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Bán-Forgács Nóra

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JUDICIAL INDEPENDENCE IN HUNGARY – A THEORETICAL FRAMEWORK

Bán-Forgács, Nóra[1]

Abstract: This article discusses challenges of judicial independence in Hungary under illiberal constitutionalism. The main claim that illiberal constitutionalism sets up a theoretical framework and a technical toolbox against judicial independence. On the other hand, the separation of powers doctrine leads to the demand for judicial supremacy and rule of law which is part of Europe's DNA.

Keywords: judicial independence; illiberalism; judicial branch; separation of powers; populism

Introduction

In this article, we argue that judicial independence can only be understood in illiberal constitutionalism through a series of changes that deviate from the classical sense of judicial independence. We argue that this involves a hyper-concentration of powers in the hands of the Executive, and this serves as an antithesis to the doctrine of the separation of powers in the Hegelian sense and thus contributes to a vision of the unity of the state.[2] Our hypothesis is that in Hungary judicial independence has three equally important dimensions: sovereignty, populist illiberalism and illiberal judicial interpretation.

1) *sovereignty argument*: according to the sovereignty argument, nation states are not restricted in designing their own constitutional structure, including their judicial system. The claim is that an independent sovereign state must have an independent judiciary. This argument is also closely linked to the contemporary discourse on constitutional identity within and out of the EU.

2) *populist illiberalism*: the second issue is related to sovereignty and populist constitutionalism. The real question remains: who has supreme power over the judiciary? We argue that under illiberal populism, the supreme power belongs to the Government elected not to a separate judicial branch.

3) *judicial interpretation*: the monopoly over the interpretation of the law in illiberal constitutionalism belongs to the main Sovereign, the Parliament, or more precisely, to the Government-majority formulating the parliamentarian majority, as we have witnessed in the past decade in Hungary.

We claim that the one who has monopoly over the interpretation of statutes (and the interpretation of the text of the Constitution), together with the one who has ownership over the

[1] Research fellow, Institute for Legal Studies, Hungarian Research Network (Hun-Ren). Associate Professor, Milton Friedman University, Budapest.

[2] Kosař argues that Central European countries have always gravitated towards a centralisation of power. See David Kosař, Jiri Baroš and Pavel Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (2019) EuConst 459.

judiciary is always a totalitarian-like state in sharp contrast to constitutional democracies where the concept of judicial supremacy and the separation of powers doctrine always prevails.

1) Sovereignty argument and judicial independence

Hungary's constitutional turn in 2010 was established by a two third victory of Fidesz-KDNP right wing coalition. Since then and on, the Country is governed for the four times with an absolute majority of the same political coalition. The Ruling party has a super-majority in the Parliament which soon resulted in the enactment of a new Hungarian Fundamental Law (Constitution).

The post-2010 system is based on a particular concept of sovereignty in Hungary – the notion that the government (through Parliament, but often bypassing it) is the paramount Sovereign power based on its legitimacy. We argue that this concept of sovereignty challenges the courts' monopoly on the interpretation of the law. So, on the one hand the court system tries to maintain the illusion of the right to interpret, on the other hand, the Government, through its supermajority power has been taking over systematically.

We argue that under illiberal constitutionalism, the judiciary is outweighed by the sovereign will of the state. According to political philosopher János Kis, the new Hungarian Constitution (Fundamental Law) of 2012 violates the principle of separation of powers by limiting the powers of the Constitutional Court, by increasing the number of constitutional justices, and by allowing the present majority to appoint new justices without the agreement of the opposition, by mandating early retirement for judges and placing the power to appoint their replacements in the hands of a politically appointed chief of the judiciary, and by allowing the chief prosecutor (elected by the populist majority parliament) to designate the proceeding court.[3]

Under illiberal constitutionalism we, 'the people' are present as one unity, with one (common) interest. According to this philosophy, unity and supreme power itself leads to sovereignty.[4] This is nothing less, - we argue, than a counterclaim for separation of powers Therefore, every illiberal, populist state, rejects the concept of judicial independence. Corrias denotes that populist leaders are the sole representatives of state unity.

