right to freely establish political parties; (v) the right to freely choose a trade, occupation or profession; (vi) property rights; (vii) the right to elect deputies of the German Bundestag; and (viii) the right to constrain any person seeking to abolish the constitutional order of Germany.[886]

The FCC found that only one of the complaints was admissible, and it was a violation of the right to vote in elections to the Bundestag. Only the FCC is vested with the power to accept constitutional complaints. A complaint may be filed by any person alleging that one of his or her fundamental rights or one of his or her rights under para 4 of article 20, Articles 33, 38, 101, 103 or 104 has been infringed by a public authority.

According to the decision, the FCC guaranteed adequate protection of the complainant's basic rights in cooperation with the European Court of Justice.[887]

In my opinion, the FCC is the unique political organisation that can interpret the BL to solve constitutional problems. EU law is legally binding on its Members; but the ECJ, as a judicial organ of the EU, cannot construe the constitutions of its Members. The Constitutions, the structures of the courts, legal backgrounds, historical culture and political differences already exist among the Members. The individual CCs have their legal difficulties among the governmental branches, even at the domestic level. Accordingly, the EU and European institutions, EU and European Law,

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[884] Daniel Wincott. (1996). Federalism and the European Union: The Scope and Limit of the Treaty of Maastricht, *International Political Science Review*, Vol 17(4). (Accessed on 1 December 2021). (I have referred to just one sentence mentioned in the abstract. I could not read the whole paper, so I cannot express the pages numbers.) Retrieved from https://journals.sagepub.com/doi/101177/01925196017004005?icid=int.sj-abstract.similar-article.1&

[885] This is my opinion after studying the literature reviews and the Maastricht decision by the FCC.

[886] Joachim Wieland. (1994). Germany in the European Union – The Maastricht Decision of the Bundesverfassungsgericht, p-260.

[887] Joachim Wieland. (1994). p-261.

and EU and European citizenship rights and duties are already working together to solve the problems. The main task of the EU's institutions is not to compete for the strength of their existence with the Members but to protect the rights of the EU citizens and to check the actions of the governments of the EU Member/s with respect to violations of human rights. These are the civilizations of the EU and the whole of Europe in the world. And the EU has become the third largest community because of its ability to maintain the values on which it was founded. The values are the original principles to establish the EU, and the founding countries are experienced in demanding these values. Again, these values are primarily coming down from international standards and criteria to keep the peace, obtain equality before the law, get fairness and justice for society, avoid discrimination and so on. All of these relate to democracy and the rule of law. It is also important to systematically and impartially analyse the nature of democracy and the rule of law. Therefore, state authorities should know more about these principles. Member/s need a FL that expresses their rights and responsibilities and those of citizens as well.[888]

The right to vote was affected by a transfer of competencies by the German parliament to another institution. [889] The FCC's approach in the *Maastricht* case is that the right to vote will not be recognised if the parliament transfers its powers through an international agreement, although the parliament is composed of democratic elections.[890] The FCC reasons that 'the guarantee safeguards the right to participate in the legitimation of public authority by the people carried out through election and exercise such public officer'. Moreover, Art 38 of the BL does not allow the transfer of the power and functions of the German Bundestag to the European level by violating the principle of democracy. The Article prohibits the European Integration from rendering the legitimation of state authority and influencing the exercise of this authority.[891]

Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instruction and responsible to their conscience.[892]

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[888] This paragraph consists of my thoughts and opinions after reading the literature reviews.
[889] Karl M. Meessen. (1993). Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany, p-514.
[890] Karl M. Meessen. (1993). Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany, p-515.
[891] See *Supra Note 630*.
[892] Art 38(1), the BL, 1949.

The FCC exercises its jurisdiction regarding the applicability of secondary community law in Germany in a cooperative relationship with the ECJ. The ECJ ensures the protection of fundamental rights in individual cases within the entire community, whereas the FCC can limit its scope of review to securing the general inalienable fundamental rights standards.[893] Therefore, the FCC concluded that the EU treaty is compatible with the principle of democracy. However, the FCC set out specific circumstances regarding the EU and emphasised particular requirements for its democratic legitimation.[894] For instance, if EU entities were to implement the EU treaty beyond the scope of the treaty instrument on which the act of approval was based, the resulting legal action would not be binding within the German sphere of sovereignty.[895]

On 12 October 1993, the *Maastricht* judgement reserved the right of final review for German courts. Despite confirming the constitutionality of the Maastricht Treaty, the judgement qualifies for the latter category of a nationally assertive position.[896] Professor Joachim Wieland concluded that the *Maastricht* decision shows the ways to a further integrated Europe, without answering all theoretical questions.[897] The Maastricht treaty was not the first case in which the FCC made fundamental statements about the relationship between the community and German constitutional law. The ECJ held that national courts could not review community law under their constitutions in a preliminary ruling under Art 177 of the EEC (European Economic Community) treaty. The FCC responded to that decision in its *Solange I* decision by ascertaining that the FCC has the power to review alleged human rights violations under European instruments. The FCC revised the *Solange I* decision in a *Solange II* case twelve years later.[898]

