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TANULMÁNY

Detre László:

How deep is the rabbit hole? Taking a glimpse at the theoretical debate on the rule of law

I. Introduction

The exact meaning of the rule of law is a subject of heated debate, not just in the daily adjudication but even more in the field of legal theory. This is hardly surprising since it is about the very basics: how one shall think of the law itself:[1] of its origin; of its content; of its aims and means and of its relation with human reality. Thus, defying and narrowing down the implementation of the rule of law is no lesser task then describing such dimensions that are to be defined themselves.

Doing so is not an easy task at all, quite possibly one of the most difficult ones in the jurisprudence. It involves a great deal of historical; cultural; philosophical, sociological and legal knowledge. Every human being has some sort of conception about the law in the greater sense and as such, the commotion over the rule of law touches upon deep personal convictions as well. Finding answers then is like accompanying Alice down in the rabbit hole. But how deep is it?

The aim of this paper is to present the main aspects of the theoretical discourse in the Western legal thought by highlighting the main divisions that exist within the legal scholarship. It also intends to provide a solution to reconcile these disagreements, which could serve as a base for a rule of law measurement.

II. The rule of law debate is necessarily heated

To begin with, the rule law is widely accepted as an essentially good thing.[2] Being good, naturally, is already a subjective dimension and as such, it already reduces the chance to agree upon its meaning. The goodness of the concept derives from its historical origin that is also its most basic feature: aiming to be the antithesis of any arbitrary power, especially the power of men.[3] Failure is just a part of human nature and unfortunately, man can be easily tyrannical towards his fellows. It is well to say then that two fundamental pre-conceptions frame the rule of law idea: *i)* political pessimism and *ii)*

[1] Paul Craig: Formal and substantive conceptions of the rule of law: an analytical framework. *Public Law*, 1997, 487.

[2] Laurent Pech: 'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law. *European Constitutional Law Review*, 2010 Volume 6, 360.

[3] See: Jørgen Møller: The advantages of the thin view. In: Christopher May and Adam Whinchester: *Handbook on the Rule of Law*. Edward Elgar Publishing, Cheltenam, UK – Northamtpon, MA, USA, 2018, 30. Also see: Gianluigi Palombella: The Rule of Law as an Institutional Idea. In: Leonardo Morlino – Gianluigi Palombella: *Rule of Law and Democracy, Inquires into Internal and External Issues*. Brill, Leiden – Boston, 2010, 3.

normative optimism.[4] These mean that men do not trust the unpredictable and unregulated political power of their fellows but they do trust the law that shall constrain the coded human deviations.[5]

Aiming to reach the previous goal, the rule of law – a fundamentally Western[6] idea – emerged with the rise of the bourgeois[7] and as such, with the rise of liberalism.[8] Very broadly, individuals wanted to secure their interests by constraining the sovereign prince through various forms[9] but through what they might have called law. The basic thought – that equal men bore certain rights against the public power and that the public power must enact predictably – evolved in a slightly different way in the national legal thinking due to historical and cultural circumstances. Indeed, almost all rule of law discussion mentions the British; the French; the German and usually the American understandings as point of references.

Despite the fact that there are rather technical discrepancies, common patterns – especially a common founding notion – can be detected.[10] The starting point here is what functions law shall attain in Western legal cultures. The short answer may be that it should be organizing and legitimizing public power, arranging social relations and most importantly: protecting individual freedom. Thus, law has to maintain social order and preserve individual liberty at the same time.[11] Adding to these overly broad aspects, two questions have to be answered. If law is a human creation, how can it constrain the conduct of men? Secondly, how can the law constrain itself?

Firstly, the rule of law is not just a legal but also a political idea[12] *in a greater sense*. It may depict a certain conception on how social affairs should be handled. That is the key to solve how may law channel human behavior. The ultimate answer is self-limitation. There are differing theories on why men would follow legal rules on the first place but here the question is more elemental. It is about if they accept the law – as the form of guiding principle of the human interactions – at all or not. A general view on the law – and respect towards to it – bears a great deal, if not the greatest deal of importance. It is

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[4] Danilo Zolo: The Rule of Law: A Critical Reappraisal. In: Pietro Costa – Danilo Zolo: *The Rule of Law – History, Theory and Criticism*. Springer, Dordrecht, 2007, 21.
[5] Shannon C. Stimpson: Constitutionalism and the Ruel of Law. In: John S. Dryzek – Bonnie Honig – Anne Philips: *The Oxford Handbook of Political Theory*. Oxford University Press, Oxford, 2008., 323.
[6] Gianluigi Palombella: The Rule of Law and its Core. In: Gianluigi Palombella – Neil Walker: *Relocating the Rule of Law*. Hart Publishing, Oxford and Portland, Oregon, 2009, 18.
[7] Dieter Grimm: *Constitutionalism – Past, Present and Future.* Oxford University Press, Oxford, 2015, 45-53.
[8] See: Maurice Adams – Ernst Hirsch Ballin – Anne Meuwese: The Ideal and the Real in the Realm of Constitutionalism and the Rule of Law: An Introduction. In: Maurice Adams – Anne Meuwese – Ernst Hirsch Ballin: *Constitutionalism and the Rule of Law – Bridging Idealism and Realism*. Cambridge Univerity Press, Cambridge, 2017, 12.
[9] Brian Z. Tamanaha: *On the Rule of Law*. Cambridge University Press, Cambridge, 2004, 27.
[10] See: Zolo's external history concept and his constructivist approach: Zolo, 7-18.
[11] Martin Loughlin: *The Foundation of Public Law*. Oxford University Press, Oxford, 2010, 312.
[12] Tom Ginsburg: Difficulties with measuring the rule of law. In: Christopher May and Adam Whinchester: *Handbook on the Rule of Law*. Edward Elgar Publishing, Cheltenam, UK – Northamtpon, MA, USA, 2018, 48.; Zolo, 3.

fair to say then that the rule of law is rather an enterprise, or a process if one may like, trying to set human behavior under the law.[13] That is to say, since it is thought to be essentially good, it is an aspiration towards a just world,[14] an ideal arrangement for rule system and as it is idealistic, one would say that it remains impossible to reach.[15]

Secondly, answering the question how could law constrain itself is more related to the general division, which defines the theoretical debate, elaborated later. The remark here is whether the concept should involve only formal or also substantial elements. The latter category is expected to set a limit against the law itself. One may well ask the question: why shall the law be constrained if it is believed that the rule of law is essentially good?

To find the answer to this question a much broader subject has to be presented. That is the never-ending fist fight over the connection between law and morality, a constellation that deeply determines not just the fate of the rule of law, but also the debate about the law itself. The major opponents are well-known: according to the positivist view, law is what it is, a creature that has to meet certain requirements determined by a higher creature of its same kind. Natural lawyers tend to say that the law is more than that. Positive law may still be the law but there is something behind and above it: the empire of morality. However, it has fundamentally changed and modern – liberal – societies tend to be regarded as morally pluralistic which means that no single absolute conception shall prevail.[16] Thus, in the light of these remarks – far from being exhaustive – four distinct concepts are to be sketched to present how the question on this connection might diverse and affect the rule of law debate.

III. Law and morality – what do Raz, Habermas, Fuller and Dworkin think?

1. Introduction

As it was indicated, the rule of law mystery is hugely about what the law is and how the goodness of the rule of law is conceived. It was also hinted that such a question is far greater than the possibilities of this paper, which does not, in any case, try to provide a full-scale – presumably impossible – analysis on the current state of this issue. However, there is a high chance that the following authors will be mentioned if one triggers a rule of law discussion. The reason is that four of them formulated very characteristic opinions on what the law is, what it has to do with goodness – if it has anything to do – and how the rule of law should be seen. As the big debate follows the pattern from formalism to the more substantive approaches, thoughts of the chosen authors are presented in the same way.

2. Joseph Raz

[13] Lon L. Fuller: *The Morality of Law*. Yale University Press, New Heaven, 1969, 74.
[14] Randall Peerenboom: Varieties of Rule of Law: an introduction and provisional conclusion. In: Randal Peerenboom: *Asian Discourse of the Rule of Law – Theories and implementation of rule of law in twelve Asian countries, France and the U.S*. RoutledgeCurzon, London, 2004, 1.
[15] Loughlin, 312., 314., 337.
[16] See: Tamanaha (2004), 39-42.

Raz[17] considers that law – and the rule of law – has nothing to do with morality, justice, democracy and so on. It is only what it literally purports: law rules, not men. In this sense, to a lesser or greater extent, every legal system might meet this demand. On the one hand, law should rule the people who should obey it. On the other hand, law has to bear the capabilities to make this obedience possible.

In this regard, Raz formulates eight principles of the rule of law divided into formal qualities attached to the law itself and requirements to its enforcement: i) all laws should be prospective, open, and clear; ii) laws should be relatively stable; iii) making of particular laws should be guided by open, stable, clear, and general rules; iv) the independence of the judiciary must be guaranteed; v) principles of natural justice (open and fair hearing, correct application of the law) must be observed; vi) courts should have review powers over the administration and the law-making; vii) courts should be easily accessible and viii) discretion given to crime-preventing agencies should not be allowed to pervert the law.

Raz emphasizes that the rule of law is just one virtue that the legal system may possess but it is already something valuable. Firstly, it provides a framework under which men could choose their way of life since it stabilizes social relations and makes planning possible. Secondly, it bears a great importance to guarantee individual freedom. The latter differs from freedom in the political sense since Raz puts the emphasis on predictability. Provided by the stability of the legal system it does not mean less than respecting human dignity: treating men as they are capable of arranging their future. So to say, predictability includes respecting dignity and autonomy, men's right to control their future.

Raz believes that law may serve very different purposes and the rule of law is to secure them. These goals may be good but they may also be bad. Raz here uses his famous knife metaphor: "a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives. At most, it shows that from the point of view of the present consideration it is not a moral good. Being sharp is an inherent good-making characteristic of knives. A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value it is of the essence of law to guide behavior through rules and courts in charge of their application".[18]

To sum up, Raz approaches the question of the connection between law and morality from the ends which law may serve. He firmly states that even if conformity with the rule of law is already a virtue, it may well serve very different purposes. Law easily generates arbitrary power and the mission of the rule of law is to minimize it. Maybe it is best to say that Raz considers law as an instrument and as such, neutral to its ends. However, the rule of law is a virtue of the law: it "does not mean that conformity with it is of no moral importance. Quite apart from the fact that conformity to the rule of law is also a moral

[17] In the followings: Joseph Raz: *The Authority of Law – Essays on Law and Morality*. Oxford University Press, Oxford, 1979, 210-228.
[18] Raz, 225.

virtue, it is a moral requirement when necessary to enable the law to perform useful social functions".[19] So to say, it may well be immoral as well but that is not the question of the rule of law itself.

3. Jürgen Habermas

Habermas[20] states that law and morality are similar in the sense that they both intend to regulate interpersonal relations and to equally protect individual autonomy. However, he makes a division of an outmost importance: law is not entirely parallel to morality. The realm of morality has no spatial or historical boundaries and it *fully* embraces *all* natural persons. The individual's self-determination is an absolute, unitary concept, as "each person obeys just those norms that he considers binding according to his own impartial judgment."[21] Additionally to this argumentation, one of the most important remarks from him perfectly depicts his stance on the relation between law and morality: the latter's demands based entirely on individual conscience.[22]

So to say, law is different. Firstly, the legal realm is both narrower and broader than morality at the same time. Narrower, since it only affects external behavior but broader, as it not just regulates interpersonal conflicts but also realizes some political aims. Law might be based on morality but as for the previous argumentation, it cannot do so *solely*. As such, law is complementary to morals at best. Habermas sees that modern law – in Western societies – shall be coercive and freedom guaranteeing at the same time. The question is, he argues, where legitimacy comes from. Habermas believes that natural law is gone and post-traditional morality is just not able to serve as a substantive source anymore. He finds the answer in democracy and in the – *equal* – autonomy of the citizens. So to say, legal freedom is a free choice of rational actors and an existential one of ethically deciding individuals. Law, just as morality, aims to protect the equal autonomy of everyone. However, within the law, the individual's autonomy splits into a private and into a public sphere.

Public autonomy corresponds to the participation of the individual in the community that regulates itself through popular sovereignty. Whereas, private autonomy takes the form of fundamental rights or in his words, the rule of law. Habermas here claims that neither of these autonomies shall detract from each other since otherwise the idea of their co-originality falls. He presents the republican and the liberal approach towards the law, as they emphasize the primacy of one autonomy over the other for their own good. Habermas does not favor either of these approaches but states that democratic will formation is the *only* form that legitimates the lawmaking process in the age of social and ideological pluralism. In this sense, fundamental rights should not be narrowed down to the ones that guarantee the participation in the will formation since they cannot be imposed on it as constrains. Fundamental rights are to do much more: they shall provide

[19] Raz, 226.

[20] In the followings: Jürgen Habermas: On the Internal Relation between the Rule of Law and Democracy. *European Journal of Philosophy*, 1995, Volume 3 – Issue 1., 12-20.; Jürgen Habermas: *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy*. Massachusetts Institute of Technology, New Baskerville, 1996, 238-287., 447-517.

[21] Habermas (1996), 450.

[22] Habermas (1995), 15.

everyone with the equal opportunity "to pursue his or her private conception of the good."[23]

All in all, the autonomy of the individual and the balance between his public and private sphere can only be maintained if one sees himself not just as the *addressee* but also as the *author* of the law. This is the internal relation or co-originality between democracy and the rule of law or fundamental rights. Very importantly, Habermas here breaks with morality since the idea that fundamental rights are only reformulations of pre-existing moral goods would destroy the previous notion. Individuals are co-legislators and as such not free to choose the line under they can realize their own good. Individuals turn into legal persons under the law, bearers of fundamental rights and through this institutionalization, private and public autonomy presupposes each other. To sum up, and this is Habermas's view on the law, citizens make use of their public autonomy only if – based on their fundamental rights they are sufficiently independent and – they arrive to a consensual regulation of their private autonomy.[24]

Habermas makes a clear cut between law and morality in a very convincing way. He sees law as a formal consensus of the individuals, whose equality and autonomy, as well as their restriction, is protected and governed by their own decisions. He depicts how lawmaking works or should work in modern societies. In his theory, the rule of law (corresponding to fundamental rights) is co-equal with popular sovereignty, supposing that one is not prior to the other. Habermas also contrasts liberal and social welfare conceptions to imply that equality between citizens might not only be a legal but a material question. As it was indicated, Habermas's perception is very compelling in a pluralistic society. However, despite the fact that he does not clearly state this, there is one assumed moral – liberal – aspect of his argumentation: the pre-granted equality of the citizens.

4. Lon L. Fuller

To begin with, Fuller[25] makes a distinction between the morality of aspiration and the morality of duty. The first is a question of good life and the matter of conscience, the latter is about the basic rules of social co-existence. The boundaries between these categories are drown by an invisible pointer and where to put him is the greatest challenge of moral philosophy. Fuller underlines that moral debates imply reciprocity between good and bad, categories that cannot be perfectly described. The command do not kill does not say anything about how one imagines a perfect life. As such, human judgements *in general* are based on some half-perceived utopia[26] which means that men may well know what is unjust without perfectly knowing the opposite. This argumentation is very important to understand Fuller's stance on law itself.

Through a tail of an imaginary Rex who fails to make law in eight different ways, Fuller promulgates his eight desideratum of legality: i) generality of the law; ii) promulgation of

[23] Habermas (1995), 17.
[24] See: Habermas (1995), 18.
[25] In the followings: Fuller, 3-38., 33-94., 95-117., 145-151., 152-167., 177-186., 191-221.
[26] Fuller, 11.

the law; iii) non-retroactivity of the laws; iv) clarity of the laws; v) non-contradictory laws; vi) law cannot require impossible; vii) constancy of the law through time and viii) congruence between official action and the declared rule. Fuller considers that these elements end up the inner morality of law, the basic morality of social life,[27] depicting conducts negatively that are to be avoided. To answer why legality is already a moral good, Fuller separates substantive and procedural natural law. The first tackles the ends of the legal system while the second is touching upon the "ways in which a system of rules for governing human conduct must be constructed and administered."[28] According to him, most thinkers focus on the first one, the ends, but as he demonstrated regarding morality, it is hardly possible to define perfectly. However, none of this means that legality is completely neutral to the ends. It may serve different political goals but due to the inner morality of law, it cannot serve every kind of it.

