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AHARON BARAK'S LEGAL IDEOLOGY IN THE CONTEXT OF EUROPEAN CONSTITUTIONALISM

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ABSTRACT

The EU lacks the legal ideology as a social instrument that could satisfy the spirit of liberal democracy and would help to consolidate different societies to a solid European demos. Although the existence of an ideological system alone does not guarantee social consensus, it helps to manage dissension within the limits of particular values and norms. It is because a legal ideology provides the structure for social thought that individuals and social groups are able to interpret the nature of emerging conflicts and the interests they support.

The article demonstrates that the neoliberal way of thinking that prevails in contemporary Europe does not meet the spirit of the constitutionalism of the EU Member States; the article introduces some aspects of Aharon Barak's legal ideology that could be relevant for the formation and development of European demos and constitutionalism. In order to achieve this aim, the research is focused on issues that emerge in the area of three main pillars of constitutionalism: (1) adherence to the rule of law, (2) limited and accountable government, and (3) protection of fundamental human rights.

KEYWORDS

Constitutionalism, the European Union, Aharon Barak, rule of law, human rights, democracy, liberalism

INTRODUCTION

The constitutional systems of the European Union (hereinafter – the EU) Member States and their legal practice as well as their culture of legal interpretation – their constitutionalism – concern the same object: rules concerning independent self-governing political community and fundamental human rights. As G. Nolte notes:

> 'European constitutionalism' seems to embody something, which is both more removed from 'the people' and more vague than national constitutional law. (…) The development of European integration, however, has started to make these clear-cut differences disappear. This is not only because a European entity is developing which more closely resembles a state. It is also because the European states themselves and their characteristic constitutionalisms are being transformed by the process of European integration. This is visible most clearly in the jurisprudence of the European Courts in Strasbourg and Luxembourg.[1]

However, today the EU is in the deepest crisis since its establishment. This fact raises new challenges for European constitutionalism. This crisis has many factors and faces but the main problem is the absence of clear strategic guidelines for the further development of the EU. This situation is mainly caused by the intensification of globalisation processes and growing internal and external threats. External threats such as poverty of the Third World countries, increasing international terrorism and militaristic attempts of particular states that violate international law fosters global flows of migrants, refugees and asylum applicants. In terms of security, the prevention of complex external threats requires not only additional investment, but also has a significant negative impact on the condition of the EU Member States' social values, which are still fragile after the financial and economic crisis.

At the very beginning of the twenty-first century I. Pernice stressed that the contemporary state:

> is unable on its own to fulfil certain tasks of common interest, such as the preservation of liberty, peace, security and welfare of their citizens. International crime and terrorism, global trade and financial markets, climate change and unlimited communication worldwide etc. need new structures of governance. The various aspects of globalisation show that classical concepts

[1] Georg Nolte, "European and US constitutionalism: comparing essential elements": 5; in: Georg Nolte, ed., *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005).

> such as national sovereignty and the belief in unlimited powers of the state are outdated and nothing more than cosy – if not dangerous – illusions.[2]

We agree with the author; however, we also observe that these new structures of governance are insufficient without an adequate legal ideology that could serve as a basis for European demos[3] building since the lack of European demos becomes one of the most essential restrictions for the formation of European constitutionalism under conditions of negative challenges of globalisation and growing importance of public security[4].

Thus, the EU lacks the legal ideology wielded as a social instrument that could satisfy the spirit of liberal democracy and would help to consolidate different societies to a solid European demos. Although the existence of the ideological system alone does not guarantee social consensus, it helps to manage dissension within the limits of particular values and norms. Because the ideology provides a structure for social thought, individuals and social groups are able to interpret the nature of emerging conflicts and the interests they support. Accordingly, the ideology provides a context in which the social symbols and institutions are interpreted in which their sense and meaning is anchored.

The process of the integration of the EU Member States under conditions of globalisation, free market, and intensification of international terrorism results in the emergence of new factors that destabilize classical socio-cultural tensions between government and society, order and justice, and freedom and security, that had been in a relative balance during the time of peace in which the EU was born and developed.[5] These circumstances require taking into account the relevant constitutional-legal experience of countries that successfully function under conditions of terrorism and free-market. Israel has a very rich practice in coping with threats of terror acts. Therefore, the international security experts stress the need to explore the Israeli security model.[6]

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[2] Ingolf Pernice, "Multilevel Constitutionalism in the European Union" (July 2001) // http://www.whi-berlin.eu/documents/whi-paper0502.pdf.

[3] Demos - "a group of people, the majority of whom feel sufficiently connected to each other to voluntarily commit to a democratic discourse and to a related decision-making process" (Lars-Erik Cederman, "Nationalism and Bounded Integration: What It Would Take to Construct a European Demos," *European Journal of International Relations* 7(2) (2001): 224; as cited in: Daniel Innerarity, "Does Europe Need a Demos to Be Truly Democratic?" *The London School of Economic and Political Science* (July 2014) // http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper77.pdf).

[4] See more e.g.: Daniel Innerarity, *supra* note 3.

