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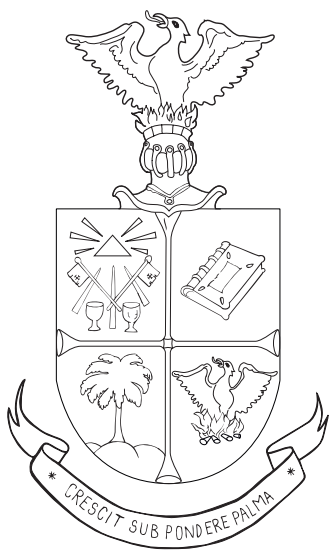

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The principles of the rule of law and democracy: Mutually exclusive or mutually reinforcing categories?[2]

I. Introduction

The term "democracy" has basically two main meanings, or two possible contents, despite the growing number of adjectives attached to it. From among them, the practical importance of "direct democracy", deriving from the ancient Hellas, has been gradually declining (even in its official form), and, as a main rule, democracy is present these days as "representative democracy" (wherever it exists at all). However, whichever form is mentioned, it cannot be enforced exclusively and the need to implement it cannot be made absolute; the majority cannot go entirely against the interests of minority members of the political community just because they are greater in number. Enforcing the decisions and the will of the majority is limited by what is called the requirements of the rule of law; however, the term "rule of law" is just as diffuse and complex as that of democracy itself.

In fact, the term "rule of law" has become by now the ace of trumps in political philosophical thinking - besides democracy - and has turned from being the subject matter of scientific analysis into a part of the political discourse, and its implementation (or the lack thereof) may serve as the basis for the legal, political and even moral evaluation of a political system. However, it is used so often and for so many things that it takes significant efforts to free this term from the non-immanent meanings superimposed on it over the past decades and to separate the latter ones from the former meaning. These efforts are made even more difficult by the fact that the content of this phrase is not constant at all but gains new and appropriate meanings, with special regard to substantive considerations beyond the formal aspects. For this reason, it is not possible to enumerate the contents of this term either; the researcher can only try to detect its "core", the range of meanings without which the rule of law does not exist today, in the 21st century.

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II. Meanings of the rule of law

The term rule of law is used by many people today but it is difficult to clarify its contents. Like all other "fashionable" terms, the rule of law also becomes devaluated; it is constantly given new meanings (and sheds old ones), so it is impossible to define its content accurately (just as it is hard to decide objectively on conceptual problems in general). However, as this term exists and is in frequent use, we should somehow try to define the meaning of the rule of law and explore the possible differences in the current word usage by ensuring that its meaning is not too wide, i.e. there should be a truly specific range of meanings that enables us to talk about it sensibly, making it different from other, similarly diffuse meanings.[3] Below, we make an attempt at this.

3 Many times, constitutionality is used as a synonym for the rule of law. Accordingly, constitutionality is a requirement towards states in terms of form and content. In reality, constitutionality is partly a narrower and partly a wider term than the rule of law, and these two expressions should not be interchanged or used as synonyms. Hungarian public law science divides the criteria for the contents of constitutionality along three major lines. One line says that the "principles of constitutionality" are the principle of democracy, the principle of pluralism, the principle of the rule of law and the principle of the separation of powers {cf. Trócsányi, László: Grounds. [Alaptanok], pp. 67-75. In: Trócsányi, László – Schanda, Balázs (ed.) Introduction to the constitutional law. [Bevezetés az alkotmányjogba]. HVG-ORAC, 2012. pp. 19-75.}: according to the second line, "the requirements of constitutionality" are the principle of popular sovereignty and popular representation, the principle of separating and balancing the branches of powers, the rule of laws, establishing the state of the rule of law, the principle of equal rights and the declaration of human rights {cf. Kukorelli, István (ed.): Constitutional theory I. Basic concepts, constitutional institutions [Alkotmánytan I. Alapfogalmak, alkotmányos intézmények]. Budapest, Osiris, 2007. pp. 29-31.]: and according to the third line, the "the principles of constitution" are the principle of state sovereignty, the principle of democracy, the principle of the rule of law (also including the separation of powers and legal security) and the principle of the market economy (cf. Petrétei, József: Hungarian constitutional law I. [Magyar alkotmányjog I.] Dialog Campus, 2002. pp. 85-106.; basically, the division is the same in the later works of József Petrétei, following the enactment of the Fundamental Law, with the difference that he generally talks about "the principles of economic order" instead of the principle of the market economy, also including other second-generation rights and state purposes in addition to the principle of the market economy, which is not specified in the Fundamental Law *expressis verbis* but it is actually included implicitly – cf. Petrétei, József: Hungary's constitutional law I. Grounding, constitutional institutions [Magyarország alkotmányjoga I. Alapvetés, alkotmányos intézmények]. Pécs, Kodifikátor Foundation, 2013. pp. 71-98., and Petrétei, József – Tilk, Péter: Bases of Hungary's constitutional law [Magyarország alkotmányjogának alapjai]. Pécs, Kodifikátor Foundation, 2013. pp. 31-35.) However, despite the fact that there can be different ways of classification, basically each case specifies the need to enforce the same content-related aspects in practice.

Historically, the *rule of law*[4] (*Rechtsstaat*)[5] meant two basic things. When first used, at the end of the 18th century and in the 19th century, it covered the *formal rule of law*. Once the requirements of the Enlightenment became clear, it became a *de facto* necessity for the upcoming nation-states and for the developing capitalist economy to terminate the injustices of absolutism (too) in the given country and to ensure that people can match their actions to laws, i.e. to legal expectations. The main requirement for this was to introduce a predictable legal order, with rules streamlined for consistency, that everyone could learn, follow and rely on once implemented. This purely formal system of criteria contained expectations, such as the chance to learn the legal regulations, i.e. their publication (which did not exist everywhere, even in the 18th century),[6] to avoid possibly too quick changes, clear and easy-to-understand legal regulations and their actual enforcement (observed by all addressees and caused to be observed by the addressees) etc. The formal rule of law meant that state bodies could not proceed either against the laws (*contra legem*) or without the laws, i.e. without a statutory basis (*praeter legem*). As such, the key point was predictability, i.e. that clear and unambiguous laws should be enforced in a manner that can be pre-planned.