Firstly, law is also a precondition of good law[29] and the only possible way to make morality possible. Neither law nor morality exist in a social vacuum. To live a good life requires firm base lines for human interaction, something that only a legal system can provide. As such, if the legal system is essential to realize moral goals then legality attaches a special type of morality to the lawmaker and to the law-administrator. Secondly, Fuller adds to his concept his general view on man. Accordingly, a man is a responsible and capable agent and law – as it is man-made, just as morality is human morality – cannot be neutral towards him. The internal morality of the law does not make less than supporting man in his self-determination and guaranteeing his dignity. So to say, any departure from the law's inner morality would deny this concept and law would not judge a man anymore but act upon him.[30] In the light of this conception on the human being, duties – whether moral or legal – arise from exchanges and trades between men under the principle of reciprocity.

Finally, Fuller contrasts managerial social ordering and law. Whereas the first is about pure subordination to the ruler and fulfilling the goals set by him, law is different. While making it possible to choose between good and bad, setting the citizens' relations and providing a framework for these interactions, it primarily assumes reciprocity of expectations between the lawgiver and the subject. In this respect, the eight principles of legality gain their real power. Fuller states that among those, congruence between the official and the declared rule is the key: "the very essence of the rule of law is that in acting upon the citizen […] a government will faithfully apply rules previously declared as those to be followed by citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing."[31] The latter stance approves Fuller's general view on law. It is a process that subordinates human behavior to legality, not an either or question and very much a matter of human behavior.

[27] Fuller, 42.
[28] Fuller, 97.
[29] Fuller, 155.
[30] Fuller, 162-163.
[31] Fuller, 209-210.

Fuller argumentations purport two main points: he acknowledges the imperfection of human reality and as such, the fact that the rule of law depends upon the attitude of the parties concerned. Secondly, he neatly defends why his points of legality end up in the – inner morality – of law. Inner morality of law looks at man as a human being and at law, as it provides his dignity. Moreover, law is more than this: an essential precondition to pursue some morally determined goals. Overall, when one of the principles of legality falls the result is not just a bad legal system but not even law at all.[32]

5. Ronald Dworkin

Dworkin[33] approaches the whole question of law and morality from the point of view of what he calls the hard cases. On this note, the dispute cannot be clearly decided under the law. Still, according to Dworkin, one party shall have the right to win[34] and the judge has to do something about it. The question is what precisely and how.

Dworkin's starting point is making a clear distinction between an argument of a policy and an argument of a principle. While the first justifies a political decision that is advancing or protecting a goal of the community, the second one is to justify also a political decision but on respecting or securing an individual right or a right of a group. It is generally accepted that legislation should be based on both principles and also that adjudication is subordinated to it. The reason behind the latter thought is that political decisions shall be made by politically responsible individuals and on the other hand, if the judge makes a new law in a hard case it is essentially retrospective. Dworkin despises the positivist answer on how to solve hard cases. He claims that trying to bring up historical facts to detect what is the law – either focusing on the wording of the law or figuring out the intent of the lawmaker – is basically a choice between policies laying behind the concrete statue and as such, not neutral at all.

Dworkin firmly states that in such a case the judge's decision "is taken on the ground that certain principles of political morality are right. A judge who decides on political grounds is not deciding on grounds of party politics. He does not decide in favor of the interpretation sought by the unions because he is (or was) a member of the Labour party, for example. But the political principles in which he believes"[35]. To elaborate, Dworkin famously contrasts "rule book" and the "rights" conception. He does so explicitly to answer what is the *political* idea of the rule of law. According to it in general, public power of the state can only be used against the citizens if it is in line with the publicly accessible rule book. Not just the government but also the citizens shall follow the rule book and it is only possible to change if it is in line with the rule book itself. That sounds like a generally accepted statement but Dworkin is not satisfied since the rule book does not say anything about the content of the law and as such, justice. Dworkin's famous rights conception reads: "citizens have moral rights and duties with respect to one

[32] Fuller, 197.
[33] In the followings: Ronald Dworkin: *Taking Rights Seriously*. Harvard University Press, Cambridge MA, 1978, 81-130.; Ronald Dworkin: *A Matter of Principle*. Harvard University Press, Cambridge MA, London, 1985, 9-32.
[34] Dworkin (1978), 81.
[35] Dworkin (1985), 9., 11.

another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand and of individual citizens through courts or other judicial institutions of the familiar type, as far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights."[36] As such, this approach treats rule of law and justice or as morality together. To sum up, Dworkin firmly believes that following the rule book is vital but it is just not enough to provide justice.

Firstly, the rule book can well be regarded as the source of the law but it is *not the only* one: "some case arises as to which the rule book is silent, or if the words in the rule book are subject to competing interpretations, then it is right to ask which of the two possible decisions in the case best fits the background moral rights of the parties."[37] Here lies Dworkin's main point on the connection between law and morality. He conceives that in these cases judges shall find and invoke a principle that best fits the case to find the moral rights of the parties. Doing so is not a matter of free of choice: the judge has to be in line with the rule book, has to be consequent – consistent in the application of the principle – and also shall not contradict other principles.

Dworkin's argumentation is quite plausible. Firstly, it would be illusory to rule out the individual's beliefs either from lawmaking or from the application of the law. Dworkin convincingly presents why the positivists' so-called neutral approach on interpretation and on filling the legal gaps falls short. He states that at one point the human conduct on creating and applying the law is inevitable. This is the moment when morals, principles, believes, goodness or whatever one may call them could take their role to make or to find the law just. Naturally, his weak spot is how to formulate these morals or principles that are to be involved. He gives a framework that might well constrain this activity but still, in a pluralistic society this concept only works if the majority of the citizens respect the institutions, which have to reflect the greater social reality. Regarding this statement, one point in Dworkin's argumentation is essential: citizens, if they are not satisfied with the rights that law provides, shall bring their case to the court, which has to rule on it in the light of the consistent principles, those are to be detected in the legal and social reality.

6. Some interim conclusions

The thoughts of the cited authors already show the greater boundaries of the rule of law debate. It has already been indicated that it greatly involves one's notion on the law itself and as such, part of the never ending debate between positivists or natural law believers or whoever falls anywhere between these categories. Something is already safe to say. Positivism on this matter does not mean that one acknowledges or even supports that law may serve any political, even horrible goals. It only implies that the rule of law has to be defined by the means of law and legal questions cannot be exported out of the realm of the law. The other side states that it is just not enough to create – by way of law – a just world. It is highly possible that all of them are right at the same time. Having said that, these views were necessary to present, and still far from being exhaustive, to frame what the rule of law debate is about in a narrower sense: is it a thin or is it a thick concept?

[36] Dworkin, (1985), 11.
[37] Dworkin (1985), 16.

IV. The basic divide in the rule of law discourse

1. General remarks

The starting point here is what the thoughts of the cited authors suggest: what are the criteria that should be met if the rule of law is at stake. It is still an abstract question since any subdivision would require further elaboration. Generally, rule of law interpretations can be formal (thin) or substantial (thick), excluding or including aspects (fundamental rights, moral dimensions, certain convictions) that the *content* of the law should meet. Both categories can have various understandings opting in or out several components. One would say that the rule of law gets thicker and thicker by adding new elements to the thinnest starting point.[38] Thin and thick approaches may or may not include qualifications, institutions and fundamental rights and procedures, depending on how one theoretically sees them justified.

Bearing in mind that the rule of law is an essentially Western idea, rooted in liberalism *in the greater sense*, the first step might be going abstract. This would allow to elaborate further details in the light of a given context (historical, cultural, political, theoretical and doctrinal). This is an important assertion since the definition determines the path of the argumentation and different definitions may lead to different conclusions.[39]

To narrow down this circle, even in the most abstract sense, there is some sort of agreement in the legal scholarship that the following considerations must be included. Rule of law has to do something with the sovereign public power – or as it is generally accepted with the state[40] –; it has to make some meaningful restrains on the power;[41] it has to channel and institutionalize the power;[42] it has to fulfil its role at maintaining social order and at the relation between the individuals.[43] However, and above all, it has to secure individual liberty as the founding notion of the Western legal thought.[44]

Taking all of these aspects into consideration, if there is a pressing need to choose, probably Zolo's definition is the most convincing one. Accordingly: "the rule of law is a normative and institutional structure of the European modern state, within which, on the basis of specific philosophical and political assumptions, the legal system is entrusted with the task of protecting individual rights, by constraining the inclination of political

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[38] Adriaan Bedner: The promise of the thick view. In: Christopher May and Adam Whinchester: *Handbook on the Rule of Law*. Edward Elgar Publishing, Cheltenam, UK – Northamtpon, MA, USA, 2018, 36.; See: Tamanaha's rule of law line, Tamanaha (2004), 91., Peerenboom, 5.

[39] Møller, 23.

[40] Loughlin, 314.

[41] Here Peerenboom refers to the state and individuals of the ruling elite. See: Peerenboom, 2.

[42] Palombella (2010), 10.

[43] See: Pietro Costa: The rule of law: an outline of its historical foundations. In: Christopher May and Adam Whinchester: *Handbook on the Rule of Law*. Edward Elgar Publishing, Cheltenam, UK – Northamtpon, MA, USA, 2018, 135.; Martyn Krygier: Tempting Power. In: Maurice Adams – Anne Meuwese – Ernst Hirsch Ballin: *Constitutionalism and the Rule of Law – Bridging Idealism and Realism*. Cambridge Univerity Press, Cambridge, 2017, 135-136.

[44] Habermas suggests that modern legal systems are the products of individual rights. See: Habermas (1995), 14. Or see: Grimm, 23., 66., 69.,83.; Zolo, 4.

power to expand, to act arbitrarily and to abuse its prerogatives. In analytical terms, it may be argued that the rule of law is a legal and institutional figure resulting from a centuries-old evolutionary process, which leads to the establishment, within the structures of the European modern state."[45] The founding notion within the Western legal culture might be this one but the real debate is about how to get and stay there. Is it enough if the law (legal system) meets some requirements or more has to be done by it?

2. As it is thin

The thin view focuses on formal qualities, institutions and any parts of the law that do not say anything about its content. Thin concepts tend to answer questions as what is the law is; who does make it; who does and how enforce it and so on. So to say, it is rather supported by positivist lawyers who think that a legal question – even if it is about to reach the "goodness" of the whole system – shall remain under the legal realm. As Raz or Fuller emphasize – despite of their fundamental difference on morality – that formal legality already enhances predictability, which is a basic condition to respect human dignity. It is true that law can be used to attain several goals but as Raz states, it is an outer question of legal reality and as such, not possible to tackle by legal means. Fuller sees it very similarly even though he puts more emphasis on the respect of the capability of the individuals to make their own choices and as such, law that does not respect this characteristic is not law at all.

All rule of law concepts start with the thinnest layer of it, what is usually labeled as rule by law. Its meaning is generally accepted: public power is conducted by way of law.[46] Palombella tackles this aspect very plausibly: law is nothing else but just an instrument.[47] In most cases, legality is the criteria that comes right after the rule by law. In the strict sense, it requires that public authorities must be able to refer to the authorization in the law that allows them to perform their actions.[48] The elaboration here is the following: legality should refer to any actions by any state authorities not just of the governmental (executive) and of the lawmaker but also of the judicial. Legality is within the core of the thinnest rule of law understanding since it does not require any form of separation of powers but only that the public authority – even if it absorbs the legislative, the executive and the judicial dimensions – has to have its legal basis to act. So to say, legality means law bound public authority.[49] Ever since public authority is submitted to the law, no further actions can be conducted. It is equally important – as Fuller depicted it through the tail of the Rex who failed to make law at all, or see Raz's points in this regard – that the law has to meet certain features to be considered *as law* and not *as a command*. These are the formal qualities of the law or formal legality of the law. It seems that there is a consensus on its subcomponents. As such, law has to be (a) general; (b) clear; (c) prospective; (d) certain or stable (including the idea of legitimate expectations); (e) consistent; (f) publicly promulgated and (g) accessible.[50] Bedner very convincingly

[45] Zolo, 19.
[46] Loughlin, 333., Zolo, 22.
[47] Palombella (2010), 6.
[48] Paul Craig: The Rule of Law, Select Committee on Constitution – Appendix 5 (2007), https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm, 2.
[49] Costa, 135; or see: Palombella (2009), 18.: "law bound state"
[50] Craig (2007), 2; Loughlin, 333.; Peerenboom, 2.; Tamanaha (2004), 92.

considers these three elements as the "thinnest" or core rule of law notion,[51] so to say: government by law according to the law. It is fair to say that after this point, different authors include different – but still formal – aspects. Many would add here the independence of the judiciary; the right to fair hearing; access to courts; reviewing the actions of the executive, sometimes the legislative power and even democracy.

However, there is still a fundamental aspect that is commonly accepted: *equality before the law*. Tamanaha plausibly defines this layer, as law shall be applied equally to everyone.[52] This does not say anything about the content of the law but it aims to suppress and avoid privileges.[53] Equality in this sense does not say anything about social equality either but only refers to the basic notion of fundamental justice.[54] This conception is the founding thought of the Western legal thinking, it is embodied in most of the legal documents having been made during the course of history[55] and it is the center of the liberal thought[56] *in a greater sense*. One might say that involving equality is already a moral good since treating everyone in the same way is not evident. This is true but the equal application of the law still does not say anything about its content. However, if one accepts Fuller's, Habermas's or even Raz's – not mentioning Dworkin's – position, it is hardly possible to leave it out from the consideration. One way or another, they all imply it. To be fair, a very important remark has to be made here that goes back to another fundamentally important problem. These two aspects must not to be confused. Equality before the law or equality in the social sense? While of course the second absorbs the first, there is a heated debate over it. Two basic approaches clash here: the liberal and the social welfare[57] one. According to the first, equality is formal; it has to provide the same protection to everyone but solely negatively. Whereas, the social welfare supporters state that the liberal social model has failed, and threats to equal liberty do come from material differences. So to say, equality should rather be "equal opportunities."[58] To get there, the state's and the law's function is more than just being a negative protector of one's rights. From the point of view of the rule of law debate, the first implies the second while the second goes beyond it in the form of fundamental rights, institutions but most importantly: in the form of the conception of the law itself. Since the last aspect partly falls out of the legal realm, it can be excluded here. Under the thin concept, law has to acknowledge formal equality as equality before the law or as its equal application without any sort of privileges.

3. As it is thick

[51] Grimm, 345.
[52] Tamanaha (2004), 94., 99., 119., See also: Møller, 29., Peerenboom, 3.
[53] Zolo, 24.
[54] Brian Z. Tamanaha: A Concise Guide to the Rule of Law. In: Gianluigi Palombella – Neil Walker: *Relocating the Rule of Law*. Hart Publishing, Oxford and Portland, Oregon, 2009, 10.
[55] See: Maurice Adams – Ernst Hirsch Ballin – Anne Meuwese: The Ideal and the Real in the Realm of Constitutionalism and the Rule of Law: An Introduction. In: Maurice Adams – Anne Meuwese – Ernst Hirsch Ballin: *Constitutionalism and the Rule of Law – Bridging Idealism and Realism*. Cambridge Univerity Press, Cambridge, 2017, 12.
[56] Grimm, 62., 69.; Tamanaha (2004), 32-33.
[57] In this regard see: Grimm, 23-27.; Habermas (1995), 18.; Habermas (1996), 244-248.; Tamanaha (2004); 63-73.; 96-98.; 112-113.
[58] Grimm, 119.

So far, normative and institutional qualities have been presented to serve the idea that the law shall rule, not men. Critics of the thin approach tend to say that it is not enough since it still does not determine the *content* of the law. Law could be despotic[59] – even if it is made by a democratic majority – simply just the tool of the powerful.[60] As such, it could serve any sort of goals and regimes. Precisely this is the reason why the idea behind the thick view is adding restrains on the law itself or, in other words, fill the rule of law up with notions that may prevent the arbitrariness – clothed in the form of law – from happening.

In the contemporary debate, Peerenboom states that the question of substance involves particular economic arrangements, certain forms of government and the protection of fundamental rights.[61] Tamanaha goes from individual rights, to rights to dignity and finally, as the thickest concept, he involves social welfare problems such as material equality.[62] Bedner argues that "all law and its interpretations are subject to fundamental principles of justice; individual rights and liberties are recognized and protected; socio-economic rights are guaranteed and promoted; group rights are recognized and protected."[63] Craig presents the thin concept, as it does not make any judgement on the actual content of the law while the believers of the substantive idea – accepting the formal characteristics – consider that "substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then applied to distinguish between "good" laws, that do comply with such rights, and "bad" laws which do not."[64] Two points have to be taken into account here that make another turn in the rule of law debate.

