

The Constitutional Court in the Classical System of the Branches of Power
(theses of PhD dissertation)



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I. Review of the research objective and research question

Constitutional courts, constitutional justice and the interpretation of the constitution have been the central issue of numerous researches and investigations; these include works on the development and historical background of constitutional justice, those focusing on the theoretical definition of the activity performed by the constitutional court, as well as texts exploring the organizational models of constitutional justice in a comparative approach. The most recent comprehensive articles on the Hungarian Constitutional Court have been published on the relationship between the Constitutional Court and the supreme judicial body. The concept of “juristocratic paradigm” was introduced recently in the Hungarian scholarly thinking, and the discussion around it is still evolving. I undertook to write my doctoral thesis entitled “The Constitutional Court in the Classical System of the Branches of Power” in this academic context, and I aimed to answer the question of whether the Constitutional Court could be regarded as an independent branch of power. This question and my attempts to answer it within the context of the separation of powers were inspired by an issue raised almost twenty-five years ago, according to which the question of whether the theory of the branches of power has become exceeded should also be the subject of individual analysis. According to some opinions emerged within the classical and modern theories of the branches of power, there are innumerable branches of power, and the theory of the branches of power applies not only within the framework of the nation-state, but also in the field of international public law. On this basis, I aim to overview why the Constitutional Court can or cannot be considered an independent branch of power.

II. Presentation of the research topics and analyzes performed

The starting point for the answer to the question set out in the previous section is established by defining the concept of state as the supreme power over a given area and population. The definition of state terminology is consistent with the explanation given for sovereignty, that can be defined as an independent supreme power. The term supreme power also requires a definition. Power is usually defined as the ability of a person exercising power to induce other individuals, groups or organizations to perform

the desired behavior. The holder of sovereignty in a politically organized society can enforce their will over the population living in the given area. Sovereignty is limited by the separation of powers. The separation of state powers is considered to be a means of defense against the arbitrary exercise of power, embodied in democratic constitutions. The rights deriving from popular sovereignty are exercised by the state as a whole in accordance with the jurisdictional order set out in the constitution. The ideology of the separation of powers is based on institutional and social control of power.

There is no consensus regarding the period when the ideology of the separation of powers emerged. According to some authors, the ideology of the separation of powers already appeared in ancient and medieval thought. In contrast, other authors do not accept the idea of linking the doctrine of the separation of powers to antiquity. For my part, I take the view that attempts to limit power were already present in ancient writings, however, the idea of the separation of powers appeared primarily in John Locke's work, and it evolved in the political struggles of the 17th and 18th century. In the English legal literature, there is a dualist concept that prevails by arguing that the judiciary is not an independent branch of power, as only the legislature and the executive can be considered as such. However, the three classical branches of power underlying my doctoral dissertation, namely the legislative, executive and judicial powers, are not associated with Locke but with Montesquieu's name and work.

In the course of the development of Hungarian legal history, the Doctrine of the Holy Crown is considered to be the representation of the constitutional continuity of the state of Hungary as declared in the National Avowal of the Fundamental Law of Hungary, in which - according to Ferenc Eckhart's definition - the 19th century thinkers reconciled István Werbőczy's tenets with the idea of popular sovereignty. The subject of state power is the state, the Hungarian concept of which can be found in the Doctrine of the Holy Crown. State power is indivisible, which does not preclude the State from acting through its bodies with various functions. In the state organization established in 1848, the separation of certain power centers took place. Legislation was vested in the sovereign and the National Assembly together. The ruler exercised executive power through the appointed ministers. The measures of the ruler came into force with the signature of the politically responsible ministers. The judges were appointed by the ruler.

Since Montesquieu, the distinction between public administration and the judiciary has been a major issue in political science. The separation of public administration and judiciary is considered to be the most significant step in the construction of a dualist rule of law. The conclusions of the ideology of the separation of powers with regard to the Hungarian state can be summarized as follows: until the entry into force of Act no. 20/1949 on the Constitution of the Hungarian People's Republic, based on the principle of concentration of powers in conflict with the ideology of the separation of powers, the principles laid down in István Werbőczy's Tripartitum and in the Doctrine of the Holy Crown were decisive in the enactment of the April 1848 laws, the adoption of the laws establishing the Austro-Hungarian Compromise of 1867, and the entry into force of Act no. 1/1920 on the restoration of the Hungarian Soviet Republic and the provisional settlement of the exercise of state authority.