It follows that the doctrine of popular sovereignty is linked with the open rejection of the separation of powers and against the independence of the judiciary, a doctrine that prevailed for a hundred and fifty years in the history of European law. So, this serves as an anti-thesis against the separation of powers which is integrated in 'Europe's DNA,'[5] associated with the idea of judicial supremacy and the rule of law.

2) Constitutional identity independence (including constitutional identity arguments)

[3] KIS, János: Introduction: From the 1989 Constitution to the 2011 Fundamental Law. In: TÓTH, Gábor Attila: Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law. Budapest, Central European University Press, 2012, 1–2.

[4] CORRIAS, Luigi: Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity. In: European Constitutional Law Review 12 (2016) 10.

[5] The conceptual development of judicial independence is part of the European Union, its organs and its agencies' DNA. See, for example, BUSTOS, Gisbert R.: Judicial Independence in European Constitutional Law. In: European Constitutional Law Review 18 (2022) 591.

In this subsection we try to explain the relation between sovereignty arguments, constitutional identity arguments, and illiberal constitutionalism.

Constitutional identity is a highly discussed concepts in European constitutional discourse. We argue in this article that this concept is much abused by illiberal constitutionalism. The Treaty of Lisbon in 2009 fertilized the debate over constitutional identity. According to the wording of the Lisbon Treaty, the European Union must respect Member States' national identities inherent in their fundamental political and constitutional structures, inclusive of regional and local self-government. It must respect their essential State functions.[6]

After Lisbon, constitutional identity is no longer a dogmatic-theoretical question. Instead, it has become a technical point of reference in the hands of national governments, and is largely used to object to EU rules and legislation, respectably in debates over judicial independence. Not surprisingly, most branches of the sovereignty claim are openly Eurosceptic.

One would argue that the concept of constitutional identity can be defined as a set of key characteristics of a given constitution. On the other hand, the notion of constitutional identity can also mean a linkage between the constitution and the culture it represents. Some argue this is the national, religious, ideological identity of the country[7].

American legal scholars, when formulating the concept of constitutional identity, tackled the characteristics of individual's identity and transformed them into a legal framework. This approach was pioneered by Gary J. Jacobson.[8] Michael Rosenfeld put constitutional identity in a broader historical context. He argued that constitutional identity is in fact an integral interface between the constitution and those for whom it was constituted. [9]

Some argue that constitutional identity is linked to core principles in the constitution that should not be amended, – unless a new constitution is enacted by the sovereign power. This model might be understood in the German constitutional legal order,[10] where the eternity clause has been identified as the core provision of the German Basic Law as the source of constitutional identity.[11] In Hungary, however, the Constitutional Court did not succeed to identify similarly

[6] Article 4 (2) of the Treaty on the European Union (TEU). TEU does not use the term 'constitutional identity'. It operates simply with the requirement to respect 'national identity'. However, the latter concept is considered to be equivalent to the obligation to respect constitutional identity in the vast majority of the literature. See SIMON, Denys: L'identité constitutionnelle dans la jurisprudence de l'Union européenne. In BOURGORGUE-LARSEN, Laurence (ed): L'identité constitutionnelle saisie par les juges en Europe. Pedonne, 2011, 27.

[7] ROSENFELD, Michel: The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community. In SAJÓ, András – UITZ, Renáta (eds): Constitutional Topography: Values and Constitutions. New York, Routledge, 2010, 30–41.

[8] JACOBSHON, Garry Jeffrey: Constitutional Identity. Cambridge, Harvard University Press, 2010, 133–135.

[9] ROSENFELD, Michel: Constitutional identity. In ROSENFELD, Michel – SAJÓ, András (eds): The Oxford Handbook of Comparative Constitutional Law, Oxford Handbooks Online, 2012. Some theories that support nationality (national identity) within the framework of liberal democratic offsets, including individual autonomy and social equality are: Kymlicka, Miller and Canovan. See: KYMLICKA, Will: Multicultural Citizenship. Oxford, Oxford University Press, 1995.