The following concepts belonged, and still belong to the formal rule of law:

1. rejecting the open inequality of rights and a sovereign legislator above the laws and *recognising the state that is bound by law*: the state, i.e. the legislator, is also bound by law, the legal norms also cover the legislator, i.e. the state itself, after creating the laws, is subject to the laws, just like any other entity;
2. *legal security, which means that the laws*
   2/A. *are proclaimed publicly and can be accessed* by anyone in advance *and in due course, and*
   2/B. *must be clear and easy to understand* for the addressees ("clear norms"): the legislator must create norms that are clear to people and have accurate content

4 The term *rule of law* is attached to the name of Charles I (Cf. Szigeti, Péter – Takács, Péter: The theory of the rule of law [A jogállamiság jogelmélete]. Budapest, Napvilág Kiadó, 2004. p. 230.)

5 The term *Rechtsstaat* was (probably) first used by Robert von Mohl. [Cf. Neumann, Franz: Rule of law and sovereignty [Jogállamiság és szuverenitás]. In: Takács, Péter (ed.): An anthology from the literature of the *Rule of Law* and the *Rechtsstaat* [Joguralom és jogállam. Antológia a *Rule of Law* és a *Rechtsstaat* irodalmának köréből]. ELTE, 1995. p. 232. Originally: Neumann, Franz: The Rule of Law. Political Theory and the Legal System in Modern Society. Berg Publishers, 1986] For the formal concept of the term see also: Kis, János: Constitutional democracy [Alkotmányos demokrácia]. Indok, 2000. p. 108.

6 For example, judges in the Italian city-states were instructed through secret decrees, or France ran the legal institute of the *lettre de cachet*, which also covered the French absolute monarchy's subsequent legislative right depending on individual considerations and aimed at specific matters. This latter, for instance, included the possibility for the monarch "to terminate a prosecution or, without relying on the judges, convict or imprison an individual without a trial and without even an offence having been committed". (Elliott, Catherine: French Criminal Law. Routledge, New York, 2011, p. 5.)

if possible, whereby the addressees (the obligors and obligees of the provisions of law) can learn with relative accuracy when the state law enforcement bodies recognise their conduct as lawful;
2/C. *they should not change quickly* (the changes can be followed), as well as
2/D. *legislation with a retroactive effect should be prohibited:*[7] with some exceptions: the state cannot regulate life events that have already occured or were already fulfilled upon the introduction of the law [i.e. legislation is permitted if it does not prescribe more adverse conditions than the current ones for any involved legal subject, except for the state (thus, Section 2 (1) of Act CXXX of 2010 on law-making says that "laws may not establish obligations, make obligations more onerous, withdraw or restrict right, or declare any conduct to be illegal with respect to the period prior to their entry into force", i.e. retroactive legislation is permitted if it only provides rights to all persons involved, or exempts them from obligations or liabilities and this does not make the situation of another natural or legal person more onerous);
2/E. *the requirement of sufficient preparation time*: the legal subjects not only need to learn the relevant rules in time but sufficient time must be provided to them for adapting to these rules and for providing the conditions of law-abiding conduct;
2/F. *protection of the acquired rights*: legal relationships that are fulfilled and finally closed shall be left untouched;
2/G. *protection of confidence*: rights arising in the future but permanently prevailing also in the present can only be limited with regard to the future, with regard to the fact that the legislator shall respect the reasons for establishing that legal regulation (e.g. concluding a permanent contract); furthermore, that the rights arising in this manner shall not be emptied in the future either;[8]

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7 With regard to retroactive effect, the legal regulation shall also be applied to the legal facts and legal relationships arising before promulgating the legal regulation. The retroactive effect can be A) *full retroactive effect*: if the legal regulation must also be applied to facts that already took place and legal relationships closed upon the promulgation; B) *partial retroactive effect*: if the legal regulation must also be applied – in the period preceding its promulgation – for legal relationships arising before the promulgation and still in progress upon the promulgation. It is *not* a retroactive effect if the legal regulation must be applied for legal relationships arising before the promulgation, still in progress upon the promulgation but only for the period after the promulgation.

8 In the interpretation of the Constitutional Court: "The requirement of confidence protection attached to legal security may set a limit to […] intervention by the legislator into the existing, permanent legal regulations. Confidence protection is a well-founded expectation – protected by law – towards the unchanged survival of a legal regulation (i.e. it should remain in effect). The Constitutional Court considers, from case to case, the borderline between the freedom of the legislator and the addressees' interest in the permanence and the predictability of the legal regulations, examining whether the disadvantage suffered by the legal subjects as a result of change in the laws justifies establishing that it is contrary to the Fundamental Law based on the violation of legal security." {3061/2017. (III. 31.) resolution of the Constitutional Court, Statement of Reasons [13]}

3. legitimacy, i.e. that
3/A. *the right is proclaimed in legal sources issued in an appropriate form*[9] and
3/B. *these should cover all addressees specified in a normative manner*.

However, this formal rule of law – achieved through the theory of Hans Kelsen, who was widely acknowledged at that time – already received a lot of criticism in the 19th century and especially between the two world wars, and later – after World War II – it became evident to everyone that it could not be maintained in itself because, for instance, even Nazi Germany could be treated as a state governed by the "rule of law", at least in its merely formal sense: life and death were controlled by norms that were created in a proper procedural order and with proper authorisation and that were (more or less) known to the public; Jews, Gypsies and homosexuals were closed in camps and later killed, and insane people were sterilised etc. based on publicly proclaimed and clear norms. Thus, in this sense, Nazi brutalities were committed under the predictable circumstances of the "rule of law".[10] For this reason, there was already a clear consensus after World War II that the term "rule of law" had to be filled with proper content, even regardless of Radbruch's well-known formula.[11]

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9 In this sense, "legitimacy" is a guarantee not only in terms of form but *also* in terms of content, as constitutional rules are in place for statutory content, which *also* serve the rule of law in terms of content.