The Constitutional Court can be considered to be a legal institution closely related to the branches of power. In a doctoral thesis examining the Constitutional Court and constitutional justice, a definition of constitutional justice must be included. According to the generally accepted definition recently published, constitutional justice can be defined as the judicial evaluation of the constitutionality of legislations, other legal norms and the decisions of individual law enforcement bodies. In addition, the Constitutional Court is entitled and obliged to carry out an authentic interpretation of the Constitution. The Constitutional Court is the supreme body for the protection of the Constitution (in Hungary: the Fundamental Law). Regarding the Constitutional Court, as a thesis statement, it can be argued that the basic precondition of its creation is to accept the separation of powers and to consider the principles of constitutional justice to be binding. The Constitutional Court has (can have) two functions: protecting the fundamental rights of citizens and controlling legislative activity. The Constitutional Court is rooted in ancient Greek and Roman thinking as the idea of *ius naturale - ius gentium*. On the other hand, the origin of constitutional justice in its modern sense can be traced back in the United States to the decision delivered in the *Marbury v. Madison* case from 1803, that stated that a law in conflict with the Constitution was not applicable.

In my doctoral dissertation, by examining the development of constitutional courts, I came to the conclusion that constitutional justice, both in common law and

continental jurisdictions, is the result of the joint development based on the synthesis of enforcing higher principles, the need for a written record of superior rights and the tools of the judiciary allowing for the enforcement of the constitution. In a democratic state subject to the rule of law, the clear legal separation between political decision and administrative decision is a requirement. Constitutional courts and supreme courts also determine the functioning of public administration by their decisions. The original idea of constitutional justice is that it provides a guaranteed, unalterable framework for the free formation of changing majority governments.

Following the above detailed investigation on the history of ideas, I provided a brief overview of the established models of constitutional courts. In the American model of constitutional justice, the judge omits to apply unconstitutional law in the individual matter to be decided. The judge protects the constitution, in the context of which, the separation of powers, on the one hand, defines the subject matter of federal legislation within the federal system (horizontal separation of powers), on the other hand, it is achieved in a vertical form (the internal brake of the two chambers of the legislature, the veto of the executive, the right of the courts to declare the disapplication of the law).

In the European model, the predominance of the parliament initially prevented the spread of constitutional justice. As a result of Hans Kelsen's theory, the Austrian Constitutional Court became operational in 1920. The primary purpose of Hans Kelsen's work entitled *The Pure Theory of Law (Reine Rechtslehre)* was to provide a general description of legal systems. The essence of Kelsen's legal theory is a hierarchical system of legal standards that is free of contradictions and gaps. The Austrian constitutional justice was created as an activity of a special court aimed directly at reviewing parliamentary legislation and annulling laws (as well as resolving disputes over jurisdiction). The essence of Kelsen's constitutional court is that it is embodied in a constitutional court separate from the ordinary court system. The European model of the constitutional court comprises a broader range of constitutional protection than the American constitutional court. As a separate institution, the constitutional court has the power to rule on the constitutionality of all types of cases.

In the states adopting the Kelsen model, it is considered that constitutional justice is outside the three branches of power, which should respect the jurisdiction of the different bodies. Majority power makes constitutional justice necessary in

continental parliamentary systems. Kelsen argued for the uniformity of the cascading system of sources of law, and thus of the legal system, according to which all legislation must be consistent with the constitution, which is ensured by a separate body: the constitutional court.