[5] See: Jolanta Bieliauskaitė, Vytautas Šlapkauskas, Milda Vainiutė, and Darijus Beinoravičius, "Constitutionalizm as the Instrument of Security and Sustainability in European Union Law," *Journal of Security and Sustainability Issues* Vol. 5, No. 3 (March 2016): 380-387 // DOI: http://dx.doi.org/10.9770/jssi.2016.5.3(6)

[6] See: Jeffrey A. Larsen and Tasha L. Pravecek, "Comparative U.S.-Israeli Homeland Security Study," *Counterproliferation Paper* No. 34 (2006) // http://www.au.af.mil/au/awc/awcgate/cpc-pubs/larsen3.pdf.

There is no doubt that the status of Israel and the EU is different. Israel is a state, the EU is a union of the states. Although both Israel and the EU (former European Communities) were established in the middle of the twentieth century, the Jewish nation that lives in the state of Israel and outside it has strong identity based on common historical experience and a rich culture. However, there is an important similarity between Israel and the EU. Israel as well as the EU has no single complete constitutional document, it has developed an operative constitution of its own, embodied in a set of written texts that reflect the political system on which the state is based, its social content, and an expanding constitutional tradition. Those texts[7] were properly promulgated by the representatives of the people and recognized as constitutional by Israel's Supreme Court[8]. The EU also does not have a constitution and still there are scholars who maintain that the constitution of the EU consists of several legal documents[9]. These circumstances reveal the necessity to talk about constitutionalism not only as a system of constitutional texts and their interpretations, or constitutional order, but also as a constitutional culture and metaconstitutional inquiry. This broadly understood concept of constitutionalism includes not only legal, but also political and philosophical components. Its core is constituted by the principles and values, which maintain the idea of the restriction of government by law and human rights.[10]

Aharon Barak is a prominent legal scholar and justice, whose precedent-setting rulings while serving on the Israeli Supreme Court, established the court as a powerful and independent institution. His innovative legal concepts and activities, which are the excellent example of coherence between personal and professional experience, legal thought and legal practice, have influenced judicial thought world-wide. The name of A. Barak is often associated with the Constitutional Revolution in Israel[11] and the maintenance of constitutional democracy.

The article shows that the neoliberal way of thinking does not meet the spirit of the constitutionalism of the EU Member States, and introduces some aspects of

[7] See: Daniel J. Elazar, "The Constitution of the State of Israel. Introduction," *Jerusalem Center for Public Affairs* (1993) // http://www.jcpa.org/dje/articles/const-intro-93.htm.
[8] *Ibid*.
[9] See: Ingolf Pernice, *supra* note 2; Ingolf Pernice, "The treaty of Lisbon: multilevel constitutionalism in action," *Columbia Journal of European Law* Vol. 15, No. 3 (February 2009): 385.
[10] Jolanta Bieliauskaitė and Vytautas Šlapkauskas, "European constitutionalism as the metatheory of the construction of legal and political reality and the challenges for its development," *DANUBE: Law and Economics Review* Vol. 7, No. 1 (April 2016): 50 // DOI: 10.1515/danb-2016-0003
[11] In 1992, human rights, established in *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity and Liberty* acquired a constitutional force above the regular statutes, which means, that a regular Knesset (Parliamentary) statute cannot infringe upon these rights, unless it fulfils the requirements of the *Basic Laws*. See more: Aharon Barak, "Constitutional Revolution: Israel's Basic Laws," *Constitutional Forum* Vol. 4, No. 3 (Spring 1993): 83-84.

Barak's legal ideology that could be relevant for the formation of European demos and constitutionalism.

In order to achieve this aim, the research is focused on the issues that emerge in the area of three main pillars of constitutionalism: (1) adherence to the rule of law, (2) limited and accountable government, and (3) protection of fundamental rights.[12] We believe that contemporary legal ideology should be based on an interpretation of these pillars that is understandable for all members of society.

1. THE DISOBEDIENCE OF RULES AS A THREAT TO THE RULE OF LAW AND DEMOCRACY

Why is disobeying rules considered a threat to the rule of law and democracy? There are many answers to this question. However, we believe that it was comprehensively answered by F. A. Hayek's deep analysis of the nature of rules and order[13], which stresses the necessity to free ourselves wholly from the erroneous conception that there can first be a society which then gives itself laws. This erroneous conception is basic to the constructivist rationalism from Descartes and Hobbes through Rousseau and Bentham to contemporary legal positivism. According to Hayek, it is only as a result of individuals observing certain common rules that a group of people can live together in those orderly relations, which we call a society. Individuals differing in their general values may occasionally agree on, and effectively collaborate for, the achievement of particular concrete purposes. But such agreement on particular ends will never suffice for forming that lasting order which we call a society.[14] Thus, the social order is characteristic to any society and functions only if common (social) rules are observed. There is as much society as its members (are able to) follow the common rules of conduct.