Firstly, as it has already been asked, what shall law do with morality? From a greater theoretical point of view, it is important to refer back to the thoughts of Raz, Habermas, Fuller or Dworkin since now it seems to be evident what the great divide between their approaches is. It feeds from the differing conceptions about the law itself. Again, according to Raz, law has nothing to do with morality, Habermas argues that there are no more absolute moral principles and as such, morality cannot serve as a limit on modern law. He plausibly depicts that in a pluralistic society finding absolute moral principles is not even possible. Fuller believes that law has its own internal moral value and he formulates that trying to reach something that is thought to be good is already something good. Whereas, Dworkin clearly states that law is more than what is in the book and especially the application of the law must not be – and cannot be – blind to moral principles that can be detected in social reality. Other authors challenge the – absolute – moral foundations of law with slightly more practical argumentations. Peereboom underlines that the thin understanding makes it possible to avoid never-ending debates about leading political theories that aim to determine justice.[65] Zolo considers that "a rigorous theory of the rule of law requires a rigorous elaboration of the doctrine of

[59] Even Raz acknowledges that law may easily generate arbitrariness, see: Raz, 224.
[60] Stimpson, 325.
[61] Peerenboom, 2.
[62] Tamanaha (2004), 91.
[63] Bedner, 38.
[64] Craig (1997), 467.
[65] Peerenboom, 9.

individual rights" but the latter is missing from the contemporary scholarship.[66] Tamanaha argues similarly.[67]

The second problem stems from the fact that in Western legal cultures fundamental rights – looking away from the question whether they are moral based – shall constrain the content of the law. The big question is how this should be done. Who shall determine the content of the fundamental rights, so to say who should have the last word: democracy or the judiciary? Most authors emphasize this aspect very heavily and it is often presented as the republican versus liberal approach.[68] The debate is rather institutional but very much fundamental regarding the rule of law. One may well ask how the law can constrain the law if there is no organ that may enforce the law on the lawmaker itself. On the other hand, it is often argued that leaving to courts to have the final word on the law would lead to their politicization or to the rule of men again. Examining the legal systems, authors here – besides the theoretical foundation – would go back to the differences between the British, the German, the French and the American solutions. While the first model would be regarded as the republican model, the rest are the liberal ones. Having said that, these are rather technical – undeniably huge but theoretically not irreconcilable – differences if one seeks or tries to seek common rule of law patterns in the Western legal cultures. It might also be said that while the British constitutional system is rather unique, the liberal approach – written constitution, bill of rights and judicial review over the legislation – prevailed in the American and the continental legal cultures.[69] The conclusion here is that involving fundamental rights protection into the rule of law debate generates new horizons that have to be taken into consideration as well.

4. Some interim conclusions

There are supporters and opponents of both (thin and thick) approaches. One would say that involving the question "what *should* be the content" in legal argumentations might lead to bias solutions and that is why the thin – or neutral[70] – understanding is preferable. For example, Palombella states that the thick conception stretches the rule of law too far: "to match one of its historical incarnations, and to embody within its very definition, a political notion of democratic power, or a socio-economic pattern, whether asking for welfare solidarity or individual market-autonomy."[71] However, there are others such as Bingham[72] who advocate for the thick concept. According to Bedner, the thin approach has its analytical advantages. Nonetheless, the thick understanding corresponds more to the founding idea of the rule of law[73] and it offers a complete protection against tyranny.[74] Tamanaha points out that whilst formal legality might be the leading idea of

[66] See: Zolo, 38-39.
[67] Tamanaha (2004), 103-104.
[68] See: Dworkin (1985), 9-32.; John A. Griffith: The Political Constitution. *Modern Law Review*, 1979, Volume 42 Number 1, 16; Habermas (1995), 16.; Habermas (1996), 245.; Loughlin, 336-337.; Tamanaha (2004), 104-110., 122-126.; Zolo, 10., 32-37.
[69] See: Zolo, 15-18.
[70] Palombella (2010), 7., Peerenboom, 12.; Tamanaha (2004), 94.; Zolo, 30., 55.
[71] Palombella (2010), 32-33.
[72] Tom Bingham: *The Rule of Law.* Penguin Books, London, 2011, 67.
[73] See: Møller, 30.
[74] Bedner, 44., Ginsburg labels the thick concept as the "maximal" one. See: Ginsburg, 51.

the rule of law among legal scholars, the thick understanding – formal legality, individual rights, and democracy – likely approximates the common sense of the rule of law within Western societies.[75] After examining the frontiers of the thick approach, one would rightly say that there is still a misunderstanding about how the *law* can rule over the *law*. A small hint has already been given when it was stated that fundamental rights shall precede "the law" and that certain institutional solutions have to be involved. This leads to the last aspect of the rule of law mystery, namely how can be the previously emphasized tension within the law explained.

V. Rule of law and constitutionalism

All presented approaches speak about the rule of law in the abstract sense, the *law* that rules. On the most abstract level that might be acceptable but rule of law evaluations aim to find concrete elements of the notion. Among these, whether one favors the thin or the thick approach, there are way too many goals and functions that "the" law has to fulfil at the same time.[76] This might be the reason why it is difficult to decide which rule of law approach is favorable. These conflicting functions and expectations make complicated to draw a clear picture.

Moreover, seemingly different ideas such as democracy or the separation of powers are often involved in the rule of law debate. There are authors who say that the rule of law just simply does not have anything to do with other founding ideas (see above Raz's argumentation) or who say that for very convincing theoretical reasons there is co-originality between democracy, the rule of law and the protection of fundamental rights. Møller claims that there are various attributes of the rule of law, namely: formal legality, checks and balances, sovereignty of the people, negative and positive rights. There might be a tension among these and it is rather better to keep referring to the rule of law on the minimalist level. He pinpoints that "where formal legality is a part of an inner uncontested core of the rule of law with a contested outer circle comprising the politico-institutional requirements of the rule of law. The point is that the vehement debates about the rule of law do not concern the conception of formal justice but the characteristics of the legal system that is to apply it and the political system that is to realize and guarantee it."[77] So to say, the tyranny of the positive law – rule of law if it is only about formality – can be prevented if it is constitutionalized.[78] After all these being said, it is easily notable that the turmoil within the rule of law debate is about seizing all or nothing. There is a uniform notion and definition but it seems that there is no practical use of it due to the diverging components. This stems from misunderstanding that the rule of law is seemingly an un-differentiable principle. The last part is about how this problem can be grasped.

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[75] Tamanaha (2004), 111.

[76] See above: organizing and legitimizing public power; arranging social relations and most importantly, protecting individual freedom.

[77] Møller, 21. and the citation is from 29.

[78] Loughlin, 340.: "The rule of law is just one expression of the objective of obliging government to control itself. It is part of the 'auxiliary precautions' needed in government. In this sense, the rule of law forms one aspect of the political theory of constitutionalism".; Møller, 31.

In Western legal cultures, the idea of constitutionalism and the constitution is about creating, guiding and constraining the public authority comprehensively and universally, prohibiting any 'extra-constitutional' authority.[79] It is a framework that contains the basic rules of law-making, certain institutions with particular goals, determines the relations between the different levels of law and powers and as such, it turns the conduct of public authority into a matter of – legal – mandate.[80] In short, the constitution is "the law" that bounds public authority by way of creating it.[81] But the constitution is more than this. It also combines some ideas and values[82] determined by the constituent power – based on the democratic idea that respects everybody equally (see Habermas above) – embodied in the form of fundamental rights. Thus, the constitution may provide the protection of individual liberty against the constituted power by enforcing fundamental rights.[83] However, it can only do so if it takes precedent over the ordinary laws and thus, it takes the top position in a hierarchized legal system.[84] The constitution is then the fundamental law[85] of the land, which determines the validity[86] of the ordinary laws. Not just their form but also their content. This might be the answer to the "how may law constrain law?" question. So to say, in the greater sense, the rule of "the law" shall be conceived as the rule of the fundamental law of a given legal system that determines and absorbs the above unfolded – democracy, separation of powers, protection of fundamental rights and so on – features. The constitution is "the law" that corresponds to the original notion, which aimed to exclude arbitrariness, secure liberty and ensure the supremacy of the law.[87] It is found then: there is a law as a framework and there might be laws according to the framework. It is not surprising then that some authors refer to the rule of law as an aspect of constitutionalism.[88]

However, there is still one major problem that has already been mentioned. If there is no consistent morality or natural legal system above the law, how can be the constitution itself constrained? How can the ultimate man-made law be over the man himself? What if the framework is already evil? What if the constituent power itself is tyrannical? The answer lies in Fuller's points. Law is always just the half of the picture, the other one is the behavior of the actors who make it work. If one rightly accepts that our time is labeled as morally pluralistic then nothing else is left just the previously mentioned self-limitation or the conscience of the constitutive power.[89] One shall assume and hope that Habermas and Fuller are right and the members of the constitutive power are wise and do

[79] Grimm, 43., 215., 237., 271-272.; Loughlin 275., 279.
[80] Adams – Hirsch – Meuwese, 3.; Grimm, 12., 271.; Loughlin, 276., 287., 336., 340.
[81] See: Kyriger, 38.
[82] Adams – Hirsch – Meuwese, 3.; Stimpson, 322.; Zolo, 35.
[83] Grimm, 23., 66., 69.,83.,
[84] See: Grimm, 11., 22., 168., 223., 321.; Loughlin, 288., 237., 271
[85] Loughlin, 276.
[86] Grimm, 325.
[87] Grimm, 335.
[88] Adams – Hirsch – Meuwese, 3.; Loughlin, 340. Kyriger believes that constitutionalism and the rule of law have "different historical, institutional and discursive/rhetorical trajectories and incarnations, but they are also closely related, and they overlap". The common trait is that they are both connected to the exercise of the power. See: Kyriger, 35.
[89] For this see: Habermas (1995), 14. The previous thought are theoretical. In practice, the picture – due to the various sources of international law – is more complicated.

not question the legal equality of the fellows, the created legal system – as this is Fuller's thought – is already something good on the level of the constitution. It still has to be concretized and interpreted. Here comes Dworkin into the picture. It is possible that there are no more universal moral values anymore but there might be ruling concepts in society that a judge might take into consideration while he solves a hard case. Law is a human creation and as such – regardless how one names it – the human factor will always be there at its creation and implementation. There might be certain principles – probably not moral – that stem from the constituent power's will and since it belongs to the society, judges may discover them. This leads to the final remark that only applies in the Western legal cultures and on which the whole previous argumentation is founded. There is one virtue that cannot be trumped by the constituent power either: legal equality of the fellow men. If it is, everything that so far has been said falls.

VI. Closing remarks

It now seems to be clear that there are three legal layers of the rule of law discussion. In the narrower sense if one intends to examine the state of the rule of law it is better to focus on the formal aspects of the law. This approach also allows making separate understandings of the three ruling notions in the Western legal thought: democracy, rule of law and the protection of fundamental rights. If it is within the legal system, it should be the thinnest core. If it is about the whole legal system, it should be about the formal layers of constitutionalism. On the other hand, the thick approach can only be conducted about the whole legal system.

Thus, a choice has to be made in any rule of law evaluation since it greatly determines the working methods.[90] How the rule of law looks like is up to the constituent power, so to say it is a political decision in this sense – but accepting Fuller's argumentation on his principle of congruence – it remains so at least in fifty percent. A lot depends on the behavior of the parties and as such it cannot be denied that the rule of law is largely a cultural phenomenon.[91] So to say, this is the fourth, empirical aspect of the rule of law. Maybe this one is the most important and determines the fate of the whole idea. Tamanaha depicts this thought in the most convincing way: "[i]n order for the rule of law to exist, people must believe in and be committed to the rule of law. They must take it for granted as a necessary, proper and existing part of their political-legal system. This attitude is not itself a legal rule. It is a shared political ideal that amounts to a cultural belief."[92]

Why is all this hustle so important? The answer is rather cynical and it comes from the assumed goodness of the rule of law. There is a fight for it for the very reason that it has an enormous power of its own: the power of legitimacy[93] is the power that any sort of regime desires to have.

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[90] Møller, 22.
[91] Grimm, 351.; Peerenboom, 5.
[92] Tamanaha (2009), 10-11.
[93] Craig (1997), 12.; Tamanaha (2004), 120.

All the presented thoughts show that the rabbit hole seems to be as deep and as surrealistic as Alice might have seen it. However, there is also a way to wake up and get out.

Koncsik Marcell:[1]

Extraterritorial application of human rights conventions: is a cause-effect notion of jurisdiction finally recognized?

This paper explores the extraterritorial applicability of human rights conventions by analyzing the jurisprudence of international and regional human rights bodies and courts. First, we introduce the problem of extraterritoriality and examine the concept of jurisdiction from a human rights perspective. In section II, the article considers the spatial model and the effective control test applied by human rights courts to establish States' extraterritorial obligations. Section III deals with the broader personal model and evaluates the pertaining controversial jurisprudence of the European Court of Human Rights. In section IV, we propose that besides the spatial and the personal models, a more progressive cause-effect notion of jurisdiction is gaining acceptance in contemporary jurisprudence, particularly in cases concerning transboundary environmental harm and in the business and human rights context. In section V, the study concludes and briefly compares the spatial-, the personal- and the causal models of extraterritoriality.

I. Introduction

1. Scope of application of human rights conventions

The majority of human rights conventions define their scope of application based on the notion of jurisdiction exercised over the right holder.[2] In the human rights context, jurisdiction refers to the State's actual competence to exercise control or authority over territory (or individuals).[3] Accordingly, the European Convention on Human Rights ['ECHR'] stipulates that 'The High Contracting Parties shall secure *to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention',[4] the American Convention on Human Rights ['ACHR'] lays down that States parties 'undertake to respect the rights and freedoms recognized herein and to ensure *to all persons subject to their jurisdiction* the free and full exercise of those rights and freedoms […]'.[5] Similarly, the Convention against Torture[6] and the Convention on the Rights of the Child[7] also require States' jurisdiction for human rights obligations to arise. The

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[1] Law student, Eötvös Loránd University, Faculty of Law; Supported by the ÚNKP-19-2 New National Excellence Program of the Ministry for Innovation and Technology.

[2] Marko Milanovic: *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*. Oxford University Press, 2011 ['Milanovic 2011'], 2.

[3] *Ibid*, 8.

[4] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04 November 1950, ETS No.005, U.N.T.S. Vol. 213, 221, No. 2889 ['ECHR'], Article 1.

[5] American Convention on Human Rights "Pact of San José, Costa Rica", San José, 22 November 1969, U.N.T.S. Vol. 1144, 123, No. 17955, Article 1(1).

[6] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, U.N.T.S. Vol. 1465, 85, No. 24841, Article 2(1).

[7] Convention on the Rights of the Child, New York, 20 November 1989, U.N.T.S. Vol. 1577, 3, No. 27531, Article 2(1).

applicability of these instruments therefore all depend on one criterion: jurisdiction. The wording of the International Covenant on Civil and Political Rights ['ICCPR'] is a notable exception from the above, since the treaty stipulates that a State party 'undertakes to respect and to ensure *to all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant [...]',[8] which appears to conjunctively require that the right holder has to be both in the State party's territory and under its jurisdiction at the same time. However, the above jurisdictional clause was consistently interpreted by both the Human Rights Committee[9] ['HRC'] and the International Court of Justice[10] ['ICJ'] to contain a disjunctive requirement, that is either within the State's territory or under its jurisdiction. On the other hand, there are some human rights treaties that do not limit their scope of application based on the notion of jurisdiction, among which the International Covenant on Economic, Social and Cultural Rights[11] ['ICESCR'] is by far the most significant.

2. Jurisdiction as a threshold criterion for human rights obligations

We must emphasize that the concept of jurisdiction in a human rights context is different from that in general international law.[12] Jurisdiction in general international law refers to States' permission to exercise legal authority in a given situation,[13] while as *Marko Milanovic* points out, in a human rights context jurisdiction serves as 'a threshold criterion, which must be satisfied in order for treaty obligations to arise in the first place'.[14] Hence, instead of a *de jure* competence of States, jurisdiction is understood as *de facto* power over territory or individuals in that sense.[15] While this concept is accepted by most human rights bodies, the practice of the European Court of Human Rights ['ECtHR'] is not that straightforward whether mere factual control can establish States' jurisdiction, as the Court took a rather *de jure* jurisdiction approach in its infamous *Bankovic* decision.[16] All in all, jurisdiction in this context serves as a prerequisite for the applicability of human rights conventions. The rationale behind requiring a jurisdictional link as a prerequisite is that States cannot reasonably be obliged to guarantee human

[8] International Covenant on Civil and Political Rights, New York, 16 December 1966, U.N.T.S. Vol. 999, 171, No. 14668 ['ICCPR'], Article 2(1).