10 Stalin's communist (state socialist, Bolshevist) system was not even a "rule of law" in this formal sense, as their state bodies also violated their own norms. Although the text of Stalin's (Bukharin's) constitution of 1936 was regarded as very modern at that time and contained all the rights that were thought necessary to be guaranteed in the developed world, none of these declared norms was enforced. Constitutionality was only a Potemkin phenomenon and the system ignored it day by day. (For the Stalinist Bukharin Constitution of 1936, see: Kriza, Elisa: From utopia to dystopia? Bukharin and the Soviet Constitution of 1936. In: Simonsen, Karen-Margrethe –Kjærgård, Jonas Ross (eds.): Discursive Framings of Human Rights: Negotiating agency and victimhood. Routledge, New York, 2017, pp. 79-93.)

11 Radbruch, Gustav: Gesetzliches Unrecht und übergesetzliches Recht. Süddeutsche Juristen-Zeitung, Jahrg. 1, Nr. 5 (August 1946), pp. 105-108. The formula is as follows (in the original language, that is, German): "*Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als >>unrichtiges Recht<< der Gerechtigkeit zu weichen hat.*" In English: "The conflict between justice and the reliability of the law should be solved in favour of positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered >>erroneous law<<." (See, e.g: Hage, Jaap: Philosophy of Law, p. 376. In: Hage, Jaap – Waltermann, Antonia – Akkermans, Bram (eds.): Introduction to Law. Second Edition. Springer, 2017, pp. 359-382.)

The material rule of law covers the following:

1. *all requirements of the formal rule of law* as a basic condition;
2. *considering the violation of any right on the merits, by judges* – who are independent, impartial and unbiased, both in their status and in their adjudication work and who are only subject to the laws – also including the judicial review of the unlawful acts of public administrative bodies, i.e. public administrative adjudication;[12]
3. *protecting human rights;*
4. *equality of rights*;[13]
5. *pluralism*:
   5/A. in a narrower sense, the mere existence of pluralism (the functioning of competing parties operating under equal public law conditions),
   5/B. in a wider sense, the existence of free elections held in regular periods, based on a general and equal, active and passive voting right and on previously defined rules providing a result representing the citizens' will;
6. *the division of powers;*
7. *democracy (and democratic legitimacy)*, i.e. basic decisions shall be made by the majority of the legislative body elected by the people as a whole or operating with the participation of the people as a whole, and all decisions by the public power can be traced back (directly or indirectly) to the people's majority will. (This latter relationship will be dealt with later.)

12 The existence of public administrative justice is independent from the existence of separate public administrative courts; it is also implemented if this rule-of-law function is performed by ordinary (e.g. civil) courts.

13 The material requirement of equal rights is more than the purely formal requirement that the laws must cover all normatively specified addressees; namely because the latter still allows the laws to give different treatment to people whose relevant attributes are identical, which means discrimination (i.e. it only requires that the law shall not make any difference between the addressees but it does not expect that everybody with similar, relevant attributes to be an addressee of the law), while equal rights already prohibit the laws from making selections among the addressees, if such a selection has no reasonable cause that can morally be defended. (It is to be noted that some opinions in the legal literature say that human rights arise from the principle of equal rights in itself, so these human rights do not have to be considered as a separate part of the material rule of law; thus, according to János Kis, "several other classic human rights derive from the principle of equality before the law, thus the political equality of religions, the prohibition of attaching the holding of office to birth or financial position etc.". (Kis, János: Do we have human rights? [Vannak-e emberi jogaink?] Paris, Dialogues Européens, 1988. pp. 158-159.)

III. The definition and the content of democracy

Democracy is a Greek word and it means the power (*kratos*) of people (*demos*).[14] However, the expression "people's power" actually says very little about the form of state organisation and about the manner in which power is practiced in the political system. Another problem is that the established democracies are very different, and numerous states call themselves "democratic" although the true enforcement of the people's interests can be questioned, or it is actually missing from these systems. (*The term "democracy" has become the jolly joker of political self-reflection by now,* as basically all existing states lay a claim to the description "democracy". It can also be said that there is a political consensus claiming that democracy is something good;[15] therefore, some regimes also try to define themselves as a democracy but are, in fact, very far from its content requirements.) Of the three questions related to the *substantive* problem of democracy, the first is what the content requirements are that make a regime democratic. The second and third essential questions (which are related to each other) are whether the *actual* (truly existing) attributes of "implemented democracies" lead to anything with regard to the democracy's normative, i.e. *prescriptive* concept (i.e. what *should* be the features of the political systems that have the grounds to call themselves "democratic") and vice versa: to what extent can the existing democracies be held accountable for such normative requirements.

These questions are much more difficult to answer than what would follow from the literal interpretation of the term ("people's power"). It is certain that *all democratic systems must be recognised by the people, and the political groups that are currently in power must be authorised by the people to exercise this power.* (It can also be said that *the legitimacy of exercising power in a democratic way comes from the people*.)