The obedience of common rules and especially the rules of security not only allowed the development of society but also the perception of this obedience as a common good and as justice. This perception of justice has strengthened social control and self-regulation. Therefore, as L. Baublys notes, justice is a fundamental

[12] See: Jiunn-Rong Yeh and Wen-Chen Chang "The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions," *Penn State International Law Review* Vol .27, No. 1 (2008); Aoife O'Donoghue "International Constitutionalism and the State," *International Journal of Constitutional Law* Vol. 11, No. 4 (2013): 1021-1045 // DOI: 10.1093/icon/mot048.
[13] See: Friedrich August von Hayek, *Law, Legislation and Liberty. Vol. I: Rules and Order* (Chicago: University of Chicago Press, 1973).
[14] Friedrich August von Hayek, *Teisė, įstatymų leidyba ir laisvė. I: Taisyklės ir tvarka* (Law, Legislation and Liberty. Vol. I: Rules and Order) (Vilnius: Eugrimas, 1998), 146–147.

principle of social life that indicates the moral, legal, economic, political limits and possibilities of human conduct.[15]

Hayek stresses the practical importance of the obedience of rules, which is the necessary condition for actions. If society wants to survive, it has to find ways to learn those rules and means to maintain them.[16] In order for law as a social institution to be efficient, individuals must interiorise legal rules and (or) obey them under the influence of other social forces. Both options were developed by practical reason but their relationship has always been a question of community and state policy. Coercive means prevailed before the era of liberal democracy. However, nowadays the means of socialisation are the priority. Legal ideology has always been a mediator in this complicated process which connects legal rules with the conduct of individuals and groups. Unlike political ideology, legal ideology emerges together with community and retains its social role. It can be understood as a certain form of social consciousness – a system of value-based and cognitive premises, which is reflected and established in a legal doctrine.

The dual – normative and value-based – nature of law covers the potential possibilities of law to be conceived as absolute and as a tool of coercion. They are determined by the attitude of authorities (elite) towards the relationship between society and law. Classically, law as a social institution has two functions: the protection of social and (or) elite values (order) and the implementation of justice. According to H. J. Berman, these two purposes of law - protection of order and implementation of justice – which lie within the Western legal tradition, are engaged in an inner conflict. The order itself is perceived as something that includes an internal tension between the need for change and the need to maintain stability. Justice is also being treated dialectically. It involves the tension between individual rights and public welfare.[17] These tensions in society may increase if authorities, while implementing their interests, unadvisedly contrast order and justice. This situation traditionally leads to the state of war.[18]

Therefore, public authority usually aims to foster obedience to common rules by means of purposeful creation and implementation of a particular legal ideology. In this case "particular legal ideology" means that it not only avoids confrontation with the legal psychology of social groups. Instead, the legal ideology relies on legal psychology and purposefully fosters a trust in law and justice. However, the role of legal ideology has notably changed in the second half of the twentieth century. The

[15] Linas Baublys, *Antikinė teisingumo samprata ir jos įtaka Vakarų teisės tradicijai* (Ancient Concept of Justice and Its Impact on Western Legal Tradition) (Vilnius: Mykolo Romerio universitetas, 2005), 33.
[16] Friedrich August von Hayek, *supra* note 14, 147.
[17] Harold J. Berman, *Teisė ir revoliucija: Vakarų teisės tradicijos formavimasis (Law and Revolution: The Formation of the Western Legal Tradition)* (Vilnius: Pradai, 1999), 41.
[18] *Ibid.*

liberal policy of the 1960's and 1970's together with the growing protection of social, economic and cultural rights as well as the weakening role of morality and religion provided a favourable social context for the formation of the consumer society. The power of Western countries increased and they began to promote the idea of modern (technical) law as a large-scale social and economic planning tool[19] without a clear moral element.[20]

Modern (technical) law can be analysed from two different angles: 1) its relationship with the government; 2) its relationship with society. The analysis of the relationship between law and government reveals its advantage: law, as a technical rule can be adapted to any regulatory objective. In other words, while developing the instrumental approach towards law, authorities have become accustomed to unilateral decisions about which legal rules are useful to follow and which are not relevant or even limit the opportunities to effectively meet new challenges. However, the society understands this advantage of modern law as a disadvantage. In the consciousness of social groups regulated by law, the separation of law from morality and customs determines its actual decay in the minds of many citizens because they do not have the necessary competence to recognize and take over the technical law. Thus, when the instrumental approach towards law increases, the social value of positive law decreases, since the technical law is strange for society. Instead of establishing law as an effective and independent tool of social control and management we get the opposite result: society does not recognise the technical law and therefore it is not socially efficient. Hence, issues of obedience to legal rules arise.

When members of a liberal democratic society do not obey the requirements of law, they destroy the society itself. These theoretical insights are also relevant to the EU where the systemic crisis has started in 2008-2009 from the global financial crisis and developed to the crisis of social security and liberal democracy. This situation was influenced by *inter alia* the issues of the EU (legal) rules obedience on the level of domestic politics,[21]as well as the longstanding instrumental approach towards law since the goals of the European Communities were primarily political and economical ones.[22] Meanwhile the role of law was to serve these goals.