[9] Human Rights Committee ['HRC'], *Sergio Euben Lopez Burgos v. Uruguay*, Communication No. R.12/52, 1981 ['*Lopez Burgos v. Uruguay*'], ¶12.3; HRC, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 ['HRC General Comment 31'], ¶10.

[10] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C. J. Reports 2004 [*'Wall Advisory Opinion'*], ¶¶108-109.

[11] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, U.N.T.S. Vol. 993, 3, No. 14531.

[12] Claire Methven O'brien: The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal. *Business and Human Rights Journal*, Vol. 3, Issue 1, 2018, 53.

[13] Cedric Ryngaert: *Jurisdiction in International Law*. Oxford University Press, 2008, 5-10.

[14] Marko Milanovic: From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties. *Human Rights Law Review*, Volume 8, Issue 3, 2008, 416; *Catan and others v. Moldova and Russia*, Applications nos. 43370/04, 8252/05 and 18454/06, Judgment, 19 October 2012 ['*Catan and others v. Moldova and Russia*'], ¶103.

[15] Milanovic 2011, 8.

[16] *Banković and Others v. Belgium and Others*, Admissibility Decision of 12 December 2001, Application no. 52207/99, Reports 2001-XII ['*Bankovic*'], ¶¶59-61.

rights to anyone in the world without some connection to the State concerned.[17] However, as the ICJ declared in its *Wall Advisory Opinion*, 'while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory',[18] which opens the door to the extraterritorial application of human rights conventions.

3. Defining extraterritorial application of human rights conventions

Human rights treaties are applied extraterritorially when the individual whose human rights have been violated was not physically within the territory of the perpetrator State when the infringement occurred.[19] International jurisprudence up until recently accepted only two models to extend human rights protection extraterritorially: the spatial and the personal models.[20] Under these models, States can exercise extraterritorial jurisdiction either by exerting effective control over foreign territory or power and authority over an individual located outside their territory.[21] Recent jurisprudence however suggests that a third model is emerging, which requires States to exercise effective control over the source of the human rights violation instead of the right holder,[22] which we refer to as the causal model.

This article subsequently examines the three models of extraterritoriality briefly introduced above. In section II, we first analyze the spatial model through the practice of the HRC and ECtHR and critically assess the controversaries surrounding the effective overall control test. The study details the personal model in section III, by highlighting the inconsistent jurisprudence of the ECtHR after the *Bankovic* decision. In section IV, we propose that the causal model is gaining progressive acceptance, especially in cases of transboundary environmental harm and in the business and human rights context. The article concludes by briefly comparing the three models of extraterritoriality.

II. The spatial model

To put it simply, States' human rights obligations apply outside their national territory under the spatial model when they exercise effective control over a foreign territory, thereby extending their jurisdiction to individuals located within that territory.[23] The spatial model is rather uncontested in international jurisprudence, as – *inter alia* – the ICJ,[24] the HRC[25] and the Committee on Economic, Social and Cultural Rights

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[17] Nicola Wenzel: *Human Rights, Treaties, Extraterritorial Application and Effects*, Max Planck Encyclopedias of International Law, May 2008, ¶5.
[18] *Wall Adivsory Opinion*, ¶109.
[19] Milanovic 2011, 8.
[20] *Ibid*, 119.
[21] Marko Milanovic: Al-Skeini and Al-Jedda in Strasbourg. *European Journal of International Law*, Volume 23, Issue 1, 2012 ['Milanovic 2012'], 122.
[22] Abe Chauhan: A Causal Model for the Extraterritorial Application of Human Rights Treaties. *The Oxford University Undergraduate Law Journal*, Issue 8, 2019 ['Abe Chauhan'], 119.
[23] Karen da Costa: *The Extraterritorial Application of Selected Human Rights Treaties*, Brill-Nijhoff, 2012 [' Karen da Costa'], 56-57.
[24] *Wall Advisory Opinion*, ¶109; *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v. Rwanda), Judgement, I.C.J. Reports 2005, ¶179.
[25] HRC, Concluding Observations of the Human Rights Committee on the Initial Report of Israel, 18 August 1998, CCPR/C/79/Add.93, ¶¶10,31.

[‘CESCR’][26] have all consistently accepted control over territory as extending human rights obligations extraterritorially. The functioning of the spatial model is well illustrated by the reasoning given in *Loizidou v. Turkey* by the ECtHR, which concerned the military invasion of Northern Cyprus by Turkey in 1974 and the attempt by Titina Loizidou to return to her former home and properties.[27] The Court declared that although the applicability of the Convention is based on the concept of jurisdiction, it does not equal the national territory of the State concerned, since effective control over a foreign territory brings the affected individuals within the States’ jurisdiction. [28]

1. The effective overall control test endorsed by the ECtHR

In *Loizidou*, the ECtHR established Turkey’s extraterritorial jurisdiction under the effective overall control test triggered by the presence of a large number of Turkish troops in northern Cyprus and declared that in such circumstances no detailed analysis is needed over which exact policies and actions the occupying State exercises control, suffice it to say that it is in ‘overall’ control of that territory.[29] Therefore, if a State exercises such overall control, all individuals within the concerned territory fall within its jurisdiction and the State owes extraterritorial human rights obligations to all of them.[30] Note, however, that the effective overall control test applied in *Loizidou* is not equivalent to the effective control test adopted by the ICJ in its *Nicaragua*[31] and *Genocide*[32] decisions, since the prior serves to determine the exercise of State jurisdiction in a human rights context, while the latter was used to attribute the conduct of non-state actors to States exercising control over them. The distinction between jurisdiction and attribution and the effective control tests pertaining to them was also stressed by the ECtHR in its *Catan and others v. Moldova and Russia* decision.[33] A crucial element of the effective overall control test pronounced by the Court in *Loizidou* is that *de facto* control over territory is sufficient to establish the State’s jurisdiction, therefore the control does not have to be legitimate and even States’ indirect acts – such as those executed through a subordinate local administration – can trigger their responsibility for extraterritorial human rights violations.[34] This approach was also adopted by the HRC in General Comment 31, affirming that mere factual control suffices to establish a jurisdictional link.[35]

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[26] Committee on Economic, Social and Cultural Rights [‘CESCR’], Concluding observations on Israel, E/C.12/1/Add.90, 23 May 2003, ¶31.

[27] *Loizidou v. Turkey,* App. no. 15318/89, Judgment, 18 December 1996.

[28] *Ibid*, ¶56.

[29] *Ibid*.

[30] *Al-Skeini and others v. the United Kingdom*, App. no. 55721/07, Judgment, 7 July 2011 [*’Al-Skeini’*], ¶138.

[31] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Merits, Judgment, I.C.J. Reports 1986, ¶115.

[32] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, ¶¶402–407.

[33] *Catan and others v. Moldova and Russia*, ¶114.

[34] *Loizidou v. Turkey*, Preliminary Objections, App. no. 15318/89, Judgment, 23 March 1995, ¶62; Michael Duttwiler: Authority, Control and Jurisdiction in the Extraterritorial Application of the European Convention on Human Rights. *Netherlands Quarterly of Human Rights*, Vol. 30, Issue 2, 2012, 150.

[35] HRC, General Comment 31, ¶10; Karen Da Costa, 56.

2. The ECtHR's controversial practice after Bankovic

Despite its seemingly consistent early practice, the ECtHR made the effective overall control test quite confusing in its *Banković and Others v. Belgium and Others* decision, concerning the aerial bombardment of Belgrade by NATO forces in April 1999 during the Kosovo crisis. The Court interpreted 'jurisdiction' within the meaning of Article 1 ECHR from a general international law perspective and declared that States' jurisdiction is primarily territorial and an exceptional extraterritorial jurisdiction arises when the State concerned exercises effective control over a foreign territory by asserting 'all or some of the public powers normally to be exercised by that Government'.[36] This line of reasoning appears to confuse jurisdiction as a threshold criterion for applicability in a human rights context with jurisdiction as States' legal authority to regulate under general international law.[37] Indeed, instead of a *de facto* control, the Court seemingly required States to exercise a degree of *de jure* control over the concerned territory to pronounce on their extraterritorial obligations, which in my view contradicts its prior practice adopted in *Loizidou*. If human rights bodies were to follow the sentiment in *Bankovic*, the threshold for establishing effective overall control would be extremely high, as it would require some sort of a 'structured military administration' on the occupied territory.[38]

However, it appears that the Court later lowered this threshold once again in its *Issa v. Turkey* decision, when it deemed the exercise of extraterritorial jurisdiction plausible through significantly lower level of effective control over territory.[39] It can be summarized, that the Court now accepts substantial military, political or economic influence over a foreign territory to extend States' human rights obligations extraterritorially under the spatial model, as clarified in *Ilaşcu and Others v. Moldova and Russia*.[40] In its more recent jurisprudence, the ECtHR also resorted to the spatial model and the effective overall control test, for example in its *Chiragov v. Armenia*[41] and *Sandu v. Moldova and Russia*[42] decisions. We can conclude, that although the acceptance of the spatial model is uncontested in international law, the test applied by the different human rights bodies to determine whether States exercise effective control over foreign territory is to some extent controversial and needs to be further clarified.

III. The personal model

1. Practice of the Human Rights Committee

Besides the spatial model, human rights bodies and courts generally recognize extraterritorial obligations when States' exercise authority and control through their agents over an individual located outside their national territory, even if no effective

[36] *Bankovic*, ¶71.
[37] Milanovic 2011, 27.
[38] *Ibid*, 137.
[39] *Issa v. Turkey*, App. No. 31821/96, Judgment, 16 November 2004 ['*Issa v. Turkey*'], ¶¶72-74.
[40] *Ilaşcu and Others v. Moldova and Russia*, App. no. 48787/99, Judgment, 8 July 2004, ¶¶379-382.
[41] *Chiragov and others v. Armenia*, App. no. 13216/05, Judgment, Merits, 16 June 2015, ¶169.
[42] *Sandu and others v. the Republic of Moldova and Russia*, App. nos. 21034/05 and 7 others, Judgment, 17 July 2018, ¶¶36-38.

control over the concerned territory can be asserted.[43] Accepting that control over just one single person can establish the perpetrator State's jurisdiction, largely extends the scope of human rights instruments compared to a much tighter approach under the spatial model. The personal model was endorsed by the HRC in its *Lopez Burgos v. Uruguay* and *Casariego v. Uruguay* decisions, concerning the abduction, incommunicado detention and torture of Uruguayan political refugees in Argentina and Brazil by Uruguayan agents. Even though the human rights violations took place outside the territory of Uruguay and it could hardly be argued that the State exercised effective control over any parts of Argentina and Brazil, the Committee held that the prerequisite of jurisdiction 'does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State'.[44] The Committee made its often quoted observation in these decisions, that 'it would be unconscionable to so interpret the responsibility under […] the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.[45] Therefore, the Committee interpreted the jurisdictional requirement under Article 2(1) of the ICCPR in a rather personal nexus between the perpetrator State and the individual whose human rights have been violated.[46]

Both Christian Tomuschat in his individual opinion annexed to the cases above and Manfred Nowak in his commentary to the ICCPR agree, that enabling States to evade responsibility for human rights violations committed by their agents abroad by reference to a strict territorial notion of jurisdiction would lead to 'utterly absurd' and 'manifestly unreasonable' results, which would run counter to what the drafters of the Covenant intended.[47] In General Comment 31, the HRC reaffirmed in more general terms that States owe extraterritorial obligations under the ICCPR to 'anyone within the power or effective control of the State party',[48] which once again interprets the jurisdictional requirement in a personal relation, rather than in a territorial context.[49] The personal model was also adopted by other human rights bodies without any substantial difference, as for example can be seen in the practice of the Committee Against Torture[50] or the Inter-American Commission on Human Rights. [51]

2. The ECtHR's rejection of the personal model

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[43] Milanovic 2011, 173.
[44] *Lopez Burgos v. Uruguay*, ¶¶12.1-12.3; *Casariego v. Uruguay*, ¶¶10.1-10.3.
[45] *Lopez Burgos v. Uruguay*, ¶12.3.
[46] *Ibid*, ¶12.2; Karen da Costa, 50.
[47] *Lopez Burgos v. Uruguay*, Appendix, Individual opinion of Christian Tomuschat, Communication No. R.12/52; Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, N.P. Engel, 2005, 682.
[48] HRC General Comment 31, ¶10.
[49] Karen da Costa, 56.
[50] Committee Against Torture, General Comment No. 2, UN Doc. CAT/C/GC/2, 24 January 2008, ¶16.
[51] Inter-American Commission on Human Rights ['IACHR'], *Coard et Al. v. United States*, Report No. 109/99, Case 10.951, 29 September 1999, ¶37; IACHR, *Alejandre et al. v Cuba*, Case 11.589, Report No. 86/99, September 29, 1999, ¶23.

Contrary to the above, the case-law pertaining to the ECHR is full of controversaries when it comes to the personal model.[52] In an early decision regarding the Turkish occupation of Northern-Cyprus, the European Commission of Human Rights held that States 'are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility', which indicates that similarly to the HRC, the European Commission interpreted the notion of jurisdiction in a rather personal relation between the perpetrator State and the individual affected.[53] This approach was reaffirmed by the Commission in its *Chrysostomos et al v. Turkey* decision, which also interpreted the Conventions' scope of application in a personal, rather than territorial nexus.[54] It thus appears that in early jurisprudence the personal model was without much trouble applied to the ECHR and as Marko Milanovic observes, this jurisdictional concept was limitless and not exceptional at all.[55] The ECtHR has, however, radically departed from this theory in its *Bankovic* decision, by proposing that the only exceptional circumstance when the Convention could apply extraterritorially is when a State party exercises effective control over foreign territory.[56] On this ground, the Court found that NATO member States did not exert effective control over Belgrade where the aerial bombardment occurred and thus no jurisdictional link can be established between the respondent States and the affected individuals, rendering the application inadmissible.[57] The Court's general international law approach to jurisdiction within the meaning of the Convention and its reluctance to apply the personal model was heavily criticized in literature by for example Lawson[58] and Wilde,[59] who consider that *de facto* control over either territory or individuals should suffice to establish States' jurisdiction under the Covenant and thus render their human rights obligations extraterritorially applicable.

3. Post Bankovic acceptance of the personal model: Issa and Al-Skeini

Just three years after *Bankovic*, the Court could not maintain its prior position and eventually endorsed the personal model in the case of *Issa v. Turkey*, but insisted that its applicability can only be exceptional.[60] The case concerned the killing of Iraqi shepherds by Turkish soldiers close to the border of Iraq and Turkey, and though the Court deemed the application unfounded, it declared that even in absence of effective overall control over a foreign territory, States parties might bear extraterritorial obligations when they

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[52] *Al-Skeini and others v. the United Kingdom*, App. no. 55721/07, Judgment, 7 July 2011 [*'Al-Skeini'*], Concuring Opinion of Judge Bonello, ¶¶4-6.

[53] European Commission of Human Rights, *Cyprus v. Turkey*, Decision, App. Nos 6780/74 and 6950/75, 26 May 1975, 136.

[54] European Commission of Human Rights, *Chrysostomos et al v Turkey*, App. Nos 15299/89, 15300/89 and 15318/89, 4 March 1991, ¶31.

[55] Milanovic 2011, 182.

[56] Cedric Ryngaert: Clarifying the Extraterritorial Application of the European Convention on Human Rights. *Utrecht Journal of International and European Law*, Vol. 28, Issue 74, 58.

[57] *Ibid*; *Bankovic*, ¶82.

[58] Rick Lawson: Life after Banković: On the Extraterritorial Application of the European Convention on Human Rights. In: Fons Coomans and Menno Kamminga: *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004, 86.

[59] Ralph Wilde: Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties. *Israel Law Review*, Vol. 40, No. 2, 2007, 507–508.