***Lisbon Treaty* (2007) Case:** The Treaty of Lisbon is a treaty amending the Treaty Establishing the European Community.[899] It originated from the failed constitutional treaty. It amended the name of the European Community into European Union and Treaty Establishing the

[893] See *Supra Note 630.*
[894] Judgment of 12 October 1993 – 2 BvR 2134/92, 2 BvR 2159/92.
[895] Ibid.
[896] Karl M. Meessen. (1993). Hedging European Integration: The Maastricht Judgment of the Federal Constitutional Court of Germany, p-512.
[897] Joachim Wieland. (1994). Germany in the European Union – The Maastricht Decision of the Bundesverfassungsgericht, p-266.
[898] Manfred H. Wiegandt. (1995). Germany's International Integration: The Ruling of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops, *American International Law Review*, Vol 10(2), p-892 (pp 889-916). (Accessed on 6 December 2021) Retrieved from https://digitalcommons.wcl.american.edu/auilr
[899] 2007/C 306/01.

European Community Treaty on the Functioning of the European Union.[900] According to the Lisbon treaty, the protection of fundamental rights in the EU is based on two foundations: the Charter of Fundamental Rights of the EU and the EU's unwritten fundamental rights.[901] Furthermore, according to the treaty, the EU's aim is to promote peace, its values and the wellbeing of its people.[902]

The Lisbon treaty clarifies the competences of the EU. The exclusive competence is that the EU alone can legislate and adopt binding acts; the shared competences are that the EU and EU countries can legislate and adopt legally binding acts and supportive competences and the EU can only intervene to support, coordinate or complement the action of EU countries.[903] The Treaty gives the EU the entire legal personality to sign international treaties or join an international organisation.[904] It reconfirms the validity of the principle of conferral, the principle of subsidiarity and the principle of proportionality.[905]

The FCC found that the EU does not have a political organ that has come into being by equal selection of all citizens and that can uniformly represent the people's will.[906] All complainants claimed that an infringement of their voting rights under Article 38 invoked the democratic principle to claim that the laws undermined the competencies of the Bundestag. This means that the EU does not have democratic legitimation, and the rules support the Federal Republic of Germany to be an independent state.[907] The Second Senate of the FCC decided that the Act approving the Treaty of Lisbon is compatible with the BL. In contrast, the Act Extending and Strengthening the Rights of the Bundestag and Bundesrat in European Union Matters infringes Article 38(1) in conjunction with Article 23(1) of the BL in so far as the Bundestag and Bundesrat have not been accorded sufficient rights of participation in EU law-making procedures and the

[900] Para 34, BVerfG Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08.
[901] Para 35, ibid.
[902] Art 2, Treaty of Lisbon, 2007, Official Journal of the European Union, Vol-50 (C-306). (Accessed on 1 December 2021). Retrieved from https://eur-lex.europa.eu/LexUriServ/
[903] EUR-Lex. (2016). Division of Competence within the European Union. (Accessed on 8 November) Retrieved from https://eur-lex/europa.eu/legal-content/TXT
[904] European Parliament. (2021). Treaty of Lisbon. (Accessed on 5 November 2021). Retrieved from https://www.europarl.europa.eu/factsheets/sheet/.
[905] Para 1595, Christian Bumke and Andreas Voßkuhle. (2019). German Constitutional Law: Introduction, Cases and Principles, p-391.
[906] Lisbon para 280, Jo Eric Khushal Murkens. (2009), p-529.
[907] Para 1596, Christian Bumke and Andreas Voßkuhle. (2019). German Constitutional Law: Introduction, Cases and Principles, p-392.

treaty amendment process.[908] The FCC further established standards for judging the constitutionality of other integration measures based on the *Maastricht* decision.[909] The FCC announced some doubts and restrictions based on Art 79 (3) of the BL in the *Maastricht* decision. The Article blocked the development of the EU into a fully federal state. Because the EU is not a sovereign state, it lacks constitutional autonomy. It can be said that the Member/s are still the masters of the treaties. But the decision has not barred further development of EU integration in practice, and the EU may decrease its status because of legal conflicts with its Members and because it does not have the EU's constitution.[910]

The FCC declared that the legislation dealing with the implementation of the Lisbon treaty rules on the involvement of national parliaments in the EU is unconstitutional[911] since Germany is the most distinct federal state in the EU and the German Länder were affected by the EU integration in the *Lisbon Treaty* case.[912]

In this case, the FCC could solve the possible loss of law-making powers by the Länder by confirming the transfer limitation of a Member's powers to the EU. The FCC approved the principles of democracy, federalism and subsidiarity between the EU and its constitution.