Recently, the EU is coping with the refugee crisis that is complicated by the fact that the people of the EU Member States barely trust the ability of the EU law

[19] Roger Cotterrell, *Teisės sociologija. Įvadas* (The Sociology of Law: An Introduction) (Kaunas: Dangerta, 1997), 64.
[20] *Ibid*., 66.
[21] Ramūnas Vilpišauskas, "Eurozone Crisis and European Integration: Functional Spillover, Political Spillback?" *European Integration* Vol. 35, No. 3 (April 2013) // http://dx.doi.org/10.1080/07036337.2013.774785
[22] Manuel Castells, *End of Millennium: The Information Age: Economy, Society and Culture, Vol. III.*, 2nd ed. (Oxford: Blackwell Publishing Ltd, 2000), 314.

and authorities to guarantee the balance between public order and justice, which is especially fragile when the level of security decreases. Thus, the crisis of the EU and its constitutionalism is influenced by *inter alia* the crisis of the obedience to legal rules and the very concept of the rule of law.

In order to restore public trust in law and to uphold the compliance with the rules we have to use a modern legal ideology that justifies the idea of the rule of law. It is therefore necessary to rely on the experience of those countries which operate under conditions of active external threats at the same time as preserving the integrity of society and its identity since the rule of law and the maintenance of public identity are the two sides of the same social process. Therefore, the EU could take an example from modern legal ideology of Israel, which is greatly influenced by the jurisprudential ideas of Aharon Barak.

The idea of the rule of law as the law of rules and the rule of values is one of the central ideas of Barak's constitutional theory. He distinguishes three aspects of the rule of law: formal rule of law, jurisprudential rule of law, and substantive rule of law. Although these aspects overlap, there are substantial differences among them:

> Formal rule of law means that everyone in the country — individuals, corporations, and arms of the state — must act according to law, and unlawful activity must meet with the organized sanction of society. Rule of law, in this sense, has a double meaning, extending to both the legality of the rule and the rule of the law. (…) Rule of law in this sense is not related to the quality of the regime but rather the principle of public order.[23]

The jurisprudential approach to the rule of law stresses the minimum requirements that a legal system needs in order to exist. They discern the legal system from the gang whose leader imposes its will on everyone else. Here the approaches of various legal scholars vary. In developing a system of interpretation, Barak especially maintains the requirement of publicity and certainty of the law, stability of the law, and security in interpersonal relationships. According to him:

> This means that the law should be clear and readable. A person must be able to understand what is forbidden and what is permitted by reading the law, if with the help of a legal professional. A statute is not a riddle. Similarly, there can be no retroactive statutes, particularly not in criminal law. Ultimately, law must be stable.[24]

However, the principle of the rule of law cannot be equated only with the

[23] H.C. 428/86 *Barzilai v. State of Israel*, 40(3) as cited in Aharon Barak, *Purposive Interpretation in Law* (Princeton and Oxford: Princeton University Press, 2005), 242. Also see: Aharon Barak, *The Judge in a Democracy* (Princeton and Oxford: Princeton University Press, 2006), 51–56.
[24] Aharon Barak, *Purposive Interpretation in Law*, *supra* note 23, 244.

principle of regime legality supplemented by jurisprudential requirements. Barak believes that:

> Rule of law must include an aspect that Dworkin calls the 'right conception' of rule of law. There is no general agreement over the scope of this concept. I think it derives from the very concept of democracy. (...) For our purposes, rule of law requires both majority rule (legislative supremacy) and human rights (guaranteeing the system's fundamental values).[25]

He describes the substantive rule of law as:

> The rule of law that constitutes the proper balance between, on the one hand, society's need for political independence, social equality, economic development, and domestic order, and, on the other hand, the needs of the individual, his or her personal liberty, and his or her human dignity.[26]

He maintains, that the "rule of law is not just public order. It is social justice based on social order."[27] Thus, Barak reminds us that law not only has a formal (technical), but also a value-based aspect where the highest values are human rights and the needs of society. Their balance can manage the emerging conflict between order and justice.

2. THE ENTRENCHMENT OF UNDERSTANDING OF COMMERCIALIZED DEMOCRACY AS A THREAT TO THE RELATIONSHIP BETWEEN GOVERNMENT AND SOCIETY

One of the fundamental elements of the concept of constitutionalism is limited and accountable government. Only in a democratic society is it possible to achieve this. However, lately democratic processes are influenced by several factors that strengthen the tension between government and society.