However, this still does not get us closer to differentiating real democracies from "false democracies" since both public speech and the political philosophical literature mention numerous types of democracies, and it is hard to select from the multitude of definitions which ones feature the true content of the people's power and which only camouflage and hide the non-democratic features of exercising power. Thus, in addition

14 See, e.g.: Laopodis, Vassilios: DEMOS: Democratic evaluation of multiple options in society, p. 319. In: Berleur J., Whitehouse D. (eds.): An Ethical Global Information Society. IFIP — The International Federation for Information Processing. Springer, Boston, 1997, pp. 318-329. This term was first used by Herodotus, who was amongst those, according to most scholars, who praised Athenian democracy. (Davie, John N.: Herodotus and Aristophanes on Monarchy, p. 162. In: Greece & Rome, Vol. 26, 1979, pp 160-168. For the opposite view, see, eg.: Stadter, Philip A.: Herodotus and the Athenian "arche", p. 784. note 7. In: Annali della Scuola Normale Superiore di Pisa. Classe di Lettere e Filosofia, Serie III, Vol. 22, No. 3, 1992, pp. 781-809.)

15 Cf.: Schedler, Andreas – Sarsfield, Rodolfo: Democrats with adjectives: Linking direct and indirect measures of democratic support, p. 639. In: European Journal of Political Research Vol. 46, 2007, pp. 637–659.

to the term "democracy" without adjectives, the following expressions are also used: direct democracy, electoral democracy, representative democracy, indirect democracy, participation democracy, self-governing democracy, assembly democracy, referendum democracy, electronic democracy, constitutional democracy, liberal democracy, social democracy, Christian democracy, egalitarian democracy, consensus democracy, majority democracy, limited democracy, deliberative democracy and consociational democracy; moreover, "people's democracy"[16] or „illiberal democracy".[17] These dimensions partly exclude each other and are partly orthogonal, i.e. overlap each other and co-exist (and in some cases they concretely reject the essence of democracy, where the qualifying adjective is actually a "privative suffix"); as, it is difficult to negotiate through this chaos of terms.

One of the most essential problems with *defining* democracy is what the term "people" means. Fortunately, there is already a consensus today in this regard; thus, *people* are – in terms of democratic decision-making – the *same as the political nation, i.e. the community of citizens who also have the right to vote* [except for the natural reasons for exclusion (minor age, incapacity for other reasons), persons imprisoned through a final court decision for committing a crime and/or prohibited from public affairs)].

IV. The content elements of democracy

However, *people are not a simple tool for legitimacy,* which one can nominally refer to, but they are a community of citizens who can actually enforce their will. As the people's will is not given once and for all, *an institutional guarantee must be provided for people to be able change their will*, i.e. to express (and enforce) their intention to think differently about public affairs or about the representatives of public affairs than before. Only those states, political regimes or political interest-articulation mechanisms where *people have a real opportunity to enforce their prevailing will* can

16 In the state socialist era, in fact, democracy did not exist at all. For instance, in Hungary, until 1985 citizens could vote for only one candidate [only a state-run social organisation named the Patriotic People's Front (Hazafias Népfront] could nominate), so there was no real active or passive suffrage.

17 This term was invented by Fareed Zakaria who used this expression for semi-democratic countries, mainly and originally for those in Latin America, Central Asia and for Russia. (See: Zakaria, Fareed: The Future of Freedom. Illiberal Democracy at Home and Abroad. W. W. Norton & Company, New York – London, 2007. See particularly pages 23 and 89-118.) 'Illiberal', virtually, is a privative suffix and a democracy cannot be 'illiberal'. (In fact, the Hungarian government no longer uses this word; it uses the term 'Christian democracy' instead.) As Francis Fukuyama pointed out, in an 'illiberal' system, "democratic majorities do not necessarily feel themselves bound to respect universal human rights" (Fukuyama, Francis: 30 Years of World Politics: What Has Changed? p. 13. In: Journal of Democracy, Volume 31, Number 1, January 2020, pp. 11-21.) – therefore, a genuine democracy, either in Eastern Europe or anywhere else, cannot be illiberal. (For the relationship between the rule of law – and, within it, human rights protection – and democracy, see below.)

be called a democracy. This is served by *regular assemblies, votes* and – in the case of a representative democracy – *regular elections* as public affairs. (Thus, in this regard, the requirements of the rule of law and democracy coincide.) There is no "people's power" in terms of content, hence the concept of democracy cannot be implemented where – after the first election –citizens waived their right to have a say in public matters and to control (or change periodically) the political stakeholders or where this was prevented by those who gained power on this first occasion.

Furthermore, the term *democracy* implies the *decision* itself. *Political democracy means the democracy of decision-making* in all of its existing forms, i.e. direct choice between alternative action models, rules and programmes (e.g. via referendum) or indirect choice between competing political forces (parties, politicians) that are to make the relevant decisions. Whether the members of a political community vote directly on a proposal or indirectly on the politicians who will make and judge future proposals (representatives), *they always make a decision: they select from the available choices* and decide which model or rule should be implemented (in a direct democracy) or who should later vote on the same questions (indirect democracy). People have different interests and values, i.e. they have different opinions on certain social problems to be solved or political questions to be decided because of their life situation or selected moral views (as well as due to their other values, prejudices, preferences, attitudes, education or world view), therefore, they have different views on what is good, correct or expedient with regard to certain issues. As a result, *there is always a conflict of interests or values between the members of political communities* and they have to find a political solution in this situation of conflicting interests or values. As such, a decision always has to be made regarding the dilemmas that arise in society, which means that a certain standpoint will win after the decision (the given rule will be introduced and the given programme will be implemented) and the alternative solutions will not be realised.

Of course, it is also theoretically possible that there are no interest or value conflicts in a society and that the members of society always think the same about certain issues. However, apart from the fact that such a political society has never existed anywhere in the world so far, it is also to be noted that if there were such a community, there would be no need for decision-making at all as there would be no dilemmas to decide on. We *can talk about* a choice between options, i.e. about a *decision only if such options exist* and there are people who support or favour them; *if views, opinions and wills were in perfect harmony in a society, there would be no need for politics and for a political system* and, within this, there would be no need for any (not even democratic) articulation of interests or decision-making mechanism. However, a perfect harmony of interests and values has not been realised anywhere; it is not even possible and therefore there is a need for choice between different wills. If this is true then *all democracies can only be majority democracies* (i.e. the decision is ultimately made by the majority, or by the majority of representatives elected by the majority);[18] therefore, in the following we always talk about democracy in this sense.