The separation of state powers is thus considered to be a means of defense against the arbitrary exercise of power, embodied in democratic constitutions. The idea of the separation of powers is a conceptual feature of the modern state. The need to define the concept of democracy arises from the introduction of the concept of a democratic constitution. A system of governance in which decisions are made by the community is called democracy. Constitutional democracy is realized if the exercise of power is enshrined in the constitution. Modern democracies operate within the framework of the rule of law enforced by the idea of constitutionality. The courts are primarily responsible for enforcing the provisions of the constitution. However, in order to abolish legislation at a lower level in the legislative hierarchy, which is interpreted as precluding the legislation at a higher level, there is a need to set up a higher-level judicial body, justified by the law interpreting function of the courts isolated from politics. Constitutional interpretation is a special, abstract case of the interpretation of legislation (legal norms), which fills in the gaps in the provisions of the constitution, or resolves its contradictions. In modern legal systems, the constitution is above the law. Legislation must be restricted in order to exercise arbitrary power, while constitutional constraints must necessarily be exercised by the courts. In modern constitutional democracy, there must be a body that controls the outcome of the democratic process. This body is the constitutional court.

Following the exploration of the relationship between constitutional justice and democracy, in my dissertation I reviewed the origins, formation and functioning of the Hungarian Constitutional Court by mapping the relevant legislative provisions before and after the entry into force of the Fundamental Law. The origins of the Hungarian constitutional justice can be traced back, in my opinion, to the 19th century. In his work entitled “The Influence of the Dominant Ideas of the 19th Century on the State”, Baron József Eötvös attributes constitutional justice powers to the “supreme tribunal”. The Supreme Tribunal can neutralize and impersonalize the other two branches of power; thus it can examine the future law to see if it conflicts with the constitution. The

establishment of this Supreme Tribunal, known as the state court, was initiated by Ferenc Deák during the debate regarding Act no. 4/1869. In his proposal, he gave the state court the power to decide on political crimes, disputes between the authority and the court, as well as on “other matters”.

Between the two world wars, as a result of the research conducted at Móric Tomcsányi’s Seminar of Public and Administrative Law, the information on constitutional justice was collected and summarized. If the law is not adopted in the prescribed constitutional way and between forms, then there is a formal unconstitutionality. Lower level legislation should not conflict with higher level legislation. In 1948, an attempt was made in Hungary to establish an institution similar to the Constitutional Court, which did not prove to be durable. The socialist economic and social system did not favor the development of constitutional justice. The socialist system declared unity of power and unity of parliamentary sovereignty, defining the state as the body of the ruling class exercising indivisible class power. Socialist states rejected the idea of any version of constitutional courts.

The idea of constitutional review was introduced in 1970 in a publication entitled “Recommendations for the Further Development of the Work of the National Assembly, the Presidium and the Council of Ministers”. Act no. 1/1972 on the amendment of Act no. 20/1949 and on the consolidated text of the Constitution of the Hungarian People’s Republic (hereinafter: the Constitution) established the most important bodies of constitutional protection and their jurisdictions. The National Assembly, with the assistance of the standing committees of the National Assembly, ensured the constitutional order of society. The National Assembly could also set up a temporary committee to investigate a constitutional problem. In addition, National Assembly committees could raise constitutional issues, present constitutional proposals, as well as examine and comment on the legislative proposals and drafts submitted from a constitutional point of view, even by using the assistance of experts. In this scope, the National Assembly annulled the unconstitutional provisions of state bodies.

Article 21 paragraph 3 of the Constitution was amended by Act no. 2/1983 on the amendment of the Constitution by setting out that the Constitutional Law Council elected by the National Assembly was entitled to review the constitutionality of laws and legal guidelines. The Rules of Procedure of the Constitutional Law Council became a chapter of the Rules of Procedure of the National Assembly. Although during the preparation of the Constitutional Law Council, the idea of creating a body similar to the

constitutional court also emerged, the Constitutional Council eventually became part of the system of the supreme representative body, which was also a body subordinate to the National Assembly, reflected also in the fact that its members were elected by the National Assembly, who were responsible to the National Assembly. The provision set out in Article 1 of Act no. 1/1984 on the Constitutional Law Council, based on the proposal of the National Council of the Patriotic People's Front, consisting of eleven to seventeen recallable members, delegated the tasks of contributing in order to ensure the constitutionality of legislations and legal guidelines, their monitoring, as well as the interpretation of the provisions of the Constitution, to the body elected by the National Assembly from among members of the National Assembly and other public figures. The law did not allow the body to declare unconstitutionality, the decision in this regard was made by the National Assembly.