The issues in this area may be traced in the neoliberal approach towards a government, when the public (state) sector is narrowed and broad opportunities for market mechanisms to operate in the public sector according to the principles elaborated in the private sector or market management are provided. It is based on the idea argued by the nineteenth-century political economy theorists that the public interest is satisfied only if it is allowed to express private interests freely.[28] The implementation of this project of the "New Right" under conditions of a universal democracy, weak moral values and expanding legal nihilism led not only to the maintenance of the welfare state idea, but also caused a totally unexpected

[25] *Ibid*., 246.
[26] *Ibid*.
[27] *Ibid*.
[28] Wayne Parsons, *Viešoji politika: Politikos analizės teorijos ir praktikos įvadas* (Public Policy: An Introduction to the Theory and Practice of Policy Analysis) (Vilnius: Eugrimas, 2001), 21.

social phenomena - three so-called disabilities of a modern society: individualism, the priority of "instrumental reason", and their negative consequences to a democracy.[29] During this period the expansion of freedom has become more important than public security. The residents of industrialised societies got increasingly concerned about the issues of individual life quality. This approach was formed under the conditions of moral relativism, when the market deregulation on the state level become an essential incentive for society's members to develop an "instrumental reason", i.e. such rationality, which provides cost-effective measures to achieve the objectives. This has a negative impact on a democracy since the relationship of democracy and global commercialization not only extends to the number of democracy actors but also presupposes the conditions for the formation of the controversial citizen-consumer concept.

> Nowadays people manifest themselves as consumers; this is what leads to their power, and therefore, the commercialization has become the reverse side of democratization. (…) A dual nature of democratization – the grant of government power to people as citizens and as consumers – helps to explain why only few dare to criticize the on-going transformation of society.[30]

In other words, the citizen is willing to obey the law, and the consumer tends to have more options for seeking benefits. This tendency is relevant not only to individuals as consumers but also to the EU Member States. Therefore, we observe the deficit of their solidarity.

The coalescence of liberal democracy and a free-market changes the structure of society: it becomes commercialised and its values become ambiguous.[31] For instance, the legal order and citizenship are perceived as an individual commodity, as an object of negotiation between the state and interest groups. This means that modern democracy has moved away from the concept of liberal democracy as found in the early twentieth century, as serving to build civil society. This democracy commercialism tends to be called post-democracy and is characterized by the following features: 1) devaluation of achievements of governmental institutions; 2) expanding privatization and commercialization of the public sector, particularly education, health care and other social services; 3) increasing role of transnational corporations and lobby groups in policy and legislation.[32] Here we observe the dangerous tendency of sociability loss or alienation. Democratic procedures chain the powers of management and control as well as responsibility,

[29] Charles Taylor, *Autentiškumo etika* (The Ethics of Authenticity) (Vilnius: Aidai, 1996), 25–34.
[30] Fareed Zakaria, *Budusheje svobody: neliberalnaja demokratija v SSHA I za ikh predelami* (The Future of Freedom: Illiberal Democracy at Home and Abroad) (Moskva: Ladomir, 2004), 241.
[31] Zygmunt Bauman, *Likvidi meilė: apie žmonių ryšių trapumą* (Liquid Love: On the Frailty of Human Bonds) (Vilnius: Apostrofa, 2007), 9–10.
[32] Colin Crouch, *Postdemokratija* (Post-Democracy) (Moskva: Izdatelskij dom Gosudarstvenovo universiteta – Vyshej shkoly ehkonomiki, 2010), 122–130.

so that no single governance body should have both the powers of management and control and that inappropriate or even ineffective decisions should not incur personal political and legal responsibility of leaders. These tendencies strengthen the tension between government and society.

This is also relevant for the EU since the era of globalisation actualizes activities of a "network state", such as the EU, as well as the problem of political theory: how to create a competent and accountable government? Who and on what basis does the "network state" govern? Can only individuals and their market-based relationships guarantee the maintenance of justice? However, European constitutionalism has no clear theoretical insights on protection of legal values that could provide the basis for addressing the general problem of political theory. In addition, in order to reduce opportunities of formation of anarchic nature of public policy and the dissociation of social structure it is also important to pay attention to public confidence in law and its ability to maintain legal values.

In this context it should be noted that Barak discerns formal democracy as concerned with the electoral process governed by the majority and expressed in legislative supremacy, and substantive democracy as concerned with fundamental values and human rights. [33] He strongly disagrees that democracy is just a majority rule and emphasizes the morality of democracy, which is based on human dignity and equality of persons.[34] Thus, he calls us to strengthen the value-based approach towards democracy.

Although Barak admits the importance of other branches of government, the main role in maintaining the constitutional order and protection of democracy, the rule of law and human rights he assigns to courts and judges in particular. Barak attributes to judges two main roles: (1) bridging the gap between law (government) and society; (2) protection of the constitution and human rights and thus the maintenance of the coherence of the legal system as a whole. Analysis conducted by N. Baeten revealed that the European Court of Justice (ECJ) meets the judicial framework set forth by Barak:

> The Court did not only protect the constitution and democracy, but it also actively engaged in enhancing the EU constitutional model and its democratic character (…). Similarly, the citizenship case law exemplifies the ways in which the Court has actively interpreted the Treaty provisions on citizenship so as to connect their wording to the social reality of EU citizens and, thereby, effectively bridging the gap between the law and life.[35]

[33] Aharon Barak, *Purposive Interpretation in Law*, *supra* note 23, 239.
[34] Aharon Barak, "On Society, Law and Judging," *Tulsa Law Review* Vol. 74, No. 2 (2011): 297; Aharon Barak, *Purposive Interpretation in Law*, *supra* note 23, 236.
[35] See: Niels Baeten, "Judging the European Court of Justice: the Jurisprudence of Aharon Barak

