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The European Protection of the Rule of Law and the Challenge of Constitutional Particularism

Abstract

In this paper, I examine some recent decisions of Polish and Hungarian constitutional courts and attempt to place these decisions in the context of jurisprudential debates on constitutional pluralism. I conclude that the Hungarian and the Polish positions represent a special version of constitutional particularism, which, in the context of European cooperation, are coupled with a destructive oppositional attitude and are essentially based on the denial of constitutional pluralism. Given that these courts cannot be considered independent and do not engage in a substantive dialogue with the European Court of Justice, its decisions cannot be interpreted as forming part of the European common constitutional cooperation.

Introduction

At the roots of the EU's crisis of the rule of law is the fact that the Polish and Hungarian governments have denounced cooperation with the European institutions based on shared values and view the European joint undertaking as a sceptical strategic partner. This also translates into the autocratic institutional practices that characterise the exercise of power by both governments.¹ In response to these autocratic tendencies, the European Union has placed increasing emphasis on the common constitutional principles that underpin European cooperation, defending Article 2 of the European Treaties and applying Article 7 to support it.² Thanks to the introduction in 2013 of the EU Justice Scoreboard³, the 2014 Rule of Law Framework⁴, in which the Commission set out in detail the content of the rule of law to be protected and its relationship with the fundamental constitutional values of the Union, and its further development in September 2020, which linked the protection of the EU budget to the protection of the rule of law, the European Court of Justice has taken an increasingly expansive approach to the protection of the rule of law in its case-law.⁵

Recent decisions of the Polish Constitutional Tribunal⁶ and the Hungarian Constitutional Court⁷ have responded to these developments in European institutional practice. In what follows I will attempt to place these two decisions in the context of the jurisprudential debates on constitutional pluralism. In these debates, the problems of the crisis of the rule of law have been linked to questions of the justifiability of constitutional pluralism. The legal scholars involved in the debate agree that the fate of the rule of law in the Hungarian and Polish cases is closely

¹ For a general description of Polish and Hungarian autocratic constitutional practice, see W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019; A. Sajó, *Ruling by Cheating. Governance in Illiberal Democracy*, Cambridge 2021.

² See L. Pech, "The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of law Toolbox", *Reconnect – Working Paper* No. 7. March 2020

³ Communication from the Commission, *The EU Justice Scoreboard. A tool to promote effective justice and growth*. COM (2013) 160 final

⁴ Communication from the Commission, *A new EU Framework to strengthen the Rule of Law*, COM (2014) 158 final

⁵ Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, 16 December 2020

⁶ The decision of the Polish Constitutional Tribunal of 7 October 2021 (K 3/21)

⁷ Hungarian Constitutional Court, 32/2021 (XII. 20) AB Decision

linked to the question of the primacy of EU law, and both positions share the view that the Hungarian and Polish governments are taking a destructive approach to EU legal obligations. The difference between the positions lies in their views on the causes and remedies for the crisis of the rule of law. One view can be described as 'absolutist'⁸ and the other as 'pluralist'⁹. According to the 'absolutist' view, the source of the current crisis of the rule of law is the theory of constitutional pluralism and, in particular, the doctrine of constitutional identity.¹⁰ The Hungarian and Polish governments are using these doctrines to oppose the implementation of EU law. According to pluralists, however, constitutional pluralism remains a guiding normative ideal that is most appropriate to the EU's multi-level legal system. The EU legal system is pluralist because each Member State claims ultimate constitutional-institutional control, as does the EU Court of Justice. And EU law must operate effectively within a network of many national legal systems. This effective cooperation is conditional on the institutions working together in a cooperative way and on commonly shared rules and principles. The source of the problem is that the Polish and Hungarian governments want to extend their particular constitutional reading to rules and principles that are part of common European values. For this reason, the issue of the rule of law merges with the issue of primacy.

In the following, I will first reconstruct the content of the rule of law on the basis of recent European legal developments, and then I will examine the decisions of the Polish and Hungarian constitutional courts in 2021, and how they relate to this concept of the rule of law. Finally, I will attempt to place and interpret these decisions in the context of the debate on constitutional pluralism. In doing so, I argue that the Polish and Hungarian governments' approach to European law can be described as a variant of constitutional particularism, which is at its core a questioning of the objective meaning of common European values. In particular, there is a growing tendency in Hungarian constitutional practice to distance itself from the

⁸ R. D. Kelemen – L. Pech, “Why autocrats love constitutional identity and constitutional pluralism. Lessons from Hungary and Poland”, *Reconnect – Working Paper* No. 2 – September 2018; R.D. Kelemen, “Is differentiation possible in rule of law?” *Comparative European Politics*, 17, (2019) pp. 246-260; R.D. Kelemen – L. Pech, *The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland*, *Cambridge Yearbook of European Legal Studies*, 21 (2019) pp. 59-74.

⁹ T. Flynn: *The Triangular Constitution. Constitutional Pluralism in Ireland, The EU and the ECHR*, Oxford, 2019; A. Bobić, Constitutional Pluralism is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice, *German Law Journal*, 18 (2017) pp. 1395-1428; M. Avbelj: Constitutional Pluralism and Authoritarianism, *German Law Journal*, 21 (2020) pp. 1023-1031.