18 Sartori draws the attention to the fact that the majority principle is a modern invention,

This is how the term consensus-based democracy becomes contentless, as it says that anything can only be accepted if there is consensus between the members of society. Deliberative democracy is partly emptied in the same way (at least its term definitions, which intend to continue deliberation until the supporters of one standpoint are won over) through logical arguments.[19] (*Deliberation* is a process thought to be ideal by the supporters of this type of democracy, whereby the representatives of originally different standpoints try to convince each other through logical arguments and they make a compromise that is ultimately acceptable to everybody.) If the only acceptable result of deliberation is the jointly worked out, discussed and compromise-based solution, it already complies with the concept of consensus-based democracy (and what was said about it losing its content will also apply to deliberative democracy); if, on the other hand, deliberation (i.e. rational debate over the proposals) can also come to an end without specifying the objectively appropriate standpoint that is accepted uniformly by everybody and, ultimately, voting is still held in order to solve the problem,[20] it (i.e. this type of deliberative democracy) does not differ from the majority interpretation of democracy (namely because some kind of debate also precedes the decision in the classic approaches of majority decision-making), as the dilemma is solved in the same way through a majority decision. [The term *deliberative democracy* was developed by Joseph M. Bessette for negotiation- and argument-based political decision-making in 1980;[21] he still accepted that deliberation can be closed without a result (then it has to be started again or votes have to be cast); however, some of the later theories already tried to devise mechanisms that allow the only, objectively right solution to be found.]

The majority concept of democracy, however, does not exclude that the will of the majority

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and it does not date back to the Greeks but only to Locke (based on the precedence of monk communities) – similarly to secret voting or to the principle of representation. (Cf. Sartori, Giovanni: Democracy [Demokrácia]. Osiris, 1999. p. 80. Originally: Democrazia: cosa è. Rizzoli, Milano, 1993)

19 According to Jon Elster, deliberation is decision-making based on the debate of free and equal citizens. (Elster, Jon: *Introduction*. In: Deliberative Democracy. Cambridge, Cambridge University Press, 1998. p. 1.) Deliberation simultaneously refers to the discussion itself and to the exchange of information that is required for it, thus implying the necessity to share rational considerations with each other and to take them into account upon the final decision.

20 Thus, e.g. Joshua Cohen says that the goal of deliberation is consensus (therefore, we have to be open to convincing counter-arguments against our own standpoint); nevertheless, it may happen that no arguments will be accepted based on a consensus – and finally voting must be held (based on some majority principle). [Cohen, Joshua: *Deliberation and Democratic Legitimacy*. In: Bohman, James – Rehg, William (eds.): Deliberative Democray. Essays on Reason and Politics. Cambridge (Massachusetts) – London (England), MIT Press, 1997. p. 75.]

21 Cf. Bessette, Joseph M.: Deliberative Democracy: The Majority Principle in Republican Government. In: Goldwin, Robert A. – Schambra, William A.: How democratic is the constitution? Washington, American Enterprise Institute for Public Policy Research, 1980. pp. 102-116.

should not be enforced without any limits; the majority will can, of course, be limited if it does not satisfy a value aspect important to society (thus specifically some criterion of the rule of law). This issue will be covered later in detail; now it is only mentioned that *these limits are laid down in all political (and legal) systems in advance and they prevent the unlimited enforcement of the majority will based on objective aspects* and simultaneously ensure that the democratic decision-making system is maintained in the long run. [In this sense, democracy and the rule of law do not (necessarily) contradict but the two are in fact similar categories that supplement, presuppose and strengthen each other.] This also means that *today's modern democracies are necessarily constitutional democracies*, i.e. decision-making is based on constitutional rules previously laid down, that serve people's real interests, as opposed to some short-term interests [thus, as a basic condition, constitutional democracies *do not allow people to surrender power permanently, to terminate the limits to power, to ignore basic human rights or to introduce (openly discriminatory) regulations contradicting the minimalist, formal concept of equal rights*]. *Constitutional democracies are also liberal democracies,* as the requirement of recognising human rights, limiting power and providing equal rights (as well as free elections based on the general voting right) is an achievement of the liberal ideology.[22] This is also true if some theories also emphasise other aspects in addition to interiorising classical liberal values; for example, similarly, social democracy is nothing else but the demand – within the institutional framework deriving from liberalism – that the state should lay greater emphasis on material equality and on social rights. [We do not deal with the various adjectives of democracy (liberal democracy, social democracy, Christian democracy etc.) – that are used unfortunately more and more frequently as a swear word in public life, on a party political basis, in order to slander and stigmatise the opposing political power deliberately – as this does not have any scientific/professional aspect.]

V. Democracy and the rule of law; democracy and the constitutional court practice

The criteria for the material rule of law are ultimately enforced in most legal systems by the constitutional court (or by another body with similar functions), which also means that the purely majority concept of democracy cannot be enforced without limits. The question is what legitimates this body to overrule the decisions of the parliament that was elected by the majority of the people (or, which is the same, to overrule the people's will) and to annul parliamentary laws (or simply "not to apply them" without annulment, as in the United States, for example). To put it in another way: how far does democracy stretch and from when can it be limited with reference to the material principles and values of the rule of law?

The starting point is *that enforcing the people's will is the main rule in democracy*. Of course, the "will" of the whole people (understood in psychological terms) is an illusion and so it is that a unified, consensus-based standpoint could be worked out

22 Cf. Sartori: op. cit., p. 18.

among the members of society. People's interests and values are different, thus their standpoints are, evidently, also different in various social issues. The *criteria of the rule of law* do not work as a "qualitative filter" in that they *do not prevent the enactment of laws that are bad, ineffective, dysfunctional or even counterproductive*. It is often said that "the people cannot be wrong" or "the people are always right"; however, this should not mean that people always make correct, scientifically verified, consistent and well-considered decisions but that *people have the right to make a mistake*, i.e. the people's will also has priority if people make an inexpedient or wrong decision.