According to Barak, preconditions of realizing the judicial role are judicial impartiality and objectivity, social consensus, and public confidence. He also pays special attention to the theory of balancing as a complex judicial tool and to constitutional and statutory interpretation as instruments for realizing the judicial role.[36] He believes that:

> a mistake of the judiciary in times of terrorism is worse than a mistake of the legislature and executive in times of terrorism. The reason is that the judiciary's mistakes will remain with the democracy when the threat of terrorism passes and will be entrenched in the case law of the court as a magnet for the development of new and problematic laws.[37]

A strong and independent judiciary is important for the government (be it national or transnational) so that it would not be able to manipulate the administration of justice and the rule of law. However, judges do not have to interfere in the democratic process and affect the will of people so that they could replace politics in political decision-making.[38] Here a balance is also needed.

3. BALANCING HUMAN RIGHTS AND FREEDOMS IN THE FACE OF A THREAT TO PUBLIC SECURITY

One of the most important means of minimizing the tension between justice and order is the constitutionalization of human rights and freedoms and the constitutional control of their compliance. The idea of legislation constitutionality control has become not only an essential condition for judicial activism, but also a guarantee of the quality of individual freedom and democratic society. Fundamental rights are guaranteed nationally by the constitutions of individual countries and at the EU level by the EU Charter of Fundamental Rights. The ECJ is a last resort for citizens of the EU Member States seeking redress. [39] Although this court does not perform a constitutional control function (in its classical sense), it also faces a problem: how to balance the value-based and normative aspects of human rights, so that this balance would adequately meet the changing nature of social reality and would not reduce the already achieved level of human rights protection? The answer to this question is complicated, for several reasons.

Human rights express a standard of individual freedom and social security, the interpretation of which can be adequate, extended or narrow. It depends on the

Through a European Lens," *Columbia Journal of European Law* Vol. 18, No.1 (2011): 155.
[36] Aharon Barak, *The Judge in a Democracy*, supra note 23, xix.
[37] *Ibid*., 285.
[38] E.g. see discussion: Richard A. Posner, "Enlightened Despot," *New Republic* (April 23, 2007) // https://newrepublic.com/article/60919/enlightened-despot; Barak Medina, "Four Myths of Judicial Review: A Response to Richard Posner's Criticism of Aharon Barak's Judicial Activism" (June 2007) // http://dx.doi.org/10.2139/ssrn.992972.
[39] Communication Department of the European Commission, "Human rights" (2016) // https://europa.eu/european-union/topics/human-rights_en

actual insecurity. Usually, there is no rush to change the interpretation of human rights, believing that the emerged or increased social insecurity is a temporary phenomenon. The relatively peaceful coexistence of the European states enabled the EU Member States and the EU institutions to develop the judicial practice of extended interpretation of human rights and freedoms. At the same time the neo-liberal democracy, the dissociation of law from moral and religious values as well as its instrumentalization respectively determines a consumerist approach towards human rights without related duties. Thus conceived absoluteness of human rights encourages the society to transform social organization according to its needs. Its structure and *modus operandi* becomes the object of choice. This consumerist approach barely recognizes any higher humanism, which enables a sense of being in society and limits the pursuit of profit and the inhumane treatment of others. However, such imperatives as well as the common will and human rights are not possible without a society that bases its existence on the conscious individuals who freely decide to live together, rather than on individual egoism.[40] The consumerist approach as well as extended interpretation of human rights strengthens the tension between freedom and security.

According to B. Buzan, most of the threats arise from the fact that people are living in a social environment which inevitably generates social, economic and political pressure.[41] Usually, we distinguish four types of social threats: physical threats (e.g. pain, injury, death etc.), economic threats (e.g. deprivation of property or destruction, deprivation of employment or resources etc.), threats to the rights (e.g. imprisonment, denial of human rights etc.) and the threat to status (e.g. public humiliation etc.). As a rule, these threats occur not alone, but together at once. They reveal a dilemma: how to balance an individual's freedom of action, so that it does not pose a real and potential threat to the freedoms of other individuals, or how to increase community freedom without increasing government oppression.

> [Lately,] the EU Member States' security situation is changing since it is affected by the multipolar world states' interactions and the threat of terrorism. It will take uncertain transitional period until this fundamental international security change will be perceived by the EU Member States and the EU's supra-national judicial authorities. One thing is clear, that the practice of extended

[40] Horst Kurnitzky, *Necivilizuota civilizacija* (An Uncivilized Civilization) (Vilnius: Dialogo kultūros institutas, 2004), 37.
[41] Barry Buzan, *Žmonės, valstybės ir baimė: tarptautinio saugumo studijos po šaltojo karo* (People, States, and Fear: An Agenda for International Security Studies in the Post-Cold War Era) (Vilnius: Eugrimas, 1997), 71.