In Hungary, in principle, the Constitutional Court would have been created by the provision specified in Article 6 of Act no. 1/1989 on the amendment of the Constitution. The law would not have allowed the Constitutional Court to annul the unconstitutional law. The body would have been entitled to suspend the implementation of the unconstitutional law. Constitutional judges would have been recallable. The provisions of Act no. 1/1989 relating to the Constitutional Court were considered valid but did not enter into force.

Finally, Article 6 of Act no. 31/1989 on the amendment of the Constitution, complemented by Article 32/A of Chapter 4 of the Constitution regulated the legal institution of the Constitutional Court. The establishment of the Constitutional Court was an integral part of the public law process of the change of regime. Some authors criticized the Hungarian constitutional justice by highlighting that the Hungarian Constitutional Court had a very broad jurisdiction even in a global context. With the initiation of Hungarian constitutional justice, it was explicitly declared that the "invisible constitution" that emerges in the decision of the constitutional court is above the written constitution.

Article 24 paragraph 1 of the Fundamental Law published in the Hungarian Official Gazette (Magyar Közlöny) no. 43/25 April 2011, defines the Constitutional Court as the supreme body for the protection of the Fundamental Law. Similarly to the previous legal provisions, the Constitutional Court examines the laws adopted but not yet published from the perspective of consistency with the Fundamental Law, reviews the compliance of the law applicable to the individual case with the Fundamental Law

based on judicial initiative, and, as a result, it annuls legislation in conflict with the Fundamental Law, which will cease to have effect on the day following the publication of the decision and will no longer be applicable. The newly introduced competence of the Constitutional Court is the so-called genuine constitutional complaint; accordingly, the Constitutional Court, on the basis of a constitutional complaint, reviews the conformity of the judicial decision with the Fundamental Law, and annuls the judicial decision contrary to the Fundamental Law, including any other judicial or official decisions in conflict with the Fundamental Law, that were reviewed by the decision.

Contrary to the previous regulation, the body may overrule a specific, individual judicial decision contrary to the Fundamental Law, while ex post normative controls can no longer be initiated by anyone; the Constitutional Court reviews the compliance of the legislation with the Fundamental Law only based on the initiative of the Government, a quarter of the Members of the National Assembly, the Commissioner for Fundamental Rights, the President of the Supreme Court of Hungary (Kúria) and the Attorney General.

After outlining the origins of the Constitutional Court and the legal provisions applicable to the body, I reviewed the operation of the Constitutional Court and its exercise of power in the light of the constitutional court case law, on the basis of which I tried to match the jurisdictions of the constitutional court with the classical branches of power as I summarize it based on those detailed in the next section.

III. Summary of the scientific results of the dissertation

After reviewing the concept of constitutional justice and the formation, operation and exercise of power of the Hungarian Constitutional Court, answering the central question addressed in my doctoral dissertation cannot be avoided. After summarizing the procedures falling within the sphere of responsibility and jurisdiction of the Constitutional Court, it can be concluded that the Constitutional Court is a legal institution closely associated with the legislative, executive and judicial branches of power, namely the three classical branches of power.

The Constitutional Court is linked to the legislative branch of power by the abstract norm control procedure: the body implements a negative legislative activity

through the fact that, in the case of a law adopted, but not yet promulgated that was found to be in conflict with the Fundamental Law by the Constitutional Court, the law cannot be promulgated by the President of the Republic. Act no. 151/2011 on the Constitutional Court, after the renegotiation of the relevant law (after its conflict with the Fundamental Law has been established), the National Assembly is obliged to carry out positive legislative activity (unless the National Assembly waives the regulatory need of the subject matter in question). The ex ante norm control procedure also includes a preliminary examination of the compliance between the Rules of the House, the international treaty or any of its provisions and the Fundamental Law. At the same time, in my doctoral dissertation, I pointed out the practice of the Constitutional Court, according to which the Constitutional Court expressly refrained from taking a position on legislative issues.