[10] POLZIN, Monika: Constitutional identity, unconstitutional amendments and the idea of constituent power: The development of the doctrine of constitutional identity in German constitutional law. In: ICON, 14 (2016) 411–438.

[11] VON BOGDANDY, Armin – SCHILL, Stephan: Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag. In: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 4 (2010) 712.

important core principles.[12] Moreover, due to a supermajority of populists representatives, the Hungarian Parliament serves both as a constitution-making and constitution-amending power.

All constitutional identity case in the area of judicial independence after 2002 is linked to a sovereignty argument, however not all sovereignty arguments established open link with constitutional identity, even we argue, that the link still exists implicitly. Under sovereignty argument, EU member States are encouraged to shape their own judicial system. Some researchers apply the distinction between nation-states and post-Westphalian states.[13] Also, the sovereignty argument is often revoked in illiberal constitutionalism against the idea of a 'collective European identity'. According to Habermas, the notion of "the nation" transferred and framed the community's collective identity, vested with homogeneous national language and national culture. This can be linked under illiberal constitutionalism to another constitutional claim which emphasizes that the sovereign power has special role in constitutional identity since it has a constitutional- making power, and even constitutional amending is circumcised by law. This results an inherent separation of powers without being anti-democratic per se. Here, the role of the court can be important but this power of the court is never considered crucial. Some link this theory to the works of Sieyes,[14] Carl Schmidt,[15] and Carl Bilfinger,[16]

A typical example from Hungary for constitutional identity is Article R (4) of the Fundamental Law (Constitution), which provides that the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.

Particularly important in this issue the academic scholarship of the Hungarian Chief Justice. Prof. Varga Zs.[17] has elaborated on his concept of the rule of law quite articulately. Prof. Varga is arguing for an illiberal constitutional setting.
Prof. Varga denotes that the separation of powers cannot be understood that, in the name of the rule of law, judicial bodies acquire unconstrained right to decide. The role of constitutional courts is to defend the so-called 'normative justice' and nothing beyond.[18] Accordingly the Court is "The Most Dangerous Branch."[19] Because it has no limits.[20] Prof. Varga highlights that modern constitutional democracies are heading towards an arbitrary system of rule of law and judicial supremacy under the unlimited power of (constitutional) courts.[21]

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[12] BÁRD Petra – CHRONOWSKI Nóra – FLECK Zoltán: Use, misuse and abuse of constitutional identity in Europe. In TUSHNET, Mark – KOCHENOV, Dimitry (eds.): Research Handbook on the Politics of Constitutional Law. Cheltenham, Edward Elgar, 2023, 619–620.
[13] ORBÁN, Endre: Constitutional identity in the jurisprudence of the Court of Justice of the European Union. In: Hungarian Journal of Legal Studies, 63 (2022) 144.
[14] SIEYÈS, Emmanuel Joseph: The Third State, Brill, 1789.
[15] SCHMITT, Carl: Verfassungslehre, Berlin, Duncker & Humblot, 2017, 55.
[16] MINKKINEN, Panu: Political constitutionalism versus political constitutional theory: Law, power, and politics. In: ICON, 3 (2013) 560–610.
[17] Head of the department of administrative law at the Catholic University, Budapest, Pázmány Péter Catholic University, Budapest.
[18] VARGA, Zs. András: From Ideal to Idol?, Budapest, Dialóg Campus, 2019, 22–24.
[19] MARTIN, Ivan: The Most Dangerous Branch, Kingston, McGill-Queen's University Press, 2003.
[20] Martin specifically implies that the Canadian Supreme Court is the most dangerous branch. See MARTIN, Ivan: The Most Dangerous Branch, Kingston, McGill-Queen's University Press, 2003. 7. See also: https://jogaszvilag.hu/szakma/az-eletben-a-legtobb-dontest-nem-en-hoztam-meg/.
[21] VARGA, Zs. András: From Ideal to Idol?, Budapest, Dialóg Campus, 2019, 8–10., 101–102.