[60] *Issa v. Turkey*, ¶68.

exercise authority and control over an individual through their agents operating abroad,[61] which essentially means the acceptance of the personal model. Therefore, as Judge Bonello observed, '*Issa* flies in the face of *Banković',*[62] since the Court not only contradicted itself by accepting the personal model, but did it with reference to the exact same jurisprudence cited by the applicants and unanimously rejected by the Grand Chamber in *Bankovic*.[63] However, even after the clear contradiction between *Bankovic* and *Issa,* the Court never altered openly its position in later cases regarding the exceptional nature of extraterritorial jurisdiction[64] and maintained that its jurisprudence is coherent when it comes to the Conventions' extraterritorial applicability.[65]

The leading case in the ECtHR's jurisprudence is now *Al-Skeini v. the United Kingdom*, which concerned the killing of five Iraqi nationals by British soldiers on patrol in southern Iraq and one who was arrested, detained and eventually killed at a UK detention facility located in Iraq. After the House of Lords rejected the application of the relatives of the five Iraqis killed on patrol due to the UK's lack of effective control over the concerned Iraqi territories *per Bankovic*,[66] the ECtHR finally clarified some (but not all) controversaries. Although the Court endorsed both the spatial- and the personal models, it apparently 'mixed' the two tests which serve to determine effective overall control over territory and State agent authority over individuals.[67] In *Bankovic,* the Court rejected the application by holding that the respondent States did not exercise effective control over the territory of Belgrade as they never exerted public powers within Yugoslavia, whereas in *Al-Skeini* the ECtHR deemed the public powers exercised by the UK over the Iraqi individuals (and not the territory!) justifying its extraterritorial obligations.[68] Thus, it seems that the Court intentionally blurred the line between the spatial and the personal models to justify the exceptional nature of extraterritorial jurisdiction under the Covenant.[69]

It can also be observed from the ECtHR's more recent jurisprudence that sometimes it does not differentiate sharply between the extraterritoriality models, as for example in *Medvedyev v. France,*[70] *Jaloud v. the Netherlands*[71] and *Pisari v. Moldova and Russia,*[72] the Court did not clarify whether it was the spatial- or the personal model triggering the States' extraterritorial obligations, but – apparently – rather a combination of the two.[73]

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[61] *Ibid*, ¶71.
[62] *Al-Skeini,* Concurring Opinion of Judge Bonello*,* ¶5.
[63] Milanovic 2011, 183.
[64] See for example: *Pad and Others v. Turkey*, App. No. 60167/00, Judgment, 28 June 2007, ¶53; *Solomou and Others v. Turkey*, Judgment, App. No. 36832/97, 24 June 2008, ¶¶44-51.
[65] Milanovic 2012, 127.
[66] House of Lords, *Al-Skeini and others* (Respondents) v. *Secretary of State for Defence* (Appellant), Session 2006–07, [2007] UKHL 26, 13 June 2007.
[67] Milanovic 2012, 128.
[68] *Ibid*; *Al-Skeini*, ¶¶135-136.
[69] *Ibid.*
[70] *Medvedyev and others v. France*, App. no. 3394/03, Judgment, 29 March 2010, ¶¶64-67.
[71] *Jaloud v. The Netherlands,* App. no. 47708/08, Judgment, 20 November 2014, ¶152.
[72] *Pisari v. the Republic of Moldova and Russia*, App. no. 42139/12, Judgment, 21 April 2015.
[73] Lea Raible: The Extraterritoriality of the ECHR: Why Jaloud and Pisari Should be Read as Game Changers. *European Human Rights Law Review*, Vol. 2, 2016, 164-165.

All in all, I must agree with Judge Bonello, that the European Court's jurisprudence regarding the Convention's extraterritorial applicability and especially the personal model is hectic and it can be considered 'patchwork case-law at best'.[74]

IV. The causal model

Having examined the more generally accepted spatial and personal models, this section proposes that a third, much broader concept of extraterritoriality is emerging in contemporary jurisprudence, which we refer to as the causal model. As we have seen, both the spatial and the personal models require the perpetrator State to exercise jurisdiction over the right-holder, either through effective control over territory or authority over the concerned individual to render States' human rights obligations extraterritorially applicable. Conversely, responsibility under the causal model is triggered by the State's effective control over the source of the violation and not the victim *stricto sensu*.[75] To put it simply, States would incur responsibility under the causal model if they were in a position to effectively prevent (or remedy) foreseeable human rights violations by exercising due diligence over the source of the harm and their failure to do so is in direct causal relation with the human rights abuse.[76] In my view, accepting such a broader concept of extraterritoriality is preferable, as it would greatly contribute to the universal realization of human rights,[77] yet it would not equal an unlimited responsibility for all human rights violations, as feared by the ECtHR in *Bankovic*.[78]

1. Acceptance of the causal model by the Human Rights Committee

A broader understanding of extraterritoriality is reflected in General Comment 36, issued by the HRC in 2018 on the right to life.[79] The Committee apparently extended the ICCPR's scope of application beyond the notion of the spatial and the personal models by declaring, that a State party owes human rights obligations to 'all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control'.[80] Hence, instead of requiring States parties to exert effective control over territory or individuals, the Committee considered the exercise of power or effective control over the mere possibility to enjoy one's right to life as establishing a jurisdictional link between the perpetrator State and the affected individual, thereby

[74] *Al-Skeini*, Concurring Opinion of Judge Bonello, ¶5.
[75] Samantha Besson: Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!, *ESIL Reflections*, Volume 9, Issue 1, 28 April 2020, available: https://esil-sedi.eu/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap/.
[76] *Ibid;* Abe Chauhan, 119; Tilmann Altwicker: Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts. *European Journal of International Law*, Vol. 29, No. 2, 2018 ['Altwicker'], 604.
[77] Ibrahim Kanalan: Extraterritorial State Obligations Beyond the Concept of Jurisdiction. *German Law Journal*, Vol. 19, No. 01, 2018, 51-52.
[78] Altwicker, 590-591.
[79] HRC, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018 ['HRC General Comment 36'].
[80] *Ibid*, ¶63.

accepting an 'impact' notion of extraterritoriality.[81] As for the threshold of such impact, the Committee considered that individuals whose right to life have been impacted by the States' conduct in a 'direct and reasonably foreseeable manner' come within the jurisdiction of the concerned State, reflecting that causality is a crucial criterion in assessing whether extraterritorial human rights obligations could arise.[82] Although some States parties were reluctant to accept this extensive jurisdictional approach,[83] it is not unprecedented in the Committee's practice to extend the ICCPR's scope of application on a similar ground. In its 2014 concluding observations on the United States, the Committee addressed the issue of extraterritorial surveillance conducted by the National Security Agency and concluded that the US should conform both its domestic and extraterritorial surveillance activities to its ICCPR obligations.[84] This conclusion also suggests that the HRC deemed the human rights obligations of the US extraterritorially applicable even in absence of effective control over territory or the surveilled individuals.[85]

2. Transboundary environmental harm and extraterritorial human rights obligations

The causal model has attracted particular attention recently in cases concerning transboundary environmental harm and pertaining human rights violations. In such cases, transboundary environmental harm emanating from the territory of State *A* causes human rights violations within the territory of State *B* without the polluter State ever exercising *stricto sensu* effective control over the territory of State *B* or the affected individuals.[86] Therefore, it would be problematic to argue that the polluter State's jurisdiction could extend to the victims of the human rights abuse under either the spatial or the personal model, leaving them unprotected under such circumstances. Recent jurisprudence, however, suggests that the polluter State's extraterritorial human rights obligations can also be triggered if it exercises effective control over the source of the transboundary harm rather than the victims of the human rights violations.[87] Accordingly, *Viñuales* argues that the polluter State's human rights obligations apply extraterritorially when its actions or omissions lead to transboundary environmental harm and such harm is in direct causal relation with the human rights abuse outside its national territory.[88] The 'test'

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[81] Daniel Møgster: Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR, EJIL:Talk!, 27 November 2018, available: https://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/.

[82] HRC General Comment 36, ¶63.

[83] See for example: Austrian comments on the Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), on the right to life, available: https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx.

[84] HRC, Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, 23 April 2014, ¶22(a).

[85] Marko Milanovic: Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age. *Harvard International Law Journal*, Vol. 56, No. 1, 2015, 142.

[86] Alan Boyle: Human Rights and the Environment: Where Next? *European Journal of International Law*, Vol. 23, Issue 3, 2012, 638.

[87] Jorge E. Viñuales: A Human Rights Approach to Extraterritorial Environmental Protection?, In: Nehal Bhuta: *The Frontiers of Human Rights*. Oxford University Press, 2016, 219.

[88] *Ibid*, 192-197.

suggested by *Viñuales,* therefore, appears to be three-pronged requiring, first, effective control over the source of the harm, second, the polluter State's failure to abide by its due diligence obligations, and third, a sufficiently proximate causal nexus between the State's conduct and the human rights infringement.

The ICJ would have had the perfect opportunity to endorse (or reject) such an extensive extraterritoriality concept pertaining to transboundary environmental harm in the *Aerial Herbicide Spraying* case between Ecuador and Columbia.[89] The case concerned the aerial spraying of toxic herbicides by Columbian authorities near its border with Ecuador to destroy coca plantations, which caused human rights violations on the Ecuadorian side of the border. In this case, Columbia did not exercise effective control over the territory of Ecuador or the Ecuadorians affected by the herbicides, but exerted control over the source of the environmental harm which lead to human rights abuses, thus the Court could have resorted to the causal model to hold Columbia responsible. Regrettably, the ICJ was not required to render a judgment in the case, as the parties eventually reached an agreement in 2013.[90]

Finally in 2017, the causal model was officially endorsed for the first time by the Inter-American Court of Human Rights ['IACtHR'] in its advisory opinion concerning the extraterritorial scope of the American Convention on Human Rights.[91] The Court declared, that when human rights are infringed through transboundary environmental harm 'the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory'.[92] The rationale behind this new jurisdictional link is, as the Court held, the polluter State's effective control over the source of the harm and the failure to comply with its due diligence obligations to prevent transboundary damage.[93] It thus appears, that the IACtHR – similarly to *Viñuales* – applied a three-pronged test to determine extraterritorial jurisdiction by looking at the polluter State's control over the source of the harm, compliance with its due diligence obligations and the causal connection between the State's acts or omissions and the human rights abuse. By accepting the causal model, the Court greatly extended the extraterritorial scope of human rights, yet it omitted to clarify the exact threshold of the test applied, as it did not elaborate on the nature and proximity of the causal link, the gravity of human rights violations triggering extraterritorial obligations and the scope of the new jurisdictional link.[94]

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[89] *Aerial Herbicide Spraying* (Ecuador v. Colombia), Order of 30 May 2008, I.C.J. Reports 2008.
[90] Marko Milanovic: Aerial Herbicide Spraying Case Dead in the Air, EJIL:Talk!, 17 September 2013, available: https://www.ejiltalk.org/aerial-herbicide-spraying-case-dead-in-the-air/.
[91] Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15 November 2017, ¶104(h), available: https://www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.
[92] *Ibid*, ¶101.
[93] *Ibid*, ¶102.
[94] Berkes Antal: A New Extraterritorial Jurisdictional Link Recognised by the IACtHR, EJIL:Talk!, 28 March 2018, available: https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/ ['*Berkes* 2018'].

We further note that, although the IACtHR might appear to have accepted the very 'cause-and-effect' notion of jurisdiction that the ECtHR so rigorously rejected in *Bankovic*, considering that it would lead to State's jurisdiction over 'anyone adversely affected by an act imputable to a Contracting State' and render jurisdiction devoid of any purpose,[95] this is not the case. In this regard, I concur with Antal Berkes that the test applied by the IACtHR does not extend the scope of human rights unlimitedly, as States' extraterritorial obligations are triggered by their failure to exercise due diligence over the source of the harm and thus not all individuals fall within the State's jurisdiction whose rights have been infringed.[96] Consequently, a much broader (but not unlimited!) causal model seems to be now accepted in cases of transboundary environmental harm resulting in extraterritorial human rights violations.

3. The causal model in a business and human rights context

Besides transboundary environmental harm, the causal model also appears to be progressively accepted in the field of business and human rights regarding home States' duty to prevent human rights abuses by transnational corporations domiciled within their territory. In this case, States' extraterritorial obligations arise when they exert control over corporate nationals and fail to comply with their due diligence obligations to prevent or mitigate extraterritorial human rights violations committed by the concerned business enterprise.[97] Therefore, States' responsibility is triggered by their failure to abide by their positive human rights obligations and not because the acts of the transnational corporation are attributable to them.[98]

It is now undisputed that States' human rights obligations will only be fully discharged if on the one hand, they do not directly interfere with the enjoyment of human rights (obligation to respect) and on the other, they exercise due diligence to prevent, punish, investigate or redress the harm caused by third parties, such as corporations, within their territory or jurisdiction (obligation to protect).[99] According to the 2011 UN Guiding Principles on Business and Human Rights this obligation only applies within the State's territory or jurisdiction, as it declares that 'at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses'.[100] Conversely, I am prone to agree with Oliver De Schutter that this conclusion is by now outdated and such obligation is indeed accepted in contemporary jurisprudence.[101] Among human rights bodies, the CESCR has always been the most liberal to extend the Covenant's scope of application and even in its earlier practice, the

[95] *Bankovic*, ¶75.
[96] *Berkes* 2018.
[97] Antal Berkes: Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights, in: Yannick Radi: *Research Handbook on Human Rights and Investment.* Edward Elgar Publishing, 2018, 304-343.
[98] *Velásquez Rodríguez v. Honduras,* Merits, IACtHR Series C No. 4, Judgment, 29 July 1988, ¶172.
[99] HRC General Comment 31, ¶8; *Fadeyeva v the Russian Federation*, App. No. 55273/00, Judgement, 30 November 2005, ¶92; United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc. A/HRC/17/31, 2011, 1.
[100] *Ibid*, 3-4.
[101] Oliver De Schutter: Towards a New Treaty on Business and Human Rights. *Business and Human Rights Journal*, Vol. 1, No. 1, 2015, 45.

Committee recognized States' extraterritorial obligations to prevent their corporate nationals from committing human rights violations outside their national territory.[102] In General Comment 24, the CESCR generally declared that 'States parties' obligations under the Covenant did not stop at their territorial borders' and they are obliged to prevent human rights violations abroad by corporations domiciled in their jurisdiction by exercising due diligence.[103] The Committee considered the State's mere capacity to influence the enjoyment of human rights outside its territory through control over corporate nationals to render its human rights obligations extraterritorially applicable.[104] Thus, the Committee appears to accept that even absent effective control over territory or individuals, a causal nexus between the State's acts or omissions and the human rights abuse is sufficient to trigger responsibility.

The HRC took a similar approach in its recent *Basem Ahmed Issa Yassin v Canada* decision, concerning Canada's responsibility for failing to prevent human rights violations by two Canadian corporations conducting construction works on expropriated lands in the occupied Palestinian territories.[105] Although the Committee deemed the application unfounded, it confirmed that States parties are obliged to ensure that human rights are not impaired by the extraterritorial conduct of companies that are under their jurisdiction.[106] Once again, the HRC considered control over the source of the violation and not the affected individuals to render States' human rights obligations extraterritorially applicable, but did not elaborate on the exact jurisdictional concept endorsed. In this regard, Committee members Olivier de Frouville and Yadh Ben Achour concluded in their concurring opinion annexed to the decision, that a jurisdictional link exists between the home State and the victim of human rights violations when the State has effective capacity to regulate the perpetrator business enterprise and the violation was reasonably foreseeable.[107] They consequently noted that, 'if it can be determined that the State has sufficient influence over a corporation, then the State exercises, even indirectly, power and effective control over persons who are affected by the activities of the corporation in another country'.[108] In my view, the HRC essentially endorsed the causal model in the above decision, since it considered that even in absence of effective control over territory or individuals, a causal nexus between the State's acts or omissions to regulate the conduct of corporations and the extraterritorial human rights abuse is sufficient to hold the home State responsible.

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[102] CESCR, General Comment 15: The right to water, U.N. Doc. E/C.12/2002/11, 20 January 2003, ¶33; CESCR, General Comment No. 19: The right to social security, E/C.12/GC/19, 4 February 2008, ¶54; CESCR, Statement on the obligations of States parties regarding the corporate sector and economic, social and cultural rights, E/C.12/2011/1, 12 July 2011.

[103] CESCR, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, ¶¶26, 32.

[104] *Ibid*, ¶28.

[105] HRC, Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2285/2013, CCPR/C/120/D/2285/2013, 26 October 2017.

[106] Ibid, ¶6.5.