In the ex post norm control procedure, which is classified as an abstract norm control, on the initiative of the Government, a quarter of the Members of the National Assembly, the President of the Supreme Court of Hungary (Kúria), the Attorney General and the Commissioner for Fundamental Rights, the Constitutional Court will review the compliance of the legislation with the Fundamental Law, that may also include an examination of compliance with the procedural law provisions set out in the Fundamental law concerning the drafting and promulgation of the Fundamental Law or an amendment of the Fundamental Law. In the event of a violation of the Fundamental Law, the Constitutional Court shall render a decision which is in principle negative legislation regarding the unlawfully adopted law or regulation violating the Fundamental Law or the Amendment of the Fundamental Law in substance or in form: this also constitutes a restriction of the legislative power and thus a (negative) interference with legislation.

The laws on central taxes, fees and contributions, customs and central conditions of local taxes are currently exempted from the latter in Hungary. Laws on this subject are only examined by the Constitutional Court (in ex post norm control and in other typical jurisdictions) when they concern the right to life and human dignity, the right to protection of personal data, the right to freedom of thought, conscience and religion, or laws related to Hungarian citizenship in the event of a content conflict, and will only be annulled for the conflict with these.

The judicial initiative and the constitutional complaint procedure are constitutional court proceedings subject to individual norm control. The Constitutional

Court procedure, called “judicial initiative for specific norm control procedure”, seeks the annulment of a legislation or legal provision applicable in a court case, which can be used to enforce negative legislative jurisdiction in the judicial branch within constitutional court proceedings. Another type of individual norm control procedure is the constitutional court procedure called constitutional complaint, which has two types (direct and old), which seek to remedy a violation of law caused by the application of a statutory provision in conflict with the Fundamental Law, resulting as well in a negative legislative jurisdiction (since in the latter cases, the constitutional problem is not related to the judicial decision, but to the underlying legal norm, that is, the legislative provision or the legislation as a whole). The latter constitutional complaint procedure may be invoked after the exhaustion of judicial remedies, while the former constitutional complaint procedure may exceptionally be invoked in the case of the direct application or entry into force of a legislative provision in the absence of a judicial decision. By the constitutional court decision annulling these two types of legislations or legislative provisions, the Constitutional Court limits the legislative activity of the legislative or executive branch of power.

By submitting a (real) constitutional complaint against a judicial decision, the Constitutional Court limits the interpretation and application of the law within the judicial branch, thus interfering with the operation of the judicial power. In the event of the annulment of judicial decisions, the procedure laid down in the provision on procedural law has to be followed. In the light of recent research, the conventional relationship between the Constitutional Court and the Supreme Court of Hungary (Kúria) providing the uniform interpretation and application of the law can be understood in the following way: the Constitutional Court refrains from deciding on issues of interpretation of the law, which is then compensated by the adoption and application by the Supreme Court of Hungary (Kúria) of the resolutions and their justification formulated by the Constitutional Court.

Conflicts with international treaties may be examined in any type of constitutional court proceeding, either ex officio or at the request of the petitioners. In the event of a conflict between a legislative provision applicable to existing constitutional court proceedings and an international treaty, the court will have the obligation to apply to the Constitutional Court in addition to the suspension of the constitutional court procedure. The procedure can be initiated by a quarter of the Members of the National Assembly, the Government, the President of the Supreme Court of Hungary (Kúria), the Attorney

General and the Commissioner for Fundamental Rights. This provision also qualifies as negative legislative activity restricting the activities of the legislative or executive branch.

The Constitutional Court is also involved in the exercise of public authority within the sphere of direct democracy in the form of constitutional court proceedings regarding any resolution of the National Assembly in connection with the request of a referendum (which can be initiated by anyone) or against rejecting a mandatory referendum - in terms of compliance with the Fundamental Law and legality. In these proceedings, the Constitutional Court will, exceptionally, examine requests related to concerns regarding the content and authentication of the referendum. The Constitutional Court – which, according to some representatives of the modern theories on the branches of power, can be considered an independent branch of power – has a significant influence on local governments as well by expressing an opinion when the operation of the local council and the national minority council is in conflict with the Fundamental Law.