According to the theory of the Chief Justice, constitutional courts and their highly powerful international counterparts are essential institutions with unlimited power; whatever they decide is the only rule of law, and there is nowhere else to go from there. In contemporary legal scholarship, the concept of the rule of law serves as a magic wand for constitutional courts to justify their arbitrary decisions.[22]

The situation is less challenging for the Chief Justice in Hungary, because if an ordinary court decides in one way, it can be corrected by amending the law and even the Constitution in the other way.[23] Chief Justice concludes that giving too much power to courts is like providing 'carte blanche,' a blank mandate to act arbitrarily.[24]

Against the courts, the "counterweight cannot be solely the executive power"; however, it is a good starting point.[25] Eventually, only the legislative power, as the bearer of legitimacy, and the executive power, as the acting branch of the state, can serve together as a counterbalance against the courts.[26]

A populist topos related to the judicial independence is also revisited in the scholarship of Chief Justice Varga Zs. Accordingly, public good is the substantial anti-serum against the tyranny of the rule of law, based on "mutual respect and loyal co-operation between state organs" In this approach, the legislator or, in fact, the constitution-maker itself does not commit heresy if they change the laws or the constitution in response to a previous judicial decision.[27]

To reflect the practice associated with the abovementioned theory, the best example in Hungary is the annihilation of specific court decisions by a legislative act. First, in 2011, the Fidesz-majority Parliament, by an Annulment Act, declared null and void a range of judgments of the judicial branch related to a violent political protest that occurred in 2006. Parliament annulled criminal court judgments concerning convictions for vandalism and violence committed during a right-wing riot against the former democratic left-wing government.[28] (The riots targeted the left-wing Prime minister, demanding its resignation).

After the right wing takeover in Hungary in 2010, the Annulment Act was referred to the Constitutional Court for constitutional scrutiny. The politically packed Hungarian Constitutional Court found the provisions of this Act constitutional and upheld them.[29] Presidential pardons or amnesties were not initiated by the Fidesz-led new supermajority to support the case, because, under presidential amnesty, criminal convicts continue to be stigmatized, thus a presidential pardon would have provided only an exemption from further criminal sanction but not an exempt from a criminal record.

This case serves as an example for the open denial of judicial supremacy and a denial of the principles of the rule of law.

In this constitutional drama, the Hungarian Constitutional Court was assigned the role of a non-playing character. The majority of the literature on this case has indicated that the Hungarian Constitutional Court did not simply err by upholding the Annulment Law on criminal convictions but that it also surrendered to politics over 'law,' which meant a clear denial of

[22] VARGA, Zs. András: From Ideal to Idol?, Budapest, Dialóg Campus, 2019, 14.
[23] https://jogaszvilag.hu/szakma/az-eletben-a-legtobb-dontest-nem-en-hoztam-meg/.
[24] https://jogaszvilag.hu/szakma/az-eletben-a-legtobb-dontest-nem-en-hoztam-meg/.
[25] VARGA, Zs. András: Eszményből bálvány? [From Ideal to Idol?], Budapest, Századvég, 2019, 29.
[26] VARGA, Zs. András: From Ideal to Idol?, Budapest, Dialóg Campus, 2019, 29.
[27] VARGA, Zs. András: From Ideal to Idol?, Budapest, Dialóg Campus, 2019, 25.
[28] See Hungary, Act XVI of 2011 on remedies for the convictions in connection with the riots of Autumn 2006. Remedy was granted against public officials, criminal damage, and criminal trespass, if the judgement was based exclusively on a police report or police testimony.
[29] See 24/2013(X.4) AB Decision.

judicial supremacy.[30] We also argue that this was a symbolic capitulation of the rule of law in Hungary.