[107] *Ibid*, Annex, Concurring opinion of Committee members Olivier de Frouville and Yadh Ben Achour, ¶

[108] *Ibid.*

Besides the CESCR and the HRC, other human rights bodies also appear to accept the causal model in the business and human rights context, such as the Committee on the Rights of the Child,[109] the Committee on the Elimination of Discrimination against Women,[110] the Committee on the Elimination of Racial Discrimination[111] and the Inter-American Commission on Human Rights.[112] Consequently, it is my position that the causal model is now more or less accepted in the field of business and human rights. We lastly note that, although the ECtHR consistently rejected to endorse the causal model so far, there are now three cases pending before the Grand Chamber which provide the Court with the opportunity to revisit its controversial practice. The first is *Hanan v. Germany*, concerning an airstrike near Kunduz, Afghanistan ordered by a member of the German air force in 2009 that resulted in the death of more than a hundred civilians.[113] The factual circumstances of the case are very similar to *Bankovic*, where the Court rejected the application based on the argument that a mere 'cause-and-effect' relation does not establish a jurisdictional link between the States and the victims.[114] Although there are some differences between the two cases,[115] the essential question before the Court is – once again – can causality result in extraterritorial human rights obligations? The other two cases concern extraterritorial surveillance conducted by member States, which also raise the question of a cause-effect jurisdictional notion, as the surveilling States only exercised control over the activity and not the victims of the violation.[116] It thus remains to be seen whether the Court will finally endorse the causal model or stick to its rigid understanding of jurisdiction.[117]

V. Conclusions

This article examined how human rights obligations can be extended extraterritorially under the spatial, the personal and the now emerging causal models of jurisdiction. We first outlined that under most human rights conventions, the exercise of jurisdiction is a prerequisite for obligations to arise in the first place and although it is primarily territorial, jurisdiction can also be exercised outside national territory. The study explored

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[109] Committee on the Rights of the Child, General comment No. 16, CRC/C/GC/16, 17 April 2013, ¶43.

[110] Committee on the Elimination of Discrimination against Women, Concluding Observations: India, CEDAW/C/IND/CO 4 – 5, 24 July 2014, ¶15.

[111] Committee on the Elimination of Racial Discrimination, Concluding observations: Canada, UN Doc CERD/C/CAN/CO/19-20, 2012, ¶14.

[112] IACHR, Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, OEA/Ser.L/V/II. Doc. 47/1, 31 December 2015, ¶98.

[113] *Hanan v. Germany*, App. no. 4871/16.

[114] *Bankovic*, ¶75.

[115] See: Dominik Steiger: (Not) Investigating Kunduz and (Not) Judging in Strasbourg? Extraterritoriality, Attribution and the Duty to Investigate, EJIL:Talk!, 25 February, 2020, available: https://www.ejiltalk.org/not-investigating-kunduz-and-not-judging-in-strasbourg-extraterritoriality-attribution-and-the-duty-to-investigate/.

[116] *Big Brother Watch and Others v. the United Kingdom*, Application No. 58170/13; *Centrum för Rättvisa v. Sweden*, App. no. 35252/08.

[117] Başak Çali: Has 'Control over rights doctrine' for extra-territorial jurisdiction come of age? Karlsruhe, too, has spoken, now it's Strasbourg's turn, EJIL:Talk!, 21 July 2020, available: https://www.ejiltalk.org/has-control-over-rights-doctrine-for-extra-territorial-jurisdiction-come-of-age-karlsruhe-too-has-spoken-now-its-strasbourgs-turn/.

the spatial model of extraterritoriality by detailing the practice of the HRC and the ECtHR and concluded that if States exercise effective control over foreign territory, their human rights obligations apply to all individuals located within the concerned territory. It was assumed, that although the existence of the spatial model is uncontested, the test applied to determine States' effective overall control over territory is rather controversial. The article further analyzed the personal (or State agent authority) model, which deems effective control over an individual – rather than territory – sufficient to establish the State's extraterritorial jurisdiction. It was demonstrated, that the practice of the ECtHR is quite contentious regarding the personal model since its infamous *Bankovic* decision and even its recent jurisprudence, in cases such as *Issa* and *Al-Skeini*, remains inconsistent. Furthermore, the study proposed that a new causal model has been progressively accepted in contemporary jurisprudence, under which States' obligation would apply extraterritorially if they exercise effective control over the source of the violation, rather than the victim of the human rights abuse. The acceptance of the causal model was illustrated in cases of transboundary environmental harm and States' obligation to regulate transnational corporations in the business and human rights context. We concluded that although a cause-effect notion of jurisdiction is now gaining substantial acceptance, it remains to be seen whether all human rights bodies and courts will follow this trend.

Szabó Patrik:
Eine kleine Verfassungsdogmatik – Eine Übersicht der Verfassungsidentität-Rechtsprechung des Bundesverfassungsgerichts

„Das Verhältnis von Unionsrecht und mitgliedstaatlichem Verfassungsrecht sowie die Beziehungen zwischen den "Hütern" der jeweiligen Verfassungsordnungen gehören zu den theoretisch und dogmatisch schwierigsten Rechtsfragen im europäischen Rechtsraum."[1]
/ Armin von Bogdandy; Stephan Schill /

I. Einleitung

In der folgenden Studie wird die hinsichtlich der Verfassungsidentität relevante Praxis des Bundesverfassungsgerichts (BVerfG) erläutert und dargestellt, wie sich das Verhältnis zwischen deutschem Verfassungsrecht und dem Recht der Europäischen Union entwickelte.[2] Neben der Verfassungsidentität werden insbesondere die dogmatischen Konzepten in Rücksicht genommen, welche die Praxis des BVerfG von dem Lissabon bis zum PSPP-Urteil grundsätzlich beeinflussten. Die vorliegende Analyse zielt darauf ab, eine beschreibende Übersicht zu geben, ohne Kritik an der Rechtsprechung zu üben.

In Einklang mit den Worten von Bogdandy und Schill ist es zu anerkennen, dass das Verhältnis der europäischen und mitgliedstaatlichen Rechtsordnungen nicht nur zu den schwierigsten sondern auch zu den am meisten entscheidenden Problemen der heutigen Lage der Europäischen Union gehört. Besonders gilt diese Behauptung, wenn einige Mitgliedstaaten, denen es an rechtstaatlichen Garantien fehlt, Konzepte entwickeln, die der Anwendung des europäischen Rechts im Wege stehen können. Es ist nötig die Praxis des BVerfG zusammenzufassen und die dogmatischen Grundlagen zu klären, weil es sich dadurch herausstellt, wie das Gleichgewicht zwischen mitgliedstaatlichen und europäischen Ebenen gefunden werden kann.

Wegen der Komplexität des Themas werden hierbei nur die Schwerpunkte der Rechtsprechung sachlich zusammengefasst. Am Anfang werden sowohl die Solange- als auch die Maastricht-Urteile erläutert. Im Weiteren wird ein Vergleich zwischen den Identitäts- und ultra-vires-Kontrollen gezogen und die neuen Meilensteine, nämlich das Recht auf Vergessen(werden) und die PSPP-Rechtsprechungen werden ausgeführt.

II. Die Solange-Urteile und der Grundrechtsvorbehalt

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[1] Armin von Bogdandy - Stephan Schill: Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* 2010/70., 12.

[2] Hiermit bedanke ich mich András Wesztergom Geistwissenschafter an der Eötvös Loránd Universität, Budapest (ELTE) und Katalin Szili, Jurastudentin an der ELTE für ihre großzügige Hilfe, die bei der sprachlichen Korrektur der vorliegenden Studie geleistet wurde.

Nachdem es in dem Costa-ENEL-Urteil von dem Gerichtshof der Europäischen Union (EuGH) festgestellt worden war,[3] dass im Falle einer Kollision die europäischen Rechtsnormen einen Vorrang gegenüber mitgliedstaatliches Recht hätten, war die Frage immer noch nicht beantwortet, wie das Problem des Anstoßes zwischen dem Gemeinschaftsrecht und der nationalen Verfassung gelöst werden könnte. Darauf gab es zwei verschiedene Antworten. Einerseits wurde es vom EuGH im Rahmen des Internationale Handelsgesellschaft-Falles beschlossen, dass die mitgliedstaatlichen Verfassungen nicht im Wege der effektiven Anwendung des Gemeinschaftsrechts liegen dürften.[4] Das BVerfG widersprach aber dieser Annäherung in der Solange I. Entscheidung, indem es dabei deklariert wurde dass das Gemeinschaftsrecht aus den in nationalen Verfassungen verankerten Ermächtigungen und den aus den von den Mitgliedstaaten übertragenen Hoheitsrechten stamme.[5] Daraus ergibt sich, dass das Gemeinschaftsrecht ohne Vorbehalte nicht über der nationalen Verfassung stehen kann.

Es sollte darauf hingewiesen werden, dass das BVerfG seine Gerichtsbarkeit in Bezug nicht nur auf die Überprüfung des Sekundär- sondern auch auf das Primärrecht begründet hatte. Im Urteil wurde das folgendes festgehalten: *„Art. 24 GG begrenzt diese Möglichkeit, indem an ihm eine Änderung des Vertrags scheitert, die die Identität der geltenden Verfassung der Bundesrepublik Deutschland durch Einbruch in die sie konstituierenden Strukturen aufheben würde."*[6]Aufgrund dessen wurde der sogenannte Grundrechtsvorbehalt in dem Solange I. Urteil mit dem folgenden Wortlaut verfasst: *„Solange [...] das Gemeinschaftsrecht [nicht] [7]einen von einem Parlament beschlossenen und in Geltung stehenden formulierten Katalog von Grundrechten enthält, der dem Grundrechtskatalog des Grundgesetzes adäquat ist, ist [...] die Vorlage eines Gerichts der Bundesrepublik Deutschland an das Bundesverfassungsgericht im Normenkontrollverfahren zulässig und geboten, wenn das Gericht die für es entscheidungserhebliche Vorschrift des Gemeinschaftsrechts in der vom Europäischen Gerichtshof gegebenen Auslegung für unanwendbar hält, weil und soweit sie mit einem der Grundrechte des Grundgesetzes kollidiert."* [8]

Über die prozessualen Fragen hinaus wurde auch festgestellt, dass die Überprüfung nicht nur im Normenkontrollverfahren sondern auch im Rahmen einer Verfassungsbeschwerde zulässig sei, aber die Beschwerdeführer/-innen das Gemeinschaftsrecht nicht direkt angreifen dürften. Das BVerfG brachte auch die Verordnungen, deren Umsetzung in das nationale Recht ausdrücklich untersagt ist, unter seine Kontrolle, und sie wurden als Sanktion für *unanwendbar* erklärt.[9]

Nach dem Solange I. Urteil schlug die Praxis des EuGH eine neue Richtung ein und neigte dazu Menschenrechte als allgemeine Grundsätze des Unionsrechts zu

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[3] Costa v. ENEL C-6/64 [1964] ECR 585.
[4] Internationale Handelsgesellschaft mbH kontra Einfuhr- und Vorratsstelle für Getreide und Futtermitte. C-11/70. [1970] ECR 114.
[5] BVerfGE 37, 271.
[6] BVerfGE 37, 271 <42>.
[7] Von dem Verfasser hinzugefügt.
[8] BVerfGE 37, 271 <56>.
[9] Hans Jarass – Bado Pieroth: *Grundgesetz Kommentar*. 15. Auflage. C.H. Beck, Berlin, 2018, 155.

anerkennen[10] und dadurch auf die Europäische Menschenrechtskonvetion (EMRK) zu verweisen.[11] Infolgedessen wurde das Solange II. Urteil beschlossen, indem das BVerfG feststellte, dass das Schutzniveau der Grundrechte in der Gemeinschaft zufriedenstellend sei, und erklärte, dass es seine Befugnisse im Rahmen von der Überprüfung sekundärer EU-Rechtsakten, die auf dem Vorbehalt der Grundrechte beruht, nicht ausüben würde, solange es das Schutzniveau von GG erfülle. Die Entscheidung erweiterte somit nicht das Konzept der Verfassungsidentität, sondern es drängte, anstatt die Grundrechtskataloge zu interpretieren, auf verfassungsrechtliche Prinzipien zurück, aus denen diese Rechte abgeleitet werden können.[12]

Ferner wurde Art. 101. Abs. 1 Satz 1 vom BVerfG ausgelegt, laut dessen das EuGH als gesetzlicher Richter zählt, dem niemand entzogen werden dürfte. Eine Verletzung dieses Grundrechts liegt vor, und eine Verfassungsbeschwerde ist zulässig, wenn ein Gericht in Einklang mit dem Art. 267. Abs. 3 AEUV ein Vorabentscheidungsverfahren zu initiieren versäumt.[13] Im wesentlichen wird in diesem Fall vom BVerfG geprüft, ob das im Hauptverfahren behandelnde Gericht einen offensichtlichen oder willkürlichen Fehler beging, als es eine Frage des Gemeinschaftsrechts außer Acht ließ, deren Auslegung zweifelhaft und für den ordnungsgemäßen Ausgang des Falles entscheidend ist.[14]

In seinem im Jahre 2000 beschlossenen Bananenmarktordnung-Urteil stellte das BVerfG fest, dass eine Voraussetzung für die Feststellung einer vom Gemeinschaftsrecht verursachten Grundrechtsverletzung darin bestand, dass der Beschwerdeführer/-in nachweisen müsse, dass die Schutzniveau der Grundrechte durch die Gemeinschaft von den in Solange II aufgestellten Bedingungen abweichend sei.[15] Dies konnte vor zwanzig Jahren nicht bewiesen werden, und heute wäre es so undenkbar, dass es gesagt werden kann, dass der Grundrechtsvorbehalt für die Praxis keine deutliche Bedeutung mehr haben kann.[16]

III. Die selbständige Integrationsklausel und das Maastricht-Urteil

Mit dem im Jahre 1993 verabschiedeten Vertrag von Maastricht wurden zwei wichtige Änderungen in der deutschen Rechtsprechung eingeführt. Durch das Maastricht-Urteil wurde, neben der hinsichtlich der supranationalen Einzelheiten der Integration in Art 23 GG eingerückten neuen Integrationsklausel, der Grundstein der sogenannten ultra-vires Kontrollen gelegt.

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[10] Nold, Kohlen- und Baustoffgrosshandlung v Kommission C- 4/73 [1974] ECR 491.
[11] Liselotte Hauer v Land Rheinland-Pfalz. C-44/79 [1972] ECR *3727*.
[12] Gerhard van der Schyff: EU Member State Constitutional Identity: A Comparison of Germany and the Netherlands as Polar Opposites. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2016/76., 170. o.
[13] 1 BvR 1305/13 <7-9>.
[14] Cathrine Mächtle: Das Vorabenstscheidungsverfahren. *JuS* 2015/ Heft 4., 316.
[15] BVerfGE 102, 147.
[16] Laura Grósz: *Jogértelmezési dilemmák az Alaptörvény hetedik módosításának európai integrációt érintő rendelkezéseivel kapcsolatban*. *Közjogi Szemle* 2019./3., 48-53.

1. Selbständige Integrationsklausel

Art. 23 Abs. 1 GG gliedert sich in drei Teile. Der erste Teil des Absatzes beschreibt den Staatszweck, dass die Bundesrepublik Deutschland zur Verwirklichung eines vereinten Europas mitwirkt. Im zweiten Teil es handelt sich um die Europäische Union, die verpflichtet ist, sowohl die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätze und den Grundsatz der Subsidiarität einzuhalten, als auch einen dem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz zu gewährleisten. Der dritte Teil verweist auf Art 79 Abs. (2) und (3) GG, welche die Verfassungsänderung normieren. Laut dieses Artikels darf der Bund durch ein Gesetz mit Zustimmung des Bundesrates Hoheitsrechte übertragen. Falls es um die Begründung der Europäischen Union sowie für Änderungen ihrer vertraglichen Grundlagen und vergleichbare Regelungen geht, durch die der Inhalt des GG geändert oder ergänzt wird, gelten Artikel 79 Abs. 2 und 3. GG. Dieser Artikel erfordert dazu der Zustimmung von zwei Dritteln der Mitglieder des Bundestages und zwei Dritteln der Stimmen des Bundesrates. Hier wird auf die absolute, im Art. 79 Abs. 3 GG verankerte Grenze der Verfassungsänderungen hingewiesen, die in der Praxis als Ewigkeitsklausel genannt sind. Die Ewigkeitsklausel bezieht sich neben dem Schutz des Bundeslandesystems auf Artikel 1 und 20 GG. Das erste klassifiziert die Menschenwürde, die Menschenrechte und wessen Verpflichtung zum Schutz von Institutionen, während das letzteres die demokratische und soziale Staatlichkeit, die Volkssouveränität und die Rechtsstaatlichkeit (die rechtliche Einschränkung der öffentlichen Macht), die Gewaltenteilung und das Recht auf Widerstand als unteilbare Werte klassifiziert. Das BVerfG hat zuvor das Konzept der Rechtsstaatlichkeit mit dem Verbot der rückwirkenden Gesetzgebung, dem Grundsatz der Verhältnismäßigkeit, der Rechtssicherheit und soweit möglich mit dem Erfordernis des lückenlosen Rechtsschutzes identifiziert.[17]

2. Das Maastricht-Urteil und die Ultra-vires-Kontrolle

In dem Maastricht-Urteil hat das BVerfG seine Gerichtsbarkeit aufrechterhalten, das die in den Gründungsvertragen festgelegten Kompetenzen überschreitende Sekundärrecht zu überprüfen und seine Unanwendbarkeit anzuordnen.[18] Das relative Gegengewicht dieser verschlossenen Annäherung ist, dass die Ultra-vires-Kontrolle zusammen mit dem EuGH ausschließlich dann ausgeübt werden kann,[19] wenn es auf gemeinschaftlicher Ebene kein effektives Rechtsmittel gibt.[20] Dies wurde durch das Honeywell-Urteil präzisiert, in dem das BVerfG offenkundig machte, dass die Ausübung der Ultra-vires-Kontrolle nur in Fällen zulässig sind, wenn die Kompetenzüberschreitung hinreichend qualifiziert ist.[21] *„Das setzt voraus, dass das kompetenzwidrige Handeln der Unionsgewalt offensichtlich ist und der angegriffene Akt im Kompetenzgefüge zu einer strukturell bedeutsamen Verschiebung zulasten der Mitgliedstaaten führt.“*[22] Nach dem Wortlaut des Urteils dürfte ein Ultra-Vires-Akt danach angenommen werden, dass das EuGH Gelegenheit

[17] BVerfGE 30, 1 <99>.
[18] BVerfGE 89, 155.
[19] BVerfGE 89, 155 <70>.
[20] BVerfGE 89, 155 <140>.
[21] BVerfGE 126, 286 <60>.
[22] BVerfGE 126, 286 (Leitsatz 1).

hatte, eine Entscheidung nach Art. 267 AEUV über die Gültigkeit und Auslegung der in Rede stehenden Frage zu treffen. Der europarechtsfreundlichen Auslegung des deutschen Verfassungsrechts wurde vom BVerfG eine große Bedeutung beigemessen. Das Prinzip wird auch im Falle der unten dargestellten Identitätskontrolle angewendet, und dem Zweck dient, die im Art. 4 Abs. 3 verankerte Verpflichtung der loyalen Zusammenarbeit zu erfüllen.