Art 38(1) mentions that 'Members of the Bundestag shall be elected in general, direct, free, equal and secret election. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience'.

Article 23(1) expresses that 'With a view to establishing United Europe, Germany shall participate in the development of the EU that is committed to democratic, social and federal principles, to the rule of law and the principle of subsidiarity and that guarantees a level of protection of basic right essentially comparable to that efforted by this BL. To this end, the Federation may transfer the sovereign powers by a law with the consent of the Bundestag. The establishment and changing of its treaty foundations and regulations the Basic Law shall subject

[908] BVerfGE 123, 267- Lisbon Decision. (Accessed on 5 November).
Retrieved from https://germanlawarchive.iuscomp.org.
[909] Para 1603, Christian Bumke and Andreas Voßkuhle. (2019). German Constitutional Law: Introduction, Cases and Principles, p-393.
[910] Werner Heun. (2011). The Constitution of Germany: The Contextual Analysis, p-80.
[911] Arndt Wonka. (2010). Accountability without Politics: The Contribution of Parliament to Democratic Control of EU Politics in the German Constitutional Court's Lisbon Ruling, in Andreas Fischer-Lescano, Christian Joerges and Arndt Wonka (Eds.) ZERP Discussion Paper 1/2010, p-55 (pp 55-62).
[912] Werner Heun. (2011). The Constitution of Germany: The Contextual Analysis, p-81.

to majority voting of the Bundestag and the Bundesrat. And, the alternations affecting the division of federation into Lander, their participation in the legislative process, and the principles from Articles 1 to 20 shall not be admissible'.

Professor Dr. Jutta Limbach recommended that 'the principles of democracy, the rule of law, social state, federalism and respect of human dignity are not alterable not even by a constitutional amendment. The aim was to prevent the enemies of democracy from overturning it using its own instrument – like the majority rule'.[913]

PSPP (2015– 2021) **Case:** One of the latest cases argued about the primacy of EU law related to the proportionality assessment of the PSPP judgement by the ECJ. PSPP is the Public Sector Purchase Program, and it was a programme to mitigate the crisis caused by the COVID-19 pandemic in the Euro area.[914] On 5 May 2020, the FCC issued its judgement in the proceedings on the European Central Bank (Hereinafter: ECB) Public Sector Purchase Program. For the first time, the FCC ruled that the ECJ and ECB had exceeded their power and those judgements were not binding in Germany.[915] The FCC found the programme to be outside of the ECB and a violation of the individual constitutional right to democracy.[916] The FCC allows an individual to bring a constitutional complaint when their basic rights are violated by acts of state power. The FCC has construed the BL to contain an individual right to democracy in addition to the right to vote. According to the legal reasoning of the FCC, the individual right to democracy is infringed when too much power is transferred to the EU or when EU institutions act *ultra-vires*.[917] The FCC referred the case to the ECJ and questioned the validity of the ECB's decision. Although the ECJ confirmed the legality of the ECB's decision,[918] the FCC declared that the ECJ's decision was

[913] Professor. Dr. Jutta Limbach. (N.D) How a Constitution can Safeguard Democracy: The German Experience. (Accessed on 7 December 2021). Retrieved from https://ccpl.law.hku.hk/content/uploads/2018/03/Pub/Conf%20&%20Seminar/Juttalimbach.pdf.

[914] Annamaria Viterbo. (2020). The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank, *European Papers- A Journal on Law and Integration*, Vol 5(1), p-671(pp 671-685). (Accessed on 11 May 2022). Retrieved from https://europeanpapers.eu.

[915] Isabel Feichtner. (2020). The German Federal Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europa, *German Law Journal*, Vol 21(5), Cambridge University Press, p-1090 (pp 1090-1103). (Accessed on 11 May 2022). Retrieved from https://www.cambridge.org.

[916] Isabel Feichtner. (2020). The German Federal Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe, p-1091.

[917] Isabel Feichtner. (2020). The German Federal Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe, pp-1091-1092.

[918] Court of Justice of the European Union. (Press Release No. 192/18). The ECB's PSPP program for the Purchase of Government Bonds on Secondary Markets does not Infringe EU law.

questionable due to its lack of reasoning in its proportionality assessment and the poor standard of review employed. The ECB's decisions also lacked proper reasoning and must be amended to justify the programme.[919]

The FCC pointed out that the ECJ focussed on the third stage of proportionality review, namely appropriate or proportionality in the strict sense. The ECJ requires that consideration be given to the economic and social policy effects of the PSPP. The ECJ had focused instead on the question of suitability and necessity.[920] The FCC declared that the ECB's decision and the ECJ's judgement were ultra-vires and not binding in Germany.[921]