> interpretation of the rights and freedoms does not meet the essential changes of the EU's security conditions anymore.[42]

The growing tension between security and freedom inevitably promotes the strict interpretation of national law and order and raises questions about justice and social justice in particular. These tensions actualize the tension between government and society not only in the EU Member States, but across the EU (e.g. "Brexit").[43] Thus, the EU will have to find a balance between these social values.

In his writings, Barak widely analyses the problem of balancing between public order and security on the one hand and constitutional rights and freedoms on the other hand. Its solution is found deep in the general principles of law, including reasonableness, good faith and proportionality, according to which the liberty of the individual can be limited on the condition that the restriction is proportionate.[44]

As Barak notes, an individual has not only rights, but also duties to society. One of the most important duties is to support public order. It is one of the most important principles of any democratic society that includes guarantee of state security and public peace as well as of individual rights and welfare. Therefore, every law has to be interpreted as if it has the purpose to implement public order.[45]

Contrary to the Europeans, who during the time of peace enjoyed a broad interpretation of human rights, due to repeatedly experienced large-scale attacks the Israeli people have become more willing to accept some limits to their freedom in return for greater protection.[46] Therefore, there is no surprise that Barak states that human rights are not absolute[47] and that not all rights are created equal in importance.[48]

> Human rights are the rights of a human being as a part of society. The rights of the individual must conform to the existence of society, the existence of a government, and the existence of national goals. The power of the state is essential to the existence of the state and the existence of human rights themselves. Therefore, limitations on human rights reflect a national compromise between the needs of the state and the rights of the individual.[49]

The purposes that justify limitations on human rights are derived from the values on which society is founded. In a constitutional democracy, these values are

[42] Jolanta Bieliauskaitė, *et al*., *supra* note 5: 387.
[43] *Ibid.*
[44] "Barak, Aharon (1936–), Personal History, Biographical Highlights, Personal Chronology:, Influences and Contributions, Exploring, Influence on the Israeli Legal System" // http://encyclopedia.jrank.org/articles/pages/5561/Barak-Aharon-1936.html
[45] Aharon Barak, *The Judge in a Democracy*, supra note 23, 75.
[46] Jeffrey A. Larsen and Tasha L. Pravecek, *supra* note 6: 4.
[47] Aharon Barak, *The Judge in a Democracy*, supra note 23, 83.
[48] Aharon Barak, *Proportionality. Constitutional rights and their limitations* (New York: Cambridge University Press, 2012), 11.
[49] Aharon Barak, *The Judge in a Democracy*, supra note 23, 83.

democratic values.[50]

Barak notes the fragility of a democratic regime and warns against taking it for granted.[51] Therefore, he talks about defensive democracy and pays special attention not only to the scope and limitation of constitutional rights[52] and solutions of their conflicts, but also to the protection of human rights in times of terror.[53] He insists that democracies should conduct the struggle against terrorism within the framework of the law and with a proper balance between two conflicting values and principles:

> On the one hand, we must consider the values and principles relating to the security of the State and its citizens. Human rights cannot justify undermining national security in every case and in all circumstances. (…) On the other hand (…) national security cannot justify undermining human rights in every case and under all circumstances. (…) the rights of every individual must be preserved, including those of the individual suspected of being a terrorist.[54]

Proportionality is one of the most important principles of constitutional adjudication and management of disputes involving conflicts between two rights claims, or between a rights provision and a legitimate state or public interest.[55] However, as Barak emphasizes, the rules of proportionality should be respected and applied by every branch of government.[56]

From German origins, the principle of proportionality has spread across Europe into Commonwealth systems and Israel. As A. S. Sweet and J. Mathews notice, the principle of proportionality has also migrated to the three treaty-based regimes: the European Union (EU), the European Convention on Human Rights (ECHR), and the World Trade Organization (WTO). According to the authors, "proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism, if global constitutionalism can be said to exist at all."[57]

One of the most significant works on proportionality is the one written by Barak in which he focuses on the proportionality of a limitation applied within a democratic system, on a constitutional right by a law (a statute or the common law).[58] He derives proportionality as a constitutional concept from democracy, the

[50] Aharon Barak, *supra* note 48, 245-246.
[51] Aharon Barak, "Human Rights in Times of Terror – A Judicial Point of View," *European Court of Human Rights. Opening of the Juridical year* (January 2016): 1.
[52] See more: Aharon Barak, *supra* note 48.
[53] E. g. Aharon Barak, *The Judge in a Democracy*, supra note 23, and other works.
[54] Aharon Barak, *supra* note 51: 2-3.
[55] Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* Vol. 47, No. 72 (2008): 73.
[56] Aharon Barak, *supra* note 51: 12.
[57] Alec Stone Sweet and Jud Mathews, *supra* note 55: 73-74.
[58] See: Aharon Barak, *supra* note 48 and other works.

rule of law, principle theory, and constitutional interpretation.[59] This principle serves as a key tool for protection of constitutional rights in a constitutionally rights-based democratic society.[60]