Sowohl in dem PSPP,[23] als auch in dem OMT-Fall[24] leitete das BVerfG eine Vorabentscheidung ein, aber es lehnte die Verletzung der Verfassungsidentität in beiden Fällen ab. Das BVerfG anerkannte auch die Verantwortung für den Haushalt als Teil der Verfassungsidentität und traf wichtige Erkenntnisse zur Kontrolle von Ultra-Vires. Es erklärte, dass die offensichtlich willkürliche Auslegung der Verträge durch das EUGH gegen Art. 19 Abs. 1 Satz 2 EUV stoße und überprüft werden darf.[25]

IV. Der Lissabon-Urteil und die Identitätskontrolle

Im Jahre 2009 nach der Annahme des Vertrages von Lissabon wurde der Lissabon-Urteil beschlossen,[26] in dem das BVerfG seine Kompetenz aufrechthielt, in Rahmen der sogenannten Identitätskontrolle zu überprüfen, ob ein Rechtsakt der Europäischen Union gegen den unberührbaren Kern der Verfassung stößt. Unter diesem Kern sind sowohl die in Art. 79. Abs. 3 verankerte Ewigkeitsklausel und die von ihr geschützten Werte als auch fünf weitere Bereiche zu verstehen, die das BVerfG besonders sensibel für die demokratische Selbstgestaltungsfähigkeit betrachtet. Zu diesem Kreis gehören folgende: (1) Entscheidungen über das materielle und formelle Strafrecht, (2) die Verfügung über das Gewaltmonopol polizeilich nach innen und militärisch nach außen, (3) die fiskalischen Grundentscheidungen über Einnahmen und – eben auch sozialpolitisch motivierte – Ausgaben der öffentlichen Hand, (4) die sozialstaatliche Gestaltung von Lebensverhältnissen (5) sowie kulturell besonders bedeutsame Entscheidungen etwa im Familienrecht, Schul- und Bildungssystem oder über den Umgang mit religiösen Gemeinschaften .[27]

Hinsichtlich dieser Bereiche darf die Integration derart nicht vertieft werden, dass es für einen Mitgliedstaat keinen genügenden Spielraum gibt, über die zu den oben erwähnten Bereichen gehörenden Fragen zu entscheiden. In dem Urteil gewann die Frage der demokratischen Legitimation und des Wahlrechts eine bedeutsame Aufmerksamkeit, entgegen deren die Kompetenzen der Europäischen Union soweit nicht erweitert werden dürften, was zur wesentlichen Einschränkung der Kompetenz des deutschen Parlaments führt.[28] Im Zusammenhang damit wurden Garantien betreffend die Änderung der Verträge gestellt. Zu jeder Vertragsänderung, die durch die Mitgliedstaaten nicht ratifiziert werden muss oder ausschließlich durch die Organe der Union erfolgt, müssen die Abgeordneten des Parlaments – mit Zweidrittelmehrheit – ein sogenanntes

[23] BVerfGE 146, 216.
[24] BVerfGE 134, 366.
[25] BVerfGE 134, 366 <151>.
[26] BVerfGE 123, 267.
[27] BVerfGE 123, 267 <252>.
[28] Andreas Engels: Die Integrationsverantwortung des deutschen Bundestags. *IuS*. 2012/Heft 3., 214.

Zustimmungsgesetz verabschieden. Falls es zurückgeblieben ist, ist es den deutschen Abgeordneten in dem Europäischer Rat nicht erlaubt die Vertragsänderung zu unterstützen, die gemäß Art. 48 Abs. 7 EUV stattfindet soll.[29] Es zieht die Aufmerksamkeit auf sich, dass Art. 38 Abs. 1 GG den Weg eröffnet, das Zustimmungsgesetz durch eine Verfassungsbeschwerde anzufechten. Indem das BVerfG prüft, ob die Vertragsänderung Art. 23 Abs. 1 GG entspricht.[30] Die Funktion des mitgliedstaatlichen Vertretungsorgans darf daher nicht so entleert sein, dass es eine rein symbolische Rolle in der Integration spielt.[31]

Mithilfe der Identitätskontrolle ist das BVerfG so weit gegangen, die Vollstreckung eines Europäischen Haftbefehls verhindert zu haben.[32] Der Beschwerdeführer wurde *in absentia* in Italien zu 30 Jahren Haft verurteilt und reichte nach seiner Festnahme in Deutschland eine Verfassungsbeschwerde beim Gremium ein. Vom BVerfG wurde festgestellt, dass ein in Abwesenheit ergangenes Strafurteil die Schuldprinzip verletzt. Der Schuldgrundsatz wurzelt in der Menschenwürdegarantie des Art. 1 Abs. 1 GG, weswegen eine Verletzung der Verfassungsidentität vorliegt. Diese theoretischen Aussagen des BVerfG führten im konkreten Fall zur Verweigerung der Vollstreckung des Haftbefehls.[33]

Die Entscheidung wurde als Solange III genannt, weil es laut ihrer wesentlichen Feststellungen *solange* das deutsche GG in Kraft ist, überprüft das BVerfG, ungeachtet des Vorhandenseines der in Solange II erwähnten Grundrechtsschutzniveau, ob die Verletzung der Menschenwürde im konkreten Fall vorliegt.[34] Im Falle einer bejahenden Antwort auf diese Frage würde das BVerfG die in Rede stehende Rechtsakte hinsichtlich dieses speziellen Bereiches wegen des Verstoßes gegen die Verfassungsidentität unanwendbar erklären. Diese Auffassung des BVerfG kann als Antwort auf die Melloni Rechtsprechung des EuGH betrachtet werden. In dem Melloni-Fall handelte es sich ebenso um die Verweigerung eines Haftbefehls.[35] Im Mittelpunkt stand die Frage, ob das spanische Gericht die Vollstreckung des Haftbefehls zurückweisen darf, wenn er den in Rahmenbeschluss verankerten Voraussetzungen entspricht, aber die Garantien der spanischen Verfassung nicht erfüllt. Diese Argumentation wurde vom EuGH abgelehnt, weil sie gegen den absoluten Vorrang des europäischen Rechts stößt.

Die Auswirkung der deutschen Rechtsprechung zeigt sich in zwei Entscheidungen des EuGH, die auch als ein wichtiger Teil der europäischen gerichtlichen Diskussion gelten.

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[29] Sven Hölscheidt - Steffi Menzenbach - Birgit Schröder: Das Integrationsverantwortungsgesetz – ein Kurzkommentar. *Zeitschrift für Parlamentsfragen*, 2009/4., 764. o.
[30] Heiko Sauer: *Staatsrecht III. 5. Aufgabe*. C.H. Beck, Berlin, 2018, 191.
[31] BVerfGE 123, 267 <249>.
[32] BVerfGE 140, 317.
[33] BVerfGE 140, 317 <84>.
[34] Mathias Hong: *Humand dignity and constitutional identity: The Solange-III-Decision of the German Constitutional Court*. https://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/ (heruntergeladen: 26.08.2020.)
[35] http://curia.europa.eu/juris/document/document.jsf?docid=134203&doclang=EN

Im Rahmen des Aranyosi und Caldararu Urteils[36] wurde vom EuGH festgestellt, dass es im Gegensatz zur Melloni-Rechtsprechung ein höheres Schutzniveau der Grundrechte geben kann, aufgrund dessen der europäische Haftsbefehl zu verweigern ist, sofern das behandelnde Gericht über objektive, zuverlässige, genaue Angaben verfügt, die das Vorliegen systemischer oder allgemeiner Mängel der Haftbedingungen im Ausstellungsmitgliedstaat bestätigen. Eine weitere Voraussetzung ist, dass der Angeklagte durch die Vollstreckung des Haftbefehls, aufgrund der Bedingungen seiner Inhaftierung in einem anderen Mitgliedstaat einer echten Gefahr unmenschlicher oder erniedrigender Behandlung im Sinne von Art. 4 der Charta der Grundrechte der Europäischen Union ausgesetzt wird.[37]

Die LM-Rechtsprechung handelte sich um den Zusammenhang gerichtlicher Unabhängigkeit und des europäischen Haftbefehls.[38] Der Irische Oberste Gerichtshof hat im Rahmen eines Vorabentscheidungsverfahrens dem EuGH die Frage gestellt, ob es rechtmäßig ist, die Auslieferung einer Angeklagten zu verweigern, weil die politischen Geschehnisse, der behauptete Mangel an Rechtstaatlichkeit, die Unabhängigkeit der polnischen Gerichte derart beeinflussten, dass es nicht mehr möglich ist, ein faires Verfahren in Poland zu führen.[39] Die Argumentation wurde vom EuGH abgelehnt, das vielmehr die Wichtigkeit der Einheit des europäischen Rechtes, der Grundsatz der gegenseitigen Anerkennung und des gegenseitigen Vertrauens betonte.[40]

V. Das Verhältnis der Identitäts- und Ultra-vires-Kontrolle bzw. das Vorabentscheidungsverfahren

Die Identitäts- und die Ultra-vires-Kontrolle, die auch als *„Integrationsbremsen“* bezeichnet wurden, waren in dem Lissabon-Urteil nach den Worten des BVerfG *„Hand in Hand“* gegangen, aber später das BVerfG trennte die beiden Konzepte. In diesem Absatz wird versucht, die Unterschiede zwischen ihnen zu untersuchen und sie zuerst anschaulich, in Form einer Tabelle darzustellen und mithilfe einer Erklärung zu vergleichen.

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[36] Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen C-404/15 e C-659/15 [2016] ECR 118.

[37] Christoph Burchard: *EuGH C-404/15 und C-659/15 PPU - Urteil des EuGH (Große Kammer) vom 5. April 2016 (Aranyosi und Caldararu).* https://www.hrr-strafrecht.de/hrr/eugh/15/c-404-15.php (heruntergeladen: 26.08.2020.).

[38] Minister for Justice and Equality v LM C-216/18 [2018] ECR 586.

[39] Christoph Burchard - David Andrick: *EuGH C-216/18 PPU - Urteil des EuGH (Große Kammer) vom 25. Juli 2018 (LM).* https://www.hrr-strafrecht.de/hrr/eugh/18/c-216-18.php (heruntergeladen: 26.08.2020.).

[40] Zum Kritik an dem Urteil, sieh: Pál Sonnevend: *A Clever Compromise or a Tectonic Shift? The LM Jugment of the CJEU.* https://verfassungsblog.de/a-clever-compromise-or-a-tectonic-shift-the-lm-jugment-of-the-cjeu/ (heruntergeladen: 26.08.2020.).

Identitätskontrolle		Ultra-vires-Kontrolle
Art. 79 Abs. 3 GG	***Durch welche Vorschrift des GG ist sie begründet?***	Art. 23 Abs. 1 GG
Nein, weil es ein absolutes Konzept ist.	***Ist Abwägung möglich?***	Ja, weil es ein relatives Konzept ist.
Ausschließlich vom BVerfG.	***Von welchem Gremium ist sie ausgelegt?***	Zuerst vom EuGH dann vom BVerfG.
Nein.	***Ist die Vorabentscheidung möglich?***	Ja, die Intiierung ist obligatorisch.
• **Parlament; Verfassungsändernde Macht** • **Die Organe der Europäischen Union**	***Welches Organ verpflichtet sie?***	Die Organe der Europäischen Union
Europarechtsfreundlich	***Wie ist sie ausgelegt?***	Europarechtsfreundlich
Verfassungsbeschwerde und Normenkontrollsverfahren	***In was für einem Verfahren darf sie überprüft werden?***	Verfassungsbeschwerde und Normenkontrollsverfahren
Unanwendbarkeit	***Was ist die Rechtsfolge ihrer Verletzung?***	Unanwendbarkeit

Tabelle: Der Vergleich der Identitäts- und der Ultra-vires-Kontrolle anhand der Praxis des BVerfG

Es ist ersichtlich, dass die Hauptunterschiede zwischen den beiden Konzepten darin bestehen, auf welchem Vorschrift des GG sie beruhen, in welchem Fall es die Möglichkeit zur Abwägung und Vorabentscheidung gibt, durch welche Organe sie auszulegen sind und welche sie verbinden.[41]

Alle oben dargestellte Unterschiede wurzeln darin, dass die Identitätskontrolle auf der Ewigkeitsklausel beruht, die der Ausdruck der Macht des souveränen Volkes zu verstehen ist und als Grenze der verfassungsändernden Macht funktioniert. Wenn eine nicht durch das GG konstituierte Macht ihren Inhalt veränderte, bedeutete das nichts anderes, dass eine neue, mit der deutschen Rechtsordnung gleichzeitig existierende verfassungsändernde Macht entstand. Andererseits ist jede Änderung des Inhalts der Ewigkeitsklausel, die sich nicht aus der Ausübung der innerstaatlichen verfassungsändernden Macht (Annahme einer neuen Verfassung) ergibt, ein Eingriff in den Willen des verfassungsgebenden Volkes, der nur von ihm selbst derogiert werden darf. Aus diesem Grund lässt sich die Beziehung zwischen Souveränität und Identitätskontrolle wie folgt zusammenfassen: Alle Akten, welche die Verfassungsidentität verletzen, sind Ultra-Vires, aber nicht alle Akten, die Ultra-Vires sind, verletzen die Verfassungsidentität.

[41] Über den theoretischen Vergleich der Ewigkeitsklausel und der Verfassungsidentiät, sieh: Patrik Szabó: Under the skin. Additives to the theoretical and dogmatic problems of constitutional identity. *MTA Law Working Paper* 2019/09., 1-14.

Ungeachtet seiner gemeinschaftsrechtlichen Relevanz, ist die Verfassungsidentität nur durch das BVerfG interpretiert, wessen Ursache in der vom Carl Schmitt entwickelten Konzept der Verfassungsidentität zu untersuchen ist.[42] Aufgrund dessen ist es zu verstehen, dass die Wirbelsäule der Verfassung, deren Veränderung praktisch zur Entstehung einer neuen Verfassung führte, darf nur durch das Organ ausgelegt werden, zu deren autentischen Befugnissen die Auslegung der Verfassung gehört.

Gleichzeitig ist anzumerken, dass die gesamte Idee, einschließlich ihrer europarechtsfreundlichen Auslegung, die dünne Linie symbolisiert, entlang derer das BVerfG versucht, durch Rechtsstaatlichkeit ein Gleichgewicht zwischen nationalen und Integrationsinteressen herzustellen. Auf diesem Weg gibt es zwei Handläufe. Einerseits gibt es den Gesetzgeber der Mitgliedstaaten, der mit eigener Zustimmung (oder dessen Fehlen) die Integration verlangsamen oder vertiefen kann und den EuGH, der durch ein Vorabentscheidungsverfahren und die Bekanntmachung seiner eigenen Auslegung die Arbeit des BVerfG unterstützen kann. Im Gegensatz dazu schien das BVerfG die helfende Hand des EuGH abzulehnen, als sie erklärte, dass nur das BVerfG selbst berechtigt sei, die Verfassungsidentität auszulegen, und daher nicht verpflichtet sei, ein Vorabentscheidungsverfahren einzuleiten. Dementsprechend initiierte das Gremium in dem OMT-Fall im Falle der Verfassungsidentität kein Vorabentscheidungsverfahren.