The Commission argued that Germany disobeyed the principles of autonomy, primacy, effectiveness, uniform application and respect for the jurisdiction of the ECJ.[922] The Commission further argued that the FCC breached the primacy of EU law by going beyond its competence. Therefore, the Commission started the infringement procedure against the EU Member/s by sending a notice letter on 9 June 2021.[923]

On 2 December 2021, the Commission decided to close the infringement procedure against Germany concerning the judgement of the FCC of 5 May 2020 which was related to the PSPP of the ECB for three reasons. First, in its reply to the formal notice letter, Germany provided very strong commitments. Germany declared that it affirms and recognises the principles of autonomy, primacy, effectiveness and uniform application of EU law and EU founded values under Art 2 TEU, including the principle of the rule of law. Second, Germany recognised the authority of the ECJ and that its decisions are final and binding. It also considered that the legality of acts of EU institutions cannot be made subject to the examination of constitutional complaints before German courts but can only be reviewed by the ECJ. Third, the German government, explicitly referring to

[919] EU Law Live. (2020). German Constitutional Court Rules the Court of Justice's Weiss Judgment Ultra Vires due to Poor Reasoning and Weak Standard of Review. (Accessed on 12 May 2022). Retrieved from https://www.eulawlive.com/

[920] Isabel Feichtner. (2020). The German Federal Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe, pp-1096-1097.

[921] 2 BvR 1651/15, 2 BvR 2006/15. (BVerfG, Order of the Second Senate of 29 April).

[922] Art 267, TFEU, 1957.

[923]European Sources Online (2022). Infringement Procedure by the European Commission against Germany over Breach of Fundamental Principle of EU Law. (Accessed on 13 May 2022). Retrieved from https://www.europeansources.info

its duty of loyal cooperation enshrined in the treaties, committed to use all the means at its disposal to avoid a future repetition of an *ultra vires* finding and take an active role in that regard.[924]

In brief, the reasonable acceptance of the ECJ on the FCC's decision of *ultra vires* is a result of the constitutional complaints submitted by the German/European citizens before the FCC. It proves that admissibility of constitutional complaints before a domestic court is important if the procedure initiates the public interest. Moreover, the efficiency, integrity, merits and ability of the judges from the ECJ and FCC are also considerable based on EU integration.

Finally, the case polished the concept that cooperation between the national courts and the EU institutions is needed to protect EU values from internal and external autocratic attacks.[925]

4.8 Critical Study on the Contributions of the German Federal Constitutional Court in the Development of European Union Law

Germany's contributions to developing EU law are found in case law. The leading cases between the ECJ and the FCC are still cited on the same issues and in similar matters. All the cases are related to human rights protection in the economic, social and political sectors. In connection with the EU values of democracy, human rights and the rule of law, the FCC guarantees basic rights protection by implementing democracy. Therefore, I realised that democracy means the protection of human rights in Germany and in the EU. The safeguard of the rule of law framework in Germany is connected to federalism. In addition, German federalism is regarded with the separation of powers and the appointment of judges to the FCC. Art 50 of the BL allows the Länder to participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the EU.

Germany focuses on the adequate protection of human rights because of its historical background of the Nazi regime. Therefore, the FCC has significant power to interpret the BL, and human dignity is defined as a human right in the FRG. Furthermore, federalism, democracy and social affairs have been considered to interpret the BL. Therefore, federalism is one of the criteria for analysing the separation of powers between the legislature, executive and judiciary regarding

[924] European Commission. (2021). December Infringement Package: Key Decisions. (Accessed on 13 May 2022). Retrieved from https://ec.europa.eu/

[925] The idea comes partly from the article 'All's well that ends well?' by Pro. Dr. Thomas Giegerich. (2021). (Accessed on 13 May 2022). Retrieved from https://jean-monnet-sarr.eu/?page_id=125638.

the appointment of CC judges in Germany. In Europe, notably, there is no formal requirement for the appointment process for the highest court judges.

The outstanding aspect for the German Republic is to set up federalism. Art 24 of the BL expresses that federalism is connected to the transfer of sovereign power to the international organisations. The state power is divided between the Federation and Länder. Federalism is also the German concept of integration to the EU under the reasoning of the FCC.

The principle of proportionality which fundamentally originated in Germany became useful and practicable before the ECtHR to interpret the European Convention and also before the European Court of Justice to construe the European treaty. The German FCC practices proportionality to safeguard fundamental rights and limit basic rights. The principle of proportionality is also defined as a 'balancing act'. The notion of proportionality was fully developed in the case of *Internationlae Handelsgesellschaft* (Case 11/70).