So, we can conclude that the pattern of the sovereignty argument (loyal cooperation between branches of government) in constitutional populism is to shift emphasis from the rule of law and separation of powers to the 'shared responsibility' of the administration of justice between branches of government. Then, a politically mutilated judicial body is granted a new Chief Justice with unprecedented superpowers to demonstrate how cherished judicial independence under a sovereign state is, with a fully empowered chief of the branch. (The newly appointed chief has wide competencies, including competencies over the arbitrary system of the allocation of court cases and, more generally, exercises a unilateral concentration of power over court administration to designate cases among jurisdictions and to appoint judges to the branch without adequate checks and balances).[31]

As early as 2011, the Venice Commission signaled that adopting a new Constitution (Fundamental Law of Hungary, FL) represents a backsliding, a significant step, which "appears to be only the beginning of a longer process of establishing a comprehensive and coherent new constitutional order. This implies adoption or amendment of numerous pieces of legislation, new institutional arrangements, and other related measures."[32] The Venice Commission was concerned about whether the processes were based on the greatest consensus possible within Hungarian society.[33]

Similarly, Hungarian civil society representatives claimed in 2011[34] that the new Hungarian constitutional order regarding the judiciary can be identified as the centralization and "concentration of powers."[35] Some scholars also noted that the "Hungarian judiciary is highly centralized, and judges are under administrative control."[36]

Considering the fact that the Chief Justice of the Curia has key powers within the judiciary it goes without further explanation that when further concentration of power is granted by law to the Chief Justice – such as the right to appoint lower court judges, to directly impact the career path of judges, to delegate cases and judges between different jurisdictions, and to interfere directly with the composition of court panels – this will result in a 'hyper power' in the hands of (a politically appointed) head of the Branch.[37]

The Chief Justice of the Curia was appointed in spite of the manifest objection of the competent judicial body (NJO) to evaluate the application.

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[30] BENCZE Mátyás – KOVÁCS Ágnes: "Mission: impossible": alkotmánybíráskodás az alkotmányos értékek védelme nélkül. Jogtudományi Közlöny, 6 (2014) 273.

[31] See the thirty-page criticism of the Venice Commission: CD-AD(2012)001-e Opinion on Act CLXXI of 2011, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012).

[32] AD(2011)016-e, Opinion on the new constitution of Hungary Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

[33] AD(2011)019-e, European Commission for Democracy through Law, the advisory body of the Council of Europe, Venice Commission's Opinion on the new constitution of Hungary adopted by the Venice Commission at its 87th plenary session (Venice, 17-18 June 2011).

[34] Such as the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union and the Eötvös Károly Public Policy Institute.

[35] Joint opinion of the Eötvös Károly Policy Institute, the Hungarian Helsinki Committee and the Hungarian Civil Liberties Union on the Hungarian legislative package on justice reform. Similarly, The Venice Commission was concerned about the judicial administration being under unified control, without proper balancing of powers. See CDL-REF(2012)034-e Act CXI of 2012 and CDL-AD(2012)020-e Opinion on the Cardinal Arts.

[36] BENCZE, Mátyás: Judicial Populism and the Weberian Judge – The Strength of Judicial Resistance Against Governmental Influence in Hungary. In: German Law Journal, 21 (2022) 1297.

[37] https://www.amnesty.hu/wp-content/uploads/2020/10/ELEMZE%CC%81S.pdf.

The Chief Justice was elected in 2021 after a series of legislative enactments that paved the way to making his appointment legally possible. This has been criticized by international organizations[38], especially after the undue and premature termination of the mandate of the previous president of the Supreme Court, András Baka, in 2011 in the middle of his mandate.[39] Meanwhile a series of legislation – as noted before- changed the role and scope of the judicial branch by the initiative of the illiberal Government. (Act CLXI of 2011 on the Organization and Administration of the Hungary, Act CLXII of 2011 on the Legal Status and Remuneration of Judges).