V.1. The rule-of-law self-defence of democracy

Democratic legitimacy must therefore be accepted as a starting point; however, *"the people's will" cannot be enforced without limits*. A decision that makes it impossible to enforce democracy in the future sets an evident barrier to democratic decision-making. It is therefore clear that the self-defence mechanism of democracy can never let the extreme case happen whereby democracy would liquidate itself (e.g. a referendum on cancelling regular elections cannot be permitted). This, however, no longer depends on democracy but *on the rule of law, which prohibits certain things based on their content, even if they were supported by most citizens* (via single, all-decisive and irrevocable voting). This does not just prevent the termination of democracy (e.g. the institution of elections) but it also covers all material value aspects that would violate equal rights, which is also accepted by democracy as a value, the human rights that also set a foundation for people's civil rights and the right to political participation as well as all the principles ensuring their organisational conditions and institutional guarantees (separation of powers, the judicial review of laws/constitutional court practice etc.). *A real democracy is possible only on a content basis; it is guaranteed by the criteria of the rule of law* (within this, constitutional court practice has had a key role since the middle of the 20th century).

V.2. Democracy and the constitutional court practice

The main thesis of this sub-chapter is as follows: *in fact, the constitutional court practice – in its consolidated form – is not opposed to the idea of democracy at all; what is more, the existence of the constitutional court practice can be a guarantee of real democracy*.

Hans Kelsen, who devised the modern, European, centralised constitutional court practice[23] faced criticism by the judicial review of legal regulations, basically focusing

23 As state chancellor Karl Renner's consultant, Kelsen's achievement was that the constitutional court and constitutional court practice were established in Austria in 1920. [Cf. Beyme, Klaus von: Judicial review. [Alkotmánybíráskodás]. In: Paczolay, Péter (ed.): Constitutional adjudication – constitutional interpretation [Alkotmánybíráskodás – alkotmányértelmezés]. Rejtjel, 2003. p. 119. Originally in: America as a model. The impact of American democracy in the world. Palgrave Macmillan, 1987, pp. 85-109.]

on two aspects. On the one hand, it criticised that the constitutional court practice contradicted parliamentary sovereignty and, on the other hand, that was also against the separation of powers (this latter aspect is not covered here in detail).[24] Kelsen's answer to the first criticism was that parliamentary sovereignty is only a sub-type of the principle of popular sovereignty; furthermore, as the goal is to trace back to the people's will not only one single branch of power but the operation of the whole state order, *popular sovereignty* is therefore not provided by parliamentary sovereignty but basically by state sovereignty, *the operation of the branches of power based on the people's will, where no single organisation can enjoy priority* compared to other state organisations ensuring popular sovereignty. In this situation, *it is the very task of the constitutional court to limit the possible violation of popular sovereignty by the parliament*: just as courts and public administration are subject to the law, the *parliament is also subject to the constitution and it may carry out legislative work only within the framework of the constitution.* As can be seen, the procedure of the legislative body is bound by the constitution and by the constitutional court, enforcing the constitutional provisions exactly with a view to popular sovereignty and democracy (where the point is to create a compromise between the majority and the minorities and, thus, to promote social peace). The task of the constitutional court is to enforce the provisions of the constitution as opposed to laws and decrees (and to terminate anti-constitutional norms), to resolve disputes over scope and competence (also based on the constitution) as well as to protect the minority, i.e. to prevent the tyranny of the majority.[25]

Christopher Wolfe stated in three points that three answers can be given to the criticism that judicial review is antidemocratic (the criticism basically relates to American decentralised judicial activities but can basically be extended to all types of constitutional court practice) and the advocates of constitutional court practice can prove with these answers that the institution of judicial norm review is not antidemocratic; on the contrary, it expressly promotes the enforcement of democracy. Accordingly: "*(1) the basic goals of the Court are democratic, (2) the judges are ultimately subjected to the control of the public will, (3) the modern judicial power was legitimated by tacit approval.*"[26] From among these, the most important is Wolfe's first argument on the democratic nature of judicial goals.

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24 Cf. Paczolay, Péter: Constitutional adjudication on the border of politics and law [Alkotmánybíráskodás a politika és jog határán]. In: Paczolay, Péter (ed.): Constitutional adjudication – constitutional interpretation [Alkotmánybíráskodás – alkotmányértelmezés]. Rejtjel, 2003. p. 16.; Favoreu, Louis: Az alkotmánybíróságok. In: Paczolay: ibid. p. 58. In original language: Favoreu, Louis: Les Cours constitutionelles, Paris, Presses Universitaires de France, 1992, pp. 1-105.

25 Cf. Paczolay: op. cit. pp. 16-17.; Favoreu: op. cit. pp. 58-59.

26 Wolfe, Christopher: Judicial review and democracy [Alkotmánybíráskodás és demokrácia]. In: Paczolay, Péter (ed.): Constitutional adjudication – constitutional interpretation [Alkotmánybíráskodás – alkotmányértelmezés]. Rejtjel, 2003. p. 129. Originally in: Judicial activism. Bulwark of freedom or precarious security? Brooks/Cole Publishing Company, California, 1991, pp. 49-71.