The BL was enacted in 1949 before the enactment of European and European Union laws. Again, Germany was one of the first Member/s to constitute the EU. Therefore, Germany's legal culture and tradition were already in existence and had been practiced before the development of EU law. It can thus be said that EU law was accumulated from the legal culture of the Member/s. Otherwise, the EU law prescribes uniformity for the Member/s. The prominence of Germany is in the modes to sufficiently safeguard human rights against the EU institutions. The EU community did not have any specific laws to protect fundamental rights according to the conflicts between the ECJ and the FCC. As a result, the EU Charter of Fundamental Rights 2000 has arisen. The core objective of the EU and its Member/s is to protect the minimum rights of each citizen. Therefore, the principle of proportionality concerning human rights developed in Germany, mitigated by various legal orders and systems and even reflected in international law.

Conclusion

I learned about the judicial independence of Myanmar compared to the other legal systems of Indonesia, Thailand in the ASEAN, Hungary and Poland in Europe as well as the US system. Judicial independence is essential in every country. It is demanded in the modern states.

The following are important points I have found after studying constitutionalism, especially in the EU. Judicial independence is one of the guarantees given by the Constitution.

- The role of the judiciary is weaker than the legislature and executive in the domestic, regional and international legal theories and in practice as well.
- Judicial independence is vital for the promotion of democracy and human rights.
- The independence of the judiciary is related to the constitutional problems and political issues.
- Sometimes that linkage between political issues and legal inefficiency can create a constitutional crisis among the governmental organs.

When I studied judicial independence in Hungary, I focused on the functions of the CC of Hungary, and I also had to learn EU law and values. As Hungary became a member of the EU in 2004, I learned how Hungary had tried to become a democratic country and implement a democratic system.

After attending the national and international conferences that could help me to develop my dissertation, I understand that:

- Advantages of regional integration between the EU and the Member/s exist.
- EU law has binding legal force on the Member/s.
- EU standards of judicial independence are based on international standards.
- It is obligatory for Member/s to maintain EU laws and values.
- There are essential functions of the CC in Hungary.
- The Polish constitutional crisis relates to the progress of regional integration.
- Broad EU citizen rights are vested in the Member/s.

In conclusion, the judicial system of Hungary under the Constitution 2011 still needs to be independent under theories and in practice. Under the integration theory, Member/s have to share their competencies with the EU, and their citizens can enjoy both the fundamental rights and the rights that the EU law gives them. Therefore, when someone's fundamental rights have been violated in his or her country and when the CCs refuse the right to a hearing, the person can claim damages for their violated rights to the ECtHR. The European Commission can then allege that

the Member/s did not follow EU law before the ECJ under the integration theory. It is remarkable machinery except for the length of time it takes before the ECtHR and ECJ.

The European tradition of a constitutional judiciary developed chiefly after the World War II as a natural reaction against the brutal trampling by Nazi and fascist dictatorships upon the system of values and democratic principles.

After 1930, the Kelsenian Court model and the CC system were exercised in Germany, Italy, Spain, Portugal, the Middle European countries and some other countries.

Therefore, the establishment of the CCs in Europe aims to promote democracy because democracy can:

(1) support mutual respect between the government and the governed,

(2) make sure the principle of the separation of powers among government organisations is followed,

(3) expand human rights, and

(4) create peace and security for a state.

Finally, CCs can guarantee the judiciary's independence, which is essential to implement the facts stated in (1) to (4). The important thing is that democracy should be stable. The interconnection between the independence of the judiciary and the separation of powers is much more linked to a stable democracy. The norms of judicial independence in Europe can be checked by learning the practical uses of the decisions and judgements of a CC for the public in a European country and the effective influence between the legislature, executive, and judiciary within it.

In general, the principle of the separation of powers is exercised as vertical and horizontal based on the requirements of the regions. The working vertical separation of powers can be learned in Germany and its constitutional law. On the other hand, the United States is popular for using the horizontal separation of powers. However, these types of separation of powers can in practice be mixed much like the common law and civil law systems.

Results and Findings

I presented some judicial problems in Hungary, Poland and Myanmar in my research. The issues regarding judicial independence and constitutional guarantees according to their constitutional laws were similar. As I mentioned in Chapter II, the legal systems are different in these three countries. However, similar conflicts among the governmental organisations emerged when there was no legal certainty among them in the initiative for the public good. Therefore, the responsibility to abstain from friction is on all branches, especially the legislature and executive, in order to raise the judiciary's role. The judiciary should be independent due to international and national laws. There are several criteria to keep the judicial branch independent.

In Europe, a unique and isolated court is created to implement the independent and impartial tribunal. The necessary guarantees according to legal norms for the establishment of an independent CC or tribunal are the judges' appointment proceedings, their term of office, the budget and autonomy. The research on judicial independence among Hungary, Poland and Myanmar shows that the terms of office of the judges are more vulnerable than the other norms. This can be a consequence of an appointment process which deviated from that recommended in the international standards. But some democratic countries like the United States and Germany in Europe have no legal provisions in their constitutional laws to allow the institutional freedom to appoint judges for the highest courts. In the US, the President shall appoint judges of the Supreme Court with the consent and advice of the Senate.[926] In Germany, half the judges of the FCC are set by the Bundestag and half by the Bundesrat.[927] On the other hand, the principle of the 'irremovability of judges' becomes a possible solution to secure the legal tenure of CC judges.