Czech scholar Zdeněk Kühn highlights: "[…] if we give up on the idea that the law is capable of being at least partially an autonomous phenomenon […] capable of limiting the government and parliament relatively independently of the value preferences of the individual judges, a gate will soon be wide open for government of the current political majority which is limited by nothing and no one. From this perspective, non-liberal democracy is, in fact, merely a transient phenomenon because, sooner or later, it will no longer be a democracy at all. […]"[40]

3) Judicial interpretation and illiberal constitutionalism

We argue that the monopoly over the interpretation of the law in illiberal constitutionalism is vested in the Sovereign power, as we have argued in this article, in the Hungarian context, in the hands of the popular Government.

For the claim (who has a monopoly on the interpretation of the law), we argue that it is clearly indicated in Article 28 of the new Hungarian Constitution (Fundamental Law) that courts should interpret the law according to the guidance laid down in the Constitution. And the Constitution is designed and drafted with the will of the parliamentary supermajority. In this stream, the idea of an absolute sovereign representing the highest will of the people is against the idea of judicial counterbalance. (Sieyes,[41] Carl Schmidt)[42]

So, the Hungarian Fundamental Law defines mandatory rules on the judiciary concerning how to interpret the law. This is a new limitation after 2010, since the 1989 Constitution did not enclose such rule of limitation. Additionally, the Seventh Amendment to the Fundamental Law in 2018 further circumvented the freedom of interpretation of the Judiciary by stating that in the course of legal interpretation, preambles of legal norms and their explanatory memorandums shall be primarily taken into consideration.[43]

We underlie again that who has monopoly over the interpretation of statutes (and the interpretation of the text of the Constitution), together with those who have control over the judiciary is the highest Sovereign a totalitarian-like state (like the Nazi Germany or the Communist Russia), in contrast to constitutional democracies where the concept of judicial supremacy and the separation of powers prevails.

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[38] AL HUN 2/2021. Report by the UN Special Rapporteur on the independence of judges and lawyers.

[39] Baka v Hungary App no 20261/12 (ECHR, 23 June 20 2016).

[40] KÜHN, Zdeněk: The Judiciary in Illiberal States, German Law Journal, 22 (2021) 1246.

[41] SIEYÈS, Emmanuel Joseph: The Third State, Brill, 1789.

[42] SCHMITT, Carl: Verfassungslehre, Berlin, Duncker & Humblot, 2017, 55. See also: MINKKINEN, Panu: Political constitutionalism versus political constitutional theory: Law, power, and politics. In: ICON, 3 (2013) 560–610.

[43] DETRE, László – ORBÁN, Endre: The Main Dimensions of Constitutional Interpretation of Judicial Independence in Hungary. In: Revista de derecho constitucional europeo, 22 (2019) 1.

We emphasize again that in the struggle over the monopoly of the interpretation of the law between courts and lawmakers in Hungary, but everywhere in the world the claim is the same, (often with the notion of 'pouvoir constituant'), different landmarks can be detected, such as the curtailing of the power of the courts, including the constitutional court, narrowing courts' scope of scrutiny and the introduction of new mechanisms to expand the scope of the executive power against the judicial branch. So, judicial control mechanism is weakened and restrictions are applied on freedom of constitutional and legal interpretation on the law. (For example by restricting the constitutional court's jurisdiction by a new law).

What remains constant in this context is that the courts are gradually restricted, and their room for maneuver shrinks until they are degraded to technical player, (NPC), a de facto machinery. Constitutional justice, Zdeněk Kühn emphasizes that non-liberal regimes are very skeptical of the nature of the interpretation of the law, which – in their opinion – is nothing more than pure politics concealed behind a veil of legalistic jargon.

In the current Hungarian context, we claim that 1) the Fundamental Law introduced new mechanisms to curtail judicial independence with compulsory interpretation of the law, meanwhile the language of the constitution drafted remained deliberately too vague on the organization and structure of the court system. This paved the way for the Executive to shape and re-shape existing court structures. 2) the competencies of the constitutional court were narrowed and limited 3) Preliminary reference to CJEU was curtailed, visible attempts to limit preliminary reference has been made.