Accordingly, Barak describes proportionality as "the set of rules determining the necessary and sufficient conditions for a limitation of a constitutionally protected right by a law to be constitutionally permissible."[61] His definition of proportionality reveals several important components (a proper purpose, rational connection, necessity and balance). However, here we would like to pay more attention to the notion of balancing, which, according to Barak, is central to life and law, to the relationship between human rights and the public interest, or amongst human rights. It "reflects the multi-faceted nature of the human being, of society generally, and of democracy in particular. It is an expression of the understanding that the law is not 'all or nothing'."[62]

Barak discerns two types of balancing: (1) balancing as one of the components of proportionality, which is relevant to the examination of the constitutionality of laws which limit a constitutional right, and (2) interpretative balancing, which is relevant for the examination of the interpretation of a law whose purpose includes conflicting principles. The latter type of balancing deals with the interpretation (meaning) of the law and not with its constitutionality (validity).[63] Thus, he formulates the basic balancing rule as follows:

> The more important it is to prevent marginal harm on the constitutional right, and the higher the probability such harm will occur, then the marginal benefit to the public interest (or to the protection of other persons' rights) required to justify such limits should be more socially important, more urgent, and more probable.[64]

The balancing test is passed, and the limitation of a constitutional right is proportional *stricto sensu* if the harm caused to the right by the law does not exceed the benefit gained by it.[65] Although, according to Barak interpretation does not explain fully why proportionality should be preferred over other criteria that also strive to achieve constitutional unity, the interpretive explanation is of considerable weight[66] and it is reasonable to say that the principle of proportionality is often more significant than the other criteria, because it enables subjects with different thinking to seek a social consensus within the limits of the

[59] *Ibid.*, 240.
[60] *Ibid.*, 4.
[61] *Ibid.*, 3.
[62] *Ibid.*, 345-346.
[63] *Ibid.*, 4.
[64] *Ibid.*, 11.
[65] *Ibid.*, 343.
[66] *Ibid.*, 240.

protection of liberal democratic values.

CONCLUSIONS

1. The evolution of neoliberalism in the EU led to the entrenchment of social thought based on the ratio of costs and profits on all levels of social relationships, i.e. between individuals, their groups and between the states. This way of thinking encourages obedience to the rule of law only as far as it is consistent with the interests of individuals, their groups and states. In this context legal instrumentalism as a contemporary concept of law of consumerist society has formed. It is characterised by the aim to reduce costs and enhance profit as well as by rigorous disjuncture from moral values. Therefore, we observe the tendency to disregard the rule of law in all levels of social relations in the EU.

2. Neoliberal thought and legal instrumentalism prevent the EU Member States from a timely mobilization of joint efforts to overcome external threats, the growth of which under conditions of globalization significantly destabilizes the classical socio-cultural tensions between government and society, order and justice, and freedom and security. The destabilization of these classical tensions additionally causes the internal disorganization (disconnection between values and compliance with the rules) of the EU societies. Therefore, it can reasonably be argued that the instrumental approach to law not only forms the selective approach to the recognition of the rule of law, but also denies the value-based nature of law.

3. The coalescence of liberal democracy and the free-market has changed the structure of society: it has become a consumer society with ambiguous values. Legal order and citizenship have already been considered objects of negotiation between the state and the interests groups. Thus, modern democracy has moved away from the concept of liberal democracy, according to which the government serves the political nation and the development of civil society. When commercialized groups' struggles for political power are defined only by election periods, and social relations prevail in a free market, the political elites and other social actors often lack united efforts to protect justice and common values. Under these social conditions the role of the judiciary in defence of democracy and maintenance of justice becomes extremely important. The necessity of judicial activity stems from the nature of liberal democracy (adherence to the rule of law and protection of human rights) and it will grow together with the growing tensions between social values and, accordingly, the need for their balance.

4. Neoliberalism has entrenched itself in the EU societies as a prevailing legal ideology according to which individuals and social groups ground and interpret their

selective attitude towards the adherence to the rule of law, democracy and accountable government and protection of human rights. Selectivity of profit as a structure of social thought not only makes individual interests absolute, but also works against the formation of the EU's common values and demos. In the context of growing external and internal treats neoliberalism as an ideology increasingly limits the functionality of liberal democracy. Therefore, the continuous development of this functionality must be based on the relevant socio-legal ideology.

5. Israel as a liberal democracy was established and functions under conditions of constant external and internal threats. In this context Barak's theory has been developed as a constitutional theory of continually seeking adherence to the rule of law, limited and accountable government, and consensus in the protection of human rights. He stresses the value-based aspect of the rule of law (substantive rule of law) and rejects the consumerist approach towards human rights that prevails not only in the EU, but also in Western societies in general.

The pursuit of social consensus has its value-based limits within which liberal democracy can exist. Hence, it is necessary to look for a balance of classical socio-cultural tensions between government and society, order and justice, and freedom and security, which can be achieved on the basis of the principle of proportionality. Therefore, Barak's legal ideology focuses on a balance between public values and protection of human rights, and a commitment not only to human rights and freedoms but also to other social values, including public security, is highly relevant in the context of constitutionalism of the EU and its Member States.

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