In Europe, modes of appointment vary significantly among different countries and legal systems. They can also differ within the same legal system according to the types of judges to be appointed.[928] The selection and career of judges in the light of European standards should be based on qualifications, integrity, ability and sufficiency. Even if the judicial commission makes the proposals, parliamentary elections are discretionary. Therefore, political considerations may

[926] Art 2, Sec 2, Constitution of the United States, 1787.
[927] Art 94(1), the BL, 1949.
[928] Para 7, Venice Commission on Judicial Appointments, Opinion No 403/2006. (CDL-AD (2007) 028).

prevail over objective criteria. The conduct of judicial appointments by the parliament may result in the politicisation of judicial appointments.[929]

The UN's Basic Principle on the Independence of the Judiciary only briefly mentions and does not deal in detail with the liberty of judicial appointments as in any other international legal documents.[930] The IBA (International Bar Association) standards suggested in a specific way that 'the judicial appointment by the participation of the legislature and executive is not consistent with the judicial independence'. There is an exception that the appointment by a non-judicial body in countries where judicial appointments are satisfactorily carried out will not be considered inconsistent with judicial independence.[931] It is a strange norm of exception. It can be against the uniform application of international law to all countries worldwide. The world's powerful countries, such as the US and Germany, can have those exemptions even if their appointment operations are not in harmony with judicial independence. They are democratic states and the President in the US, and the Parliament in Germany conducts the allocations of their highest courts. They can be members of the drafters of that IBA minimum standard on judicial independence and, it seems, inequality before the law. It is similar to international law's weak points and the difficulty in adjusting to differences among the countries based on their economic, culture, traditions and politics.

Impeachment proceedings for judges are the same mechanism in most of the countries; the legislative branches can impeach on the grounds of disqualification prescribed by the constitutions and statutes.

The guarantee of the terms of office of judges is to first appoint for life. Second, judges should serve their courts until their mandatory tenure as provided by law. The IBA standards mention that the power of removal of a judge should preferably be vested in a judicial tribunal. The legislative may be vested with the power of removal of judges with the recommendation of a judicial commission.[932] In Hungary, Poland and Myanmar, judges may be removed by the impeachment process under the constitution like in the Myanmar case, and the enactment of a law

[929] Para 10, Venice Commission on Judicial Appointments, Opinion No 403/2006. (CDL-AD (2007) 028).
[930] Para 10 of the Basic Principles expresses that 'Any method of judicial selection shall safeguard against judicial appointments for improper motives.
[931] Para 3, Ibid.
[932] Para 4 (b/c), IBA Minimum Standards of Judicial Independence, 1982.

can also remove judges before their term of office based on the cases which happened in Hungary and Poland. In Hungary, judges were removed by the law and its retroactive effect.[933] In addition, several judges and law officers were removed from their serving offices by law on the ground of reorganisation of the courts. As a result, several judges could not get back their positions.

We may then conclude that it is not enough for judges to be subject only to the law when the law does not have certainty for the public benefit but instead for the private good, thereby violating fundamental rights. Regarding this, the IBA has already suggested that 'legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding offices at the time of passing the legislation unless the changes improve the terms of service. And, in case of reform of courts by law shall not be affected to the judges serving in these courts, except for their transfer to another court of the same status'.[934]

Therefore, the legislature can infringe fundamental rights and individual independence of judges according to the cases in Hungary. In this case, the legal saying is that 'judges shall subject only to the law to make secure the judicial independence would be misused by the political organizations when they do not respect the principle of rule of law'. According to the EU objective, the rule of law is a foundation for all other legal values and principles. It is also a vital policy to cultivate democracy, human rights protections and political stability. The remarks on the human rights protections in Germany drew conclusions from the cases studied. Germany implements democracy by the protection of human rights. The FCC has always declared that the ECJ's decisions are not met with the BL, pointing out the violation of human rights.