We refer to the under-determined language of the Fundamental Law: the lack of provision of the structure of the court system and the lack of any reference to the composition of the courts. However, the retirement age of judges is substantially over-articulated in the Constitution,[44] instead of putting these provisions on retirement age in the sub-constitutional level. This resulted immunity for the lawmakers against constitutional court decision and even ECHR decision declaring unlawful the lowering of the retirement age of judges without prior procedure and adoption time. In Decision 33/2012 AB, the Hungarian Constitutional Court declared the provisions of the retirement age unconstitutional in a sub-constitutional level. Subsequently, Decision C-286/12 of the ECJ declared that Hungary had failed to fulfil its obligations under EU Law for establishing a general framework for equal treatment in employment for judges).

Regarding the interpretation of the law, the Hungarian Constitutional Court lost its most important competence the *erga omnes* scrutiny of laws and legislative enactments under 'actio popularis'. *Actio Popularis* served until 2012 as the most important guarantee against the unlimited power of the Parliament (and the Executive). Not surprisingly, this power of the Court was curtailed first by illiberal constitutionalism. The re-shaping of the competencies of the Constitutional Court resulted in the introduction of a new power of the Court: constitutional complaint mechanism. Constitutional complaint is first and foremost targeting the constitutionality of court judgements and therefore the competing competencies of the regular

[44] See: Article 26.2 of the FL in 2011.

courts and the Constitutional Court have resulted in the erosion of the domains of both branches (courts and the Constitutional Court) as a mutually adverse solution.[45]

Under the same spirit, in 2019, the Constitutional Court was granted oversight powers for complains from government bodies.[46] It opened the gate for Government to use constitutional complain, a tool for individual human rights advocacy, to complain against regular court decisions. This resulted that the Government could circumvent decisions they contested rather than comply to these court decisions. International organizations, including the EU criticized these new powers of the Constitutional Court empowering government bodies and the provisions were finally revoked during negotiations between the EU and Hungary in 2023.[47]

Concerning the interpretation of the law, another controversial provision limited the scope of preliminary reference to the EU Court. Accordingly, the Hungarian Prosecutor General was granted the right to challenge the legality of references for preliminary rulings from proceeding judges to the CJEU. The Hungarian Curia (Supreme Court), could find it illegal 'in the interests of legality' to refer a case to the European Court upon the request of the Prosecutor General. The CJEU ruled that such a decision by the Curia is contrary to EU law. EU law prevents national supreme courts from interfering with the legality of the lower courts when referring cases directly to the CJEU.[48]

The Hungarian standpoint is based on a sovereignty argument, which claims that the Hungarian Curia has the final say in referring a case to the CJEU against a national judge. In the present case, the referring court, sitting as a single-judge at the Central District Court in Budapest on a criminal proceeding, inter alia asked:[49]

1. "Must Article 267 [TFEU] be interpreted as precluding a national practice whereby the court of last instance, in proceedings to harmonize the case law of the Member State, declares as unlawful a decision by which a lower court makes a request for a preliminary ruling, without altering the legal effects of the decision in question?"

"If [Question 1] is answered in the affirmative, must Article 267 [TFEU] be interpreted as meaning that the referring court must disregard contrary decisions of the higher court and positions of principle adopted in the interest of harmonizing the law?"

"If [Question 1] is answered in the negative, can the suspended criminal proceedings be continued, given that the preliminary ruling proceedings are pending?"

2. Must the principle of judicial independence, established in the second subparagraph of Article 19(1) TEU, in Article 47 of the Charter and the case law of the Court of Justice, read in the light of Article 267 TFEU, be interpreted as meaning that that principle precludes disciplinary proceedings being brought against a judge for having made a request for a preliminary ruling?'