VI. Die neuen Grundsteine in der Praxis des BVerfG

In der folgenden Gedankeneinheit werden drei Entscheidungen des BVerfG erläutert, die einen ziemlich großen Einfluss auf die gesamte europäische Rechtsentwicklung haben können. Zuerst wird das Wesen der das Recht auf Vergessen(werden) I. und II. Entscheidungen zusammengefasst und danach über den PSPP-Urteil erörtert. Dieser Absatz bietet nur eine enge Übersicht über die hinsichtlich derjenigen Punkten der Entscheidungen, die in Bezug auf das Verhältnis zwischen Gemeinschaftsrecht und deutschem Verfassungsrecht relevant sind.[43]

1. Die Recht auf Vergessen Entscheidungen

In dem Sachverhalt der *Recht auf Vergessen I.* Entscheidung handelte es sich um einen Mordfall aus dem Jahre 1981.[44] Der Beschwerdeführer hatte zwei Menschen erschossen, worüber die berühmte deutsche Zeitschrift, der Spiegel in den Jahren 1982 und 1983 berichtete. Im Jahre 1999 wurden die Berichte in einem Online-Archiv zum Abruf bereitgestellt, die durch Namenseingabe bei Google auf der ersten Seite der Suchergebnisse angezeigt wurden. Hiergegen wurde eine Klage geltend gemacht, der Spiegel Online GmbH zu untersagen, über die Straftat unter Nennung des Familiennamens des Klägers zu berichten. Die Klage wurde im Zivilverfahren abgewiesen, weswegen der Beschwerdeführer eine Verfassungsbeschwerde einreichte

[42] Carl Schmitt: *Constitutional theory*. Übersetzt von: Jeffrey Seitzer. Duke University Press, London, 2008.
[43] Eine umfassende Analyse bietet: Ádám Auer – Endre Orbán: Zárókőszerep az uniós alapjogvédelemben? Újabb fejlemények a Német Szövetségi Alkotmánybíróságnak az uniós joghoz fűződő viszonyában (felejtéshez való jog I.–II.) *Jogtudományi Közlöny,* 2020/7-8., 385-397.
[44] 1 BvR 16/13.

und die Verletzung seines allgemeinen Persönlichkeitsrechts (Art. 2 Abs. 1 in Verbindung mit Art. 1 Abs. 1 GG) behauptete.[45]

Das BVerfG stellte fest, dass in diesem Fall die als DSGVO (auf Englisch: GDPR) berühmt gewordene Verordnung EU 2016/679 des Europäischen Parlaments und des Rates zum Schutz natürlicher Personen bei der Verarbeitung personenbezogener Daten anzuwenden sei. Nach Art. 85 DSGVO gibt es für die Mitgliedstaaten einen Umsetzungsspielraum, deshalb handelt es sich nicht um die Anwendung von vollständig determiniertem und harmonisiertem Unionsrecht. Die Feststellungen des BVerfG waren folgende: Einerseits prüft es unionsrechtlich kein vollständig determiniertes innerstaatliches Recht am Maßstab der Grundrechte des GG, auch wenn das innerstaatliche Recht der Durchführung des Unionsrechts dient. Anderseits ist das BVerfG davon ausgegangen, dass das Unionsrecht dort, wo es den Mitgliedstaaten fachrechtliche Gestaltungsspielräume einräumt, regelmäßig nicht auf eine Einheitlichkeit des Grundrechtsschutzes zielt, sondern eine Grundrechtsvielfalt zulässt und das Schutzniveau der Charta der Grundrechte der Europäischen Union durch die Anwendung der Grundrechte des Grundgesetzes mitgewährleistet. Letztlich liegt eine Ausnahme vor und die Charta ist dann nur in Betracht zu ziehen, wenn hierfür konkrete und hinreichende Anhaltspunkte vorliegen, ihr höheres Schutzniveau anzuwenden.[46]

Die *Recht auf Vergessen II* Entscheidung[47] ging ebenso um eine Verfassungsbeschwerde, deren Hintergrund folgendes ist: Im Jahre 2010 strahlte der Norddeutsche Rundfunk einen Beitrag des Fernsehmagazins „Panorama“ mit dem Titel *„Kündigung: Die friesen Tricks der Arbeitgeber“*. Gegen Ende dieses Beitrags, für den die Beschwerdeführerin zuvor ein Interview gegeben hatte, wurde der Fall eines gekündigten ehemaligen Mitarbeiters des von ihr als Geschäftsführerin geleiteten Unternehmens dargestellt und der Beschwerdeführerin ein unfairer Umgang mit dem Mitarbeiter vorgeworfen. Bei Eingabe ihres Namens wurde als eines der ersten Suchergebnisse die Verlinkung auf diese Datei angezeigt. Nachdem die Klage vom Oberlandesgericht abgewiesen worden war, machte sie eine Verfassungsbeschwerde geltend, damit das Gremium die Verletzung seines allgemeinen Persönlichkeitsrechts feststellt.[48]

In der in Rede stehenden Entscheidung wurde klargemacht, dass bei der Anwendung unionsrechtlich vollständig vereinheitlichter Regelungen sind nicht die Grundrechte des Grundgesetzes, sondern alleine die Unionsgrundrechte maßgeblich sind. Das heißt, dass in solchen Fällen anstelle des GG die in der Charta verankerten Unionsgrundrechte anzuwenden sind. Dies aussagen zu können, geht das BVerfG davon aus, dass das auf der europäischen Ebene gewährleistete Schutzniveau mit dem Deutschen gleichartig sei, wie es schon in dem Solange II Urteil festgestellt wurde. Das Gremium argumentierte, dass

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[45] Karsten Gulden: *Recht auf Vergessen I und II. Das Bundesverfassungsgericht statuiert ein Recht auf Freiheit*. https://ggr-law.com/recht-auf-vergessen-i-recht-auf-vergessen-ii-bundesverfassungsgericht-recht-auf-freiheit/ (heruntergeladen: 26.08.2020.).

[46] Mathias Honer: *Was bedeuten die Ent-schei-dungen für Bürger, Gerichte und den EuGH?* https://www.lto.de/recht/hintergruende/h/bverfg-recht-auf-vergessen-europa-eugh-grundrechte-teil-2/ (heruntergeladen: 26.08.2020.).

[47] 1 BvR 276/17.

[48] Gulden op.cit.

die Gewährleistung eines wirksamen Grundrechtsschutzes, der sich vor allem in der besonderen Verfahrensart der Verfassungsbeschwerde ausdrückt, zu den zentralen Aufgaben des BVerfG gehört. Laut des deutschen Verfassungsrechts ist jede Person beschwerdeberechtigt, die behaupte, in ihren Grundrechten verletzt worden zu sein, und Gegenstand einer Verfassungsbeschwerde könne jeder Akt der öffentlichen Gewalt sein.[49] Im Rahmen der Entscheidung wurde festgestellt, dass die Unionsgrundrechte auch heute zu dem gegenüber der deutschen Staatsgewalt durchzusetzenden Grundrechtsschutz gehörten. Sie seien nach Maßgabe des Art. 51 Abs. 1 GRCh innerstaatlich anwendbar und bildeten zu den Grundrechten des Grundgesetzes ein Funktionsäquivalent.[50] Die wichtigste Rechtsentwicklung besteht in der Aussage von Karlsruhe, dass das EuGH über kein individuelles Rechtschutz verfüge, weswegen ohne die Einbeziehung der Unionsgrundrechte in den Prüfungsmaßstab des Bundesverfassungsgerichts der Grundrechtsschutz gegenüber der fachgerichtlichen Rechtsanwendung nach dem heutigen Stand des Unionsrechts unvollständig bleiben würde.[51] Dementsprechend leitete das BVerfG aus seiner Integrationsverantwortung (Art. 23 Abs. 1 Satz 1 GG) ab, dass Rügen wegen der Verletzung von Rechten der Charta der Grundrechte der Europäischen Union zulässig seien,[52] und die Unionsgrundrechte nicht nur in dem Staat-Bürger-Verhältnis, sondern auch in privatrechtlichen Streitigkeiten anzuwenden seien (horizontale Drittwirkung).[53]

2. „Keine leichte Kost“ – Das PSPP-Urteil

Das PSPP-Urteil gehört zu den am meisten umstrittenen Entscheidungen des BVerfG,[54] aber alle sind darin einig, dass es zweifellos eine der wichtigsten Entscheidung des BVerfG zur europäischen Integration ist. Sie kann auch als der Biss des bislang nur bellenden Hundes markiert werden, nämlich das BVerfG erklärte im Rahmen eines Verfassungsbeschwerdeverfahrens das BVerfG die Ultra-vires-Kontrolle zum ersten Mal anwendete und den Urteil des EuGH kompetenzüberschreitend.

Hintergrund der Entscheidung ist, dass ein Vorlagebeschluss vom BVerfG im Jahr 2017 über die Gültigkeit des PSPP-Programms getroffen wurde. Infolge dessen schloss das EuGH das Weiss-Urteil und erklärte das Programm mit dem Gemeinschaftsrecht vereinbar. Die Gegenstand des BVerfG-Urteils ist das Public Sector Purchase Programme (PSPP), ein Teil des Expanded Asset Purchase Programmes (EAPP), in dessen Rahmen die Europäische Zentralbank (EZB) auf den Sekundärmarkt Staatsanleihen der Mitgliedstaaten in der Höhe von zwei Billionen Euro erwarb, damit die Inflationsrate in der Eurozone auf knapp unter 2 % erhöht werden. Das Programm wurde durch Beschluss der EZB im Jahr 2015 aufgelegt und später durch fünf weitere Beschlüsse geändert.

Das Urteil ist in zwei Schritten zu analysieren. Im ersten Schritt ging es um das EuGH-Urteil selbst. In Rahmen des PSPP-Urteils wurden die in der Honeywell-Rechtsprechung

[49] 1 BvR 276/17 <58>.
[50] 1 BvR 276/17 <59>.
[51] 1 BvR 276/17 <60>.
[52] 1 BvR 276/17 <67>.
[53] 1 BvR 276/17 <96>.
[54] 2 BvR 859/15.

festgelegten Voraussetzungen der Ultra-vires-Kontrolle angewendet. Es wurde ebenso festgestellt, dass das Weiss-Urteil des EuGH als ultra-vires-Akt zu qualifizieren sei, weil es „*wegen der vollständigen Ausklammerung der tatsächlichen Auswirkungen des Programms auf die Wirtschaftspolitik methodisch schlechterdings nicht mehr vertretbar*“[55] sei und ohne nachvollziehbare Überprüfung auf eine *„wertende Gesamtbetrachtung“*[56] verzichtete und bei der Abwägung nur die Zielsetzung des Programms in Rücksicht genommen habe. Dies sei mit dem Grundsatz der Verhältnismäßigkeit nicht vereinbar, weswegen das EuGH seine in Art. 19 Abs. 1 Satz 2 EUV verteilte Mandat überschritte.[57] Als Sanktion stellte das BVerfG die Unanwendbarkeit der europäischen „Rechtsakte“ fest, was praktisch bedeutet, dass das Urteil nicht vollzuziehen ist.

Im zweiten Schritt handelte es sich um die EZB-Beschlüsse, die das PSPP-Programm verwirklichen. Über die Unverhältnismäßigkeit des Programms wurde tatsächlich nur das festgestellt, dass keine solche Abwägung erfolgte, durch die auch die wirtschaftlichen Nachteile des PSPP berücksichtigt werden könnten und alle wirtschaftlichen Nachteile gewichtet wurden. Im Wesentlichen ging es hier auch darum, dass die EZB seine Begründungspflicht versäumte und sie vom BVerfG aufgefordert wurde, in einer Frist von drei Monaten grundsätzlich zu begründen, warum das PSPP nicht gegen den Grundsatz der Verhältnismäßigkeit stoße.

Es wurde ebenso angeordnet, dass *die Bundesregierung und der Bundestag aufgrund ihrer Integrationsverantwortung verpflichtet sind, auf eine Verhältnismäßigkeitsprüfung durch die EZB hinzuwirken.*[58] *Nach dem BVerfG ist es der Bundesbank untersagt, nach einer für die Abstimmung im Eurosystem notwendigen Übergangsfrist von höchstens drei Monaten an Umsetzung und Vollzug der verfahrensgegenständlichen Beschlüsse mitzuwirken, wenn nicht der EZB-Rat in einem neuen Beschluss nachvollziehbar darlegt, dass die mit dem PSPP angestrebten währungspolitischen Ziele nicht außer Verhältnis zu den damit verbundenen wirtschafts- und fiskalpolitischen Auswirkungen stehen.*[59]

Infolge der Entscheidung ist eine widersprüchliche Situation entstanden, in welcher die Bundesbank rechtmäßig tatsächlich nicht handeln kann.[60] Es ist einerseits aufgrund des Vorranges und der Einheit des Unionsrechts verpflichtet, das Urteil des EuGH anzuwenden. Anderseits ist die Entscheidung des BVerfG für die Bundesbank ebenso verbindlich, was den Grundsatz der Rechtssicherheit verletzt und zu schweren Unsicherheiten in Bezug auf Rechtstaatlichkeit führt.

VII. Zusammenfassung

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[55] 2 BvR 859/15 <119>.
[56] 2 BvR 859/15 <123, 141, 160>.
[57] Andrej Lang: *„Keine leichte Kost: Das BVerfG zwingt die EZB zur Rechenschaft.* https://verfassungsblog.de/keine-leichte-kost/ (heruntergeladen: 2020.08.26.).
[58] BvR 859/15 Leitsatz 9.
[59] BvR 859/15 <235>.
[60] András Jakab – Pál Sonnevend: *The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundesverfassungsgericht*. https://verfassungsblog.de/the-bundesbank-is-under-a-legal-obligation-to-ignore-the-pspp-judgment-of-the-bundesverfassungsgericht/ (heruntergeladen: 26.08.2020.).

Aus alledem kann man den Schluss ziehen, dass das Verhältnis des europäischen und deutschen Verfassungsrechtes von Anfang an eine deutliche Rolle in der Rechtsprechung des BVerfG spielt. Die in Karlsruhe entwickelte Praxis hat nicht nur in Deutschland, sondern im ganzen Europa eine Auswirkung, weil sie sowohl als Vorbild für andere europäische Verfassungsgerichthöfe dient als auch die Rechtsprechung des EuGH beeinflusst. Genau wegen dieser großen Verantwortung, die das BVerfG trägt, bemüht es sich die mitgliedstaatlichen und europäischen Interesse auszugleichen und zu harmonisieren. Um den goldenen Mittelweg zu finden, übt das BVerfG sowohl die Identitätskontrolle als auch die Ultra-Vires-Kontrolle nur in den Sonderfällen aus, was mithilfe enger Voraussetzungen der Zulässigkeit garantiert wird. Dazu kommt der Grundsatz der europarechtsfreundlichen Auslegung, der die Anwendung der oben erwähnten Kontrollen auch erschwert. Die neusten Entscheidungen lassen sich als eine absichtliche Rechtsentwicklung verstehen, und sie tragen dazu bei, den europäischen Grundrechtschutz durch die Zusammenarbeit der Gerichte zu gewährleisten. Die vom Karlsruhe entwickelte Rechtsprechung ist ein gutes Beispiel dafür, wie ein Gleichgewicht durch Dialog zwischen Gerichten geschafft werden kann und was es in der Tat bedeutet, gleichzeitig nationalen und europäischen Interessen zu dienen. Es ist auch zu gestehen, dass das PSPP-Urteil dieser Tendenz nicht entspricht, und „*die Büchse der ultra-vires-Pandora*“[61] öffnete. Abgesehen davon, dass das Urteil selbst keine direkte und ernste Bedrohung für den europäischen Rechtsraum bedeutet, weil es tatsächlich die Möglichkeit aufrechterhielt, das Problem auf politischer Ebene zu lösen, kann man davor begründete Angst haben, dass die vom BVerfG entwickelte Waffe in falsche Hände gerät.

[61] Alexander Thiele: *VB vom Blatt: Das BVerfG und die Büchse der ultra-vires-Pandora*. https://verfassungsblog.de/vb-vom-blatt-das-bverfg-und-die-buechse-der-ultra-vires-pandora/ (heruntergeladen: 26.08.2020.).