Germany had an unforgotten history of the severe violation of human rights. It still becomes new whenever we hear of human rights violations in a country. Thus, Germany effectively safeguards its citizens' rights within the constitutional framework by vesting the effective powers with the FCC. The legislature and executive branches also play an important role by accepting the binding force of the FCC's judgements. The legal binding force here is very crucial based on the Myanmar case, as the tribunal's resolution was not final and conclusive due to the legislature's impeachment. It is an essential thing to establish conciliation among governmental organs. In Germany, federalism significantly supports democracy and the separation

[933] *Baka v. Hungary 20261/12.*
[934] Para 20 (a/b), IBA Minimum Standards of Judicial Independence, 1982.

of powers: Germany follows John Lockes's theory of cooperation of power. The latter is also a comprehensively modified democracy.[935] The FCC maintains democracy, supporting human rights and human dignity as needed in today's society. Human dignity is everything for a society. Violating it can result in bad things in our lives. Human beings can do both bad and good things for themselves and others. For example, the Germans committed serious infringements of human rights during the Nazi regime. Therefore, the Germans today do not accept any kind of human rights violations due to the FCC's judgements. They respect their constitution and their constitutional rights. They trust the FCC as it has effective functions that are theoretically supported by the BL and practically by the legislature and executive branches. The FCC is also well-founded with the basic needs, competencies and extensive legal reasoning of the judges. People in Germany seem satisfied with the FCC's legal reasoning, and they believe their domestic court more than the EU's court.[936] The public's recognition and trust in the judiciary are apparent. Otherwise, the ECJ and the FCC might compete to protect human rights within their legal frameworks for the public interest and not for their sovereignty.

The cases mentioned in Chapter III proved that the 'primacy of EU law' also has limitations. Thus, the courts and other governmental organisations should not forget that they exist to help society and people. They should have expressed aims and objectives that they will carry out for the society and public good. These are the fundamental requirements for any group or for cooperation. Those aims and objectives became values, norms and standards for the institutions concerned. The highest governmental bodies must know that their positions have responsibilities. In a democratic country, the highest political authorities must be punished with removal, retirement or impeachment if they cannot appropriately and properly perform their duties.

Although we talk a lot about rights and responsibilities, this is not enough without a constitution as a piece of evidence. A constitution will show the rights and responsibilities of a government and its citizens. A constitution, whether written or not, is essential for a state. The significant criteria and sections that have been pointed out are always inserted in a constitution. Likewise, a community like the EU values its establishment and existence for the public good. The values set up are important for successful existence and to implement the organisation's objectives.

[935] These are my opinions and thoughts based on the conflicts between the governmental institutions in Myanmar and its political instability since a long time ago.
[936] See the landmark cases: *Solange I*, *II* and *III*, *the Lisbon Treaty Judgment* and *the Maastricht Treaty*.

It should be noted that the aims, objectives and values of an organisation are necessary guidelines in theory. It is much more important to properly implement them in practice. In this way, several principles emerge to meet public needs, but some principles are not uniform. In this case, the makers of the principles should not concurrently be the mediators. The third organisation, which is not composed of a member from the makers of the principles and supporters who approve them, such as the executive, is needed. The third organ should have sufficient efficiency to solve the problems that the policy makers could not solve. Therefore, the judicial organisations fill the gaps between the government and citizens which are erected in different structures worldwide. These are the logical thoughts about the fundamental origination and evolvement of judicial courts. The issues nowadays come back again based on those situations. There are plenty of laws, principles, policies, rules and regulations internationally and nationally. There are several parallel problems based on those laws. This is because theory and practice do not coincide, and it cannot be possible depending on time and situation. However, a judicial branch can be suitable to do it. The judiciary thus becomes a guardian of the constitution. This means that it can interpret the whole constitution to solve constitutional matters and that judges should define the ways to interpret the constitutions, including constitutional rights. Judges and authorities always acknowledge this basic infrastructure and these notions. The constitutional requirements, such as democracy, human rights protection, the principle of the rule of law, federalism, decentralisation, separation of powers, due process and the independence of the judiciary, are connected and support each other. The practical conflicts are always concerned with the theoretical foundations. Integration or cooperation of the judges and courts domestically, regionally and globally could be one solution to defend the dominance of the political branches on the autonomy of the judicial system by referring to the cases in Hungary and Poland. Under exceptional circumstances, the judges were removed by law as political victims in Hungary who lost their due process rights even though the regional integration was partly working. The case[937] before the ECtHR also took approximately two more years to reach a final judgement. In addition, judges did not receive effective remedies. In the EU, a fine for a Member is a kind of sanction which varies from EU law. However, the financial penalty could not be enough to prevent a Member's infringement of corporate law and judicial independence to get the public trust. Finally, it can be said that 'maintaining the judicial independence and basic principle of irremovability of judges' is mandatory for the legislature and executive. Otherwise, the judiciary

[937] *Andra Baka v. Hungary (20261/12).*

cannot be released from the dominance of the legislature and executive according to the dissertation's findings.