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[45] SZENTE, Zoltán – GÁRDOS-OROSZ, Fruzsina: Juridical deference or political loyalty? In SZENTE, Zoltán – GÁRDOS-OROSZ, Fruzsina (eds): New challenges to constitutional adjudication in Europe. New York, Routledge, 2018, 89–110.

[46] See: Hungary, Act CXXVII of 2019, Article 55, in force since 20 December 2019.

[47] 2023 Rule of Law Report, European Rule of Law Mechanism.

[48] CJEU, Case C-564/19 *IS (Illégalité de l'ordonnance de renvoi)*, ECLI:EU:C:2021:949. The Court also held that within the scope of preliminary ruling, no national judge shall be sanctioned for referring a case to the European Court by any disciplinary measure.

[49] See VÁRNAY, Ernő – PAPP, Mónika: Magyarázat az Európai Unió jogáról. Budapest, Wolters Kluwer, 2023, 371.

According to Advocate General Pikamäe's opinion, the Curia reviewed the lawfulness of the initial order for reference in the light of Hungarian national law. Thus, the Curia's judgment seems to undermine the referring judge's right to refer questions to the European Court for a preliminary ruling and, therefore, infringes Article 267 TFEU.[50]

The freedom of interpretation for preceding judges was further restricted in Hungary in 2020 by the introduction of the so-called 'limited precedent system'. Accordingly, each leading decision of the Curia (Supreme Court of Hungary) is legally binding on all lower courts.[51] Any deviation from the precedent must be justified by the lower courts, and this justification can be overruled by the higher courts.[52] This also resulted in a greater concentration of power in the hands of the Chief Justice of the Curia, an appointee who was nominated only after a series of statutory amendments paved his way for eligibility criteria.

Concluding remarks

Judicial supremacy as part of the rule of law, which is an inherent part of the DNA of European constitutionalism, has suffered substantial damage due to recent constitutional developments under illiberal constitutionalism in Hungary, (to a large extent in Poland and in other countries, such as Slovakia in East-Central Europe).[53] This concept denies the supremacy of the separation of powers as a core value of Europe, its people, and its ideas. This has devastating effect on judicial independence and accountability. We argued in this article that the pre-condition for judicial independence is the integrity of the judicial branch which is protected by the separation of powers doctrine.

The pattern is the same, Eurosceptic nation-states first declare a withdrawal from the mainstream understanding of the supremacy of law, using the argument that in a transnational level the courts are ruling instead of the 'people' governing.

Within the national state, the power of the court is curtailed and then a new head of the Branch is appointed to the mutilated courts, creating an unprecedented concentration of powers in the hands of a political appointee.

All these changes are challenging. As Armin von Bogdandy put it, Europe is at high risk today. Much is at stake. However, the constitutional European project is not yet lost.[54] Eyes are on Hungary.

[50] Case C-564/19, ECLI:EU:C:2021:292.

[51] See Article 185 of Act CXXVII of 2019 that modifies Act CLXI of 2011 on the Organization and Administration of Courts: leading decisions published in the official gazette of the Curia are binding. Analyses: Hungarian Helsinki Committee, New law threatens judicial independence in Hungary – Again (Hungarian Helsinki Committee 2020).

[52] See SZENTE, Zoltán: Hungary. In ALEN, André – HALJAN, David: International Encyclopaedia of Laws: Constitutional Law. Budapest, Wolters Kluwer, 2022, 209-210.

[53] See KOSAŘ, David – BAROŠ, Jiri – DUFEK, Pavel: The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism. In: European Constitutional Law Review, 15:3 (2019) 429–430.

[54] VON BOGDANDY, Armin: A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines Defending Checks and Balances in EU Member States. In VON BOGDANDY, Armin et al. (eds): Defending Checks and Balances in EU Member States. Berlin, Springer, 2021, 399.

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Honlap: http://jog.tk.mta.hu/mtalwp

E-mail: mta.law-wp@tk.mta.hu

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