Therefore, as far as the democratic goals of constitutional court practice mentioned by Wolfe are concerned, this argument only legitimates certain constitutional court procedures in cases that are especially important for articulating democratic political interests. Thus, for example, *if legislation deprived some people of political rights or changed these political rights* (e.g. the right to vote or the rules of the election procedure) *in a way that it does not provide everybody with equal opportunities* to select political decision-makers, *it would injure the principle of democracy itself, as well as the decision-making process based on the opportunity of equal participation.* As this correction cannot be expected from the corrupted legislative majority because democracy must, in fact, be protected from *them*, this task can only be carried out by an entity that has no political responsibility and that is outside the political system, taken in a narrow sense (and this task should actually be carried out for the sake of democracy and in order to enforce the real public will). Similarly, *if certain basic human rights are endangered, e.g. the freedom of speech is injured (also including the freedom of assembly), people will not obtain the relevant information that helps them to take decisions expressing their real will* when selecting the future members of legislation. Democracy is also injured directly if the opportunity to access information is limited by prohibiting the freedom of speech of the persons possessing the information. The principle of democracy also provides the opportunity for everybody's interest should appear in the course of decision-making. All decisions have some losers and all legislative decisions are injurious to some people; to those whose opinion or interest was in the minority in the given debate. This does not injure democracy as long as these minorities change from time to time, i.e. there is a real chance that the person who once was part of a minority will someday belong to the majority on some other issues. *If, however, there are "*separated and isolated*" minority groups always consisting of the same people who are losers in all decisions and they are systematically suppressed by the majority, they will not be members of society and political decision-makers with equal rights and of an equal rank. The suppression of such homogeneous minorities can also be prevented by operating a body that is outside the legislation.*[27]

Tamás Győrfi, on the one hand, also highlights the principle mentioned earlier that democracy can only be realised if the legal system considers the voters (based on the known Dworkin's formula) as "persons of equal dignity",[28] i.e. an equal opportunity is provided for anyone to enter a majority and minority position from time to time,

27 Cf. Wolfe: op. cit. pp. 129-132.

28 Cf. Dworkin, Ronald: *Taking Rights Seriously*. Cambridge, Harvard University Press, 1977. p. 370. The same principle also appeared in the initial practice of the Hungarian Constitutional Court: "The prohibition of discrimination means that the law must treat everybody equally (as persons with equal dignity), i.e. the basic right of human dignity cannot be injured, and the aspects of dividing rights and benefits must be determined with the same respect and care, by considering individual aspects at the same rate." (9/1990. CC resolution, ABH 1990, pp. 46, 48.]

instead of a homogeneous majority enforcing its will against a homogeneous minority;[29] on the other hand, he also draws attention to the fact that – according to those who regard constitutional court practice as democratic – *the concept of a purely majority democracy does not consider the intensity of preferences at all*: "„it violates the principle of equal treatment as it prefers the weak preferences of the smallest possible majority over the strong preferences of the largest possible minority".[30] On another instance, Győrfi presents the standpoint of those who are in favour of constitutional court practice by claiming that (what he calls "procedural") democracy based purely on the majority principle is (may also be) incorrect in terms of content as "the procedural concept is insensitive to both the correctness of the reasons supporting preferences and the distribution of the burdens of the decision".[31] (In fact, Győrfi himself would also transfer the consideration of content arguments to the legislator; in his opinion, this is required by the principle of "equal care and respect".)[32]

V.3. The relationship between democracy (people's sovereignty) and constitutional court practice in Hungary

If we already project the problem to Hungary, the earlier question of what authorises the Constitutional Court to overrule the decisions of the political legislative body elected by the people (parliamentary laws) can receive three different answers – besides and in addition to what is set forth in the previous sub-chapter – and each answer (both together and separately) verifies that *the authorisation for constitutional court practice is not contrary to the requirement of democratic legitimacy*.

The *requirement of democratic legitimacy says that,* in a democratic political and legal system built on the idea of people's sovereignty, *no public authority decision can be made if it does not come directly or indirectly from the community of citizens*, i.e. if its ultimate source is not the people. Accordingly, *it must be ensured that each public authority decision* (either individual or general, i.e. normative) *can be traced back to the original decision of the voting citizens,* and this is where it must derive from, in one or more steps. By concentrating expressly on the current Hungarian situation (but also keeping the need

29 Cf. Győrfi, Tamás: Democracy. [Demokrácia], pp. 379-380. In: Takács, Péter – H. Szilágyi, István – Fekete, Balázs: State theory. Chapters and lectures on the general theory of the state [Államelmélet. Fejezetek és előadások az állam általános elmélete köréből]. Budapest, Szent István Társulat, 2012. pp. 376-381.

30 Cf. Győrfi: op. cit. p. 380.

31 Győrfi, Tamás: Limitations on majority decision-making and constitutional adjudication [A többségi döntés korlátai és az alkotmánybíráskodás]. In: Jakab, András – Körösényi, András (eds.): Constitution in Hungary and elsewhere. Political science and constitutional law approaches [Alkotmányozás Magyarországon és máshol. Politikatudományi és alkotmányjogi megközelítések]. MTA TK PTI, 2012. p. 42.

32 Győrfi: op.c it. (note 38) pp. 54-55.

for the general authenticity of the statements), the three justifications are as follows:[33]

1. First of all, the *members of the Constitutional Court*, having the power to annul laws, are elected in Hungary by the same body, i.e. the parliament (National Assembly), which also makes the laws. When electing constitutional judges, *the same indirect (presumed) people's will is enforced as when laws are adopted.* If the constitutional judges are elected by the National Assembly and it authorises them to carry out the constitutional review of the laws, then *there is* democratic legitimacy behind the constitutional court practice too (just as behind, for example, the president of the republic and any of his/her decisions or actions). It is true, though, that this legitimacy is not direct, i.e. it is not the people (their majority) who decide on the contents of the decisions of the Constitutional Court[34] but by the (majority) of constitutional judges; however, the same is also true of the