Codes of conduct for judges are also essential for the judges for their judicial ethics and accountability. When we discuss about the independent judiciary, accountability seems opposite.[938] Firstly, judiciary shall be independent, later it should have responsibility and accountability. Without the former, the later should not be seeking. Because the judges can enjoy civil immunity and not criminal liability. It is already defined as a sentence for their ethics. The judges are human beings and citizens of the respective countries. So, they have the rights and duties what the other have. Here, judicial independence is not the privilege for the judges as so many scholars have mentioned, but it is in the interest of the rule of law and of all those who seek and expect justice.[939] Besides, it is their responsibility to keep the judicial independent. It can be said that the judges are not dutiful for their independence if they cannot implement it. That is why, independence is the very priority. Accountability is attached to the independence. If there is no independence, there is no way to expect accountability as well. The criminal responsibilities: especially for the corruption are usually promulgated in the general and special criminal laws. It may be much more related with the ordinary jurisdictions than the constitutional adjudication in my opinion.

It must be pointed out that nobody including the judiciary can be completely independent from social and cultural influence within the society in which it operates.[940] Judges should not be isolated from the society in which they live: the judicial system can work effectively only if we judges remains in touch with reality and understand the environment we inhabit.[941]

Therefore, when we cannot accept several inside or outside interruptions, we need a uniform standard of legal protection. What the people expect is also the minimum legal protection consistent with the international norms and standards.

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[938] Ballotpedia. (2022). Judicial Independence and Accountability. (Accessed on 31 May 2022). Retrieved from https://ballotpedia.org/judicial-independence-and-accountbility.
[939] Consultative Council of European Judges. (2015). Opinion No. (18/2015), p-4 (1-19). (Accessed on 31 May 2022). Retrieved from https://rm.coe.int/16807481a1.
[940] Consultative Council of European Judges. (2015). Opinion No. (18/2015), p-5.
[941] Ethics and Integrity Commission. (2017). Code of Judicial Ethics Commentary, p-4 (1-57). (Accessed on 4 June 2022). Retrieved from https://www.sodni-svet.si/images/stories/Kode.

The qualifications of the Constitutional Courts concerned are also very crucial that the judges are the role models for the fair and justice. Firstly, judges should be educated even they are lawyers, professors, or prominent jurists recommended by the President like Myanmar. The notable thing of the German appointment for the FCC prefers the legal professors than the practical judges. It is also can be connected to the improvement of the judicial independence.

The accessibility of the Constitutional Courts of the targeted countries are also based on the scopes of the jurisdictions of the Constitutional Courts according to their functions and competences of the Courts concerned. Therefore, the freedom of the Constitutional Courts is relied on their competencies. The competencies of the Constitutional Courts are also connected to the legislature and their power of making laws.

The legal effects of the Constitutional Courts respectively are also having the legal effects at the domestic levels. Nonetheless, the EU Members like Hungary, Poland and Germany shall respect the regional integration and EU law. So, in this case, the legal effect of the Constitutional Tribunal of Myanmar is different from the EU Members' courts as the ASEAN does not have regional integration like the EU.

The comparative countries in the research locate in the different regions and they apply different legal systems. Basic distinction between the two systems is that in common law country, case law in the form of published court opinions is of primary significance. Whereas, in civil law countries, codified legislation prevails but these distinctions are not as obvious as they appear. In reality, many countries combine elements of common and civil law system.[942] I absolutely agree with the author's concept of viewing on the civil law and common law verifications. I also mentioned it in the introduction part. I would like to say thanks to the author as his article confirms my opinion.

Germany, Hungary and Poland practice civil law system, but the courts shall apply their previous cases or leading cases for sure. Only law, statutes, rules, regulations cannot be working sufficiently to decide cases and to make judgments. In this case, legislature can make the law but the application is concerned to the courts. So, the laws shall be applied anyway combining with

[942] Vivek Maurya. (2021). A Comparison between Civil Law Countries and Common Law Countries, Pleaders Intelligent Legal Solutions. (Accessed on 31 May 2022). Retrieved from https://blog.ipleaders.in/a-comparison-between-civil-law-countries-and-civil-law-countires/

the judges' discretionary power and it should be approved with the former leading cases and the predecessors' legal reasoning. Thus, codified law is important partly, but, it should not be the super powerful tool for the courts as it is dangerous if it does not have legal certainty. In additions, it is not enough to decide the cases merely using with the codified laws, because some other important uncodified legal principles are also very vital for the public fair and justice. Therefore, German Federal Constitutional Court is getting well-known applying the law, legal reasoning, and legal principle like the proportionality.

Myanmar as a common law state, should focus on legal precedents. But the codified laws seem prioritized. In the Tribunal's interpretation should be emphasized on the "Interpretation law" enacted by the legislature. I just would like to recommend that the differences and similarities should be based on the initiative of the public interest in reality than the legislature's wish of making laws if there is a contrary between them. Furthermore, the original legislators cannot live along with the age as far as they wish. So, we should accept the existence of the courts, judges and their independence for us.

Finally, to implement an independent judiciary, the people because of their trust on the judicial system and the government, the legislature, the executive and the judiciary itself have the responsibility comprehensively.

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