After reviewing the jurisdictions of the Constitutional Court, it is also necessary to take a position regarding the relationship between the Constitutional Court and the classical branches of power. Under the current legal provisions, the Constitutional Court cannot be considered an independent branch of power because the legal consequences of the decisions made by the body must (and may) be remedied by legal institutions belonging to the classical branches of power. Enforcement bodies are obliged to refrain from applying a law provision which is annulled with retroactive effect in a particular individual case. In my opinion, the Constitutional Court also carries out positive legislative activity. The legislator implements the provisions of the Constitutional Court by adopting a legislative act by establishing an instance of conflict with the Fundamental Law manifested in failure. By establishing the conflict with the Fundamental Law manifested in failure, the constitutional court decision becomes subject to legislation, which is criticized for the fact that the provisions laid down in the constitutional court decisions depart from the written constitution and written legal provisions, thus limiting the legislative activity to those set out in the mandatory constitutional court decisions. In so doing, the Constitutional Court has a negative impact on the legislative activity of the legislative and executive branches of power.

In the event of the annulment of judgments, the legal consequences of the decisions of the constitutional courts are determined by the leading legal institution of

the judiciary, the Supreme Court of Hungary (Kúria) applying the provisions of procedural law. In addition to the annulment, constitutional court decisions may contain a constitutional requirement enforcing the provisions of the Fundamental Law, that must comply with the application of the law applicable to court proceedings, which greatly influences the activities of the court in terms of interpretation and application of law. In the course of judicial activity, the court is required to take into account the interpretation of law included in the decision of the constitutional court, which restricts the activity of the court in interpreting the law, and thus partly takes over the functions of the judiciary.

In summary, it can be stated that the Constitutional Court is linked to the classical branches of power by the constitutional court procedures enabling the exercise of partial powers related to the classical branches of power, therefore, the Constitutional Court cannot be qualified as an independent branch of power. For the reasons stated above, the answer to the question posed in my dissertation is that the Constitutional Court is a legal institution that does not constitute an additional independent branch of power in the modern sense exercising the “hybrid” powers of the classical branches of power.

IV. List of publications on the topic of the thesis

1. A hatalommegosztás eszmerendszerének egyes kérdései [Some aspects of the idea of separation of powers]. *Jog és Állam*, No. 18. VIII. Jogász Doktoranduszok Országos Találkozója, Budapest, KRE-ÁJK, 2013.
2. A hatalommegosztás eszmerendszerének egyes kérdései [Some aspects of the theory of separation of powers]. In *Tavaszi Szél 2013/SPRING WIND 2013. Konferenciakötet. Doktoranduszok Országos Szövetsége/Association of Hungarian Phd and DLA Students*, Budapest, 2013.
3. A hatalommegosztás terminológiája és a hatalommegosztás tana – eszmetörténeti áttekintés [The terminology of the separation of powers and the study of the separation of powers – an overview from the history of ideas perspective]. *Jogelméleti Szemle*, No. 2017/2.
4. Hatalommegosztás a magyar eszmetörténetben [Separation of power in the Hungarian history of ideas]. *Jogelméleti Szemle*, No. 2017/4.
5. Az Alkotmánybíraskodás történeti előzményei [The historical origins of constitutional justice]. *Jog és Állam*, No. 22. XII. Jogász Doktoranduszok Országos Találkozója, Budapest, KRE-ÁJK, 2018.
6. Az alkotmánybíraskodás kialakulása [The development of constitutional justice]. *Jogelméleti Szemle*, No. 2018/1.
7. Az Alkotmánybíróság és a demokrácia kapcsolata [The relationship between the Constitutional Court and democracy]. *Jog és Állam*, No. 23. XIII. Jogász Doktoranduszok Országos Találkozója, Budapest, KRE-ÁJK 2018.
8. Az alkotmánybíraskodás és a demokrácia kapcsolata (bővített és átdolgozott változat) [The relationship between constitutional justice and democracy - extended and revised version] *Jogelméleti Szemle*, No. 2018/3.
9. Tóth J. Zoltán – Egri-Kovács Krisztián: A hatalommegosztás elmélete a XIX. század második és a XX. század első felének politikai filozófiai gondolkodásában Magyarországon [The idea of the separation of powers in the Hungarian political thinking of the second half of the 19th and the first half of the 20th century]. (Before publication)