33 In addition, there is also a fourth answer that does not start out from the requirement of democratic legitimacy but from the philosophical interpretation of the term "majority". Alexis de Tocqueville was the first to analyse – after his two trips to America as early as in 1840 – the opportunity of the judicial review of laws by checking how it contributes to preventing the "tyranny of the majority". (Tocqueville, Alexis de: Democracy in America.) It is evident that basically the will of the majority must be enforced against the minority in a democracy; however, Tocqueville says that it is wrong to identify the majority as the majority of a *country, n*amely because the main laws (the laws of justice) were created by the *majority of the whole mankind*. If the laws of the people's majority are against the general laws of the majority of mankind, the latter must then be enforced. If only the majority of one nation expresses its will, this still does not mean the absolute validity of the law. If a larger nation can tyrannise a smaller one, or a person with a lot of power can tyrannise people under them; similarly, the majority of a nation can also suppress the minority with the laws created by it. And this, being the "tyranny of the majority" can and must be prevented. In Tocqueville's words, "A general law – which bears the name of Justice – has been made and sanctioned, not only by a majority of this or that people, but by a majority of mankind. The rights of every people are consequently confined within the limits of what is just. A nation may be considered in the light of a jury which is empowered to represent society at large, and to apply the great and general law of Justice. Ought such a jury, which represents society, to have more power than the society in which the laws it applies originate?" (Tocqueville, Alexis de: Democracy in America. The Lawbook Exchange. Ltd., Clark, New Jersey, 2003, p. 240.) {This is the very reason why the majority of a given country cannot create *any* norm or cannot give constitutional authorisation to create *any* norm without violating the content-related requirements of the rule of law. For example, by quoting the opinion of the Venice Commission dated June 2013, Imre Vörös wrote the following: "Creating or modifying the constitution (…) *is not an arithmetical issue*, i.e. not a quantitative opportunity that automatically derives from the 2/3 parliamentary majority (…). (Vörös, Imre: Outline of the nature of fundamental rights after the Fourth and Fifth Amendments to the Fundamental Law of Hungary [Vázlat az alapvető jogok természetéről az Alaptörvény negyedik és ötödik módosítása után]. Fundamentum, 2013. Vol. 3. p. 60. Highlighted in the original.)}

34 Similarly, people do not decide about many other aspects, either, e.g. presidential pardon, reports of the State Audit Office, ombudsman recommendations etc.

laws: their content is not decided directly by the voting citizens but only by the (majority of) representatives elected by them. Only the referendum has a *direct* democratic legitimacy in Hungary; all other contents reflect the people's will only *indirectly*. Of course, it cannot be said that both analysed activities (legislation and constitutional court practice) would have *the same* indirect democratic legitimacy: while the content of Constitutional Court resolutions goes through double mediation calculated from the people's will (the democratic legitimacy of these resolutions is doubly indirect as the resolutions are made by constitutional judges elected by parliamentary representatives who are elected by the people), the content of laws goes through only single mediation calculated from the people's will (the democratic legitimacy of the laws is indirect only once, as the decisions are made by the parliamentary representatives elected by the people). However, since legitimacy is only indirect in both cases (although at a different rate), we can say that there is a difference between the democratic legitimacy of constitutional court practice (resolutions of the Constitutional Court) and legislation (adopted laws); however, the difference is not *qualitative* (like between a referendum and parliamentary legislation, for example), only *quantitative*, i.e. gradual.

2. Looking at the requirement of democratic legitimacy based on the *legal source* used for the decision, we get an even stronger argument that verifies the constitutional court practice serving the protection of human rights in an even more plausible manner: namely because the *basis* of the *constitution's legitimacy* (the Fundamental Law in Hungary, used as a measure for judging laws) is clearly *stronger than the legitimacy basis of the laws that can be overruled*. While the constitution is adopted in any legal system in the form of a special procedure and/or with a qualified majority (in Hungary with a 2/3 majority of all parliamentary representatives) and amendment is also possible at the same rate, adopting most laws only requires a simple majority (i.e. more than half) of the parliamentary representatives who are present and have a quorum, but the 2/3 majority of the parliamentary representatives present is also enough for cardinal laws, and the 2/3 vote of all representatives is not required. As the legitimacy basis of the resolutions made by the Constitutional Court is stronger than that of the National Assembly acting as a simple legislator (the human/constitutional rights are protected by a majority of representatives – as well as by the constitution adopted by this majority – who were elected by a larger majority of the citizens compared to the majority that passed the laws), *the constitutional court practice does not violate – but, on the contrary, it serves – the requirement of democratic legitimacy*.
3. Finally, we can talk about the *actual* enforcement of the requirement of democratic legitimacy (taken in a sociological sense) also with regard to legislation only if the governing political forces – having gained parliamentary majority – *do exactly and only what they promised to the citizens in their election programme.* The reason is that voting citizens (ideally) vote for a political force based on its election programme

and promises, hence the democratic authorisation of the parliamentary majority is attached to the promises and programme points with which the given parties acquired the votes necessary for a parliamentary majority. Anything that they do without, or contrary to, such a promise and anything that they fail to do despite their promises violates the requirement of democratic legitimacy. As this has never happened anywhere yet (and it is not even possible in its entirety),[35] *the democratic legitimacy of legislation is not only indirect but it is also necessarily partial* (to a smaller or larger extent).

VI. Conclusion

All in all, it can be said that no matter how vague content the terms "*rule of law*" *or "human rights*" have, it is *necessary to enforce them* – at least to a minimum extent – *in all legal systems* and one of the most effective ways to do this is enforcement by the constitutional court (constitutional judges), even if this system has existed for less than two centuries. *As these rights can be violated in the most dangerous manner by that very majority and by the legislative body meant to represent them,* but at least consisting of politicians elected by the majority*, it is therefore not only verifiable but also necessary that* – in the spirit of justice but in a manner prescribed by the statutory law and by the constitution forming a part of it – *an authorised body (or bodies)* (in Hungary the Constitutional Court) *can review and cancel* (or at least ignore, like in the United States) *these laws in order to prevent a "tyrannical majority" from evolving.*

35 There are always unforeseeable problems that arise and require an *ad hoc* decision and, for this reason, some of the former promises cannot be fulfilled or it would not be expedient to fulfil them.