¹⁰ F. Fabbrini – A. Sajó, “The dangers of constitutional identity”, *European Law Journal*, 25, (2019) pp. 457-473; G. Halmai, “National(ist) Constitutional Identity: Hungary’s road to Abuse Constitutional Pluralism”, *EUI Department of Law Research Paper* No. 2017/08

commonly shared concepts of European constitutional dogmatics and to create its own particularistic dogmatic constructions that are alien and not able to relate to the European tradition of legal thought.

The rule of law in the case law of the Court of Justice of the European Union

The Hungarian autocratic breakthrough after 2010 has not gone unnoticed by the European institutions. The Venice Commission has continuously monitored the constitutional process and has not been silent on its criticisms and reservations.¹¹ These experiences have contributed to Commission President Barroso's ambition to create a stronger system of instruments to defend fundamental values between the soft techniques of political persuasion and the dramatic option of leaving the Union.¹² This effort resulted in the adoption in 2013 of the new Justice Scoreboard, which was primarily linked to the economic policy coordination process launched in 2010, and the importance of an efficient and independent judicial system was explained primarily by the importance of maintaining a sound business environment and stability. The EU Justice Scoreboard reports have also played an important role in the discussions on the Polish and Hungarian judicial systems.¹³ A major innovation in the protection of the rule of law in the EU was the Commission's new rule-of-law framework, which is a three-step structured dialogue process.¹⁴ This framework was activated in January 2016 against Poland, culminating in the opening of proceedings under Article 7 TEU. The framework failed as an instrument¹⁵, so in 2019 the Commission set up a new Rule of Law Review cycle, which is a much more comprehensive examination of all Member States, from issues ranging from effective judicial protection to media pluralism and electoral fairness.¹⁶ But it will remain a soft instrument based

¹¹ Venice Commission, *Opinion in Three Legal Questions Arising in the Process of Drafting the New Constitution*, CDL-AD (2011) 001; *Opinion on the New Constitution of Hungary*, CDL-AD (2011)016; *Opinion on The Fourth Amendment to The Fundamental Law of Hungary*, CDL-AD (2013) 012; *Opinion on the Constitutional Amendments Adopted by the Hungarian Parliament*, CDL-AD (2021) 029.

¹² A. Magen - L. Pech, "The rule of law and the European Union", In Christopher May and Adam Winchester (eds.) *Handbook on the Rule of Law*, Cheltenham 2018, pp. 235-256, p. 241.

¹³ *Ibid*,

¹⁴ *Ibid*,

¹⁵ P. Bárd - L. Pech, *The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values*, European Parliament's Committee on Civil Liberties, Justice and Home Affairs and the Committee on Constitutional Affairs, (2022) pp. 1-152, p. 66-88.

¹⁶ *Ibid* p. 100-118.

on dialogue. The new financial conditionality mechanism, which will be applied in cases where a breach of the rule of law directly or seriously undermines sound financial management of the EU budget or the protection of the Union's financial interests, appears to be more effective. The CJEU has found this new instrument to be lawful¹⁷, and the Court's judgment is a key document on the content of the rule of law, so I will now draw on this judgment to reconstruct how the Court defines the content of the rule of law. The Hungarian and Polish Governments challenged the legality of the new mechanism to protect the rule of law established by Regulation 2020/2092 EC in the Court of Justice, and these actions were rejected by the Court in this judgment.

The Court defines the rule of law as:

*“The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union (the “Charter”) and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality, implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, including access to justice, by independent and impartial courts, and separation of powers.”*¹⁸

This definition is essentially in line with the concept set out in Annex I of the Commission's 2014 Rule of Law Framework, which states that the rule of law is composed of six components:¹⁹

(a) *Legality*: which means a transparent, accountable, democratic and pluralistic legislative process. (b) *Legal certainty*: which requires that rules are clear and predictable and cannot be changed retroactively. (c) *Prohibition of arbitrary executive power*: essentially involves respect for people's privacy and protection against arbitrary or disproportionate interference. (d) *Independent and effective judicial review*, including respect for fundamental rights. (e) *The*

¹⁷ *Hungary v. Parliament and Council*, (C-156/21) and *Poland v. Parliament and Council* (C-157/21)

¹⁸ C-156/21, para 3

¹⁹ *A new EU Framework to strengthen the Rule of Law*, COM (2014) 158 final, Appendix 1, p. 1-2.

right to a fair trial and separation of powers: which specifically means the right to a court independent of the executive. (f) Equality before the law.

According to the Court of Justice, the Union is founded on the premise that “*each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the Union that implements them will be respected (...) The laws and practices of Member States should continue to comply with the common values on which the Union is founded.*”²⁰

The Court of Justice has declared the rule of law to be the most important constitutional value, which is the condition for all others to be a fundamental value of the Union. In particular, it stressed the guarantee of the independence and impartiality of the judiciary as part of the principle of the rule of law.

The Court of Justice has interpreted Article 19 TEU, which gives concrete expression to the value of the rule of law enshrined in Article 2 TEU, as requiring Member States to ensure effective judicial protection in the areas governed by EU law, and the mere existence of effective judicial review to ensure respect for EU law is an inherent part of the existence of the rule of law, which requires independent courts.²¹ In this respect, the judgment confirms the *Associação Sindical dos Juizes Portugueses* judgment²², according to which the task of ensuring effective judicial protection is also the responsibility of national courts. These courts must ensure respect for EU law in the application of the Treaties on the basis of the principle of loyal cooperation. But this requires independent courts. Violations of the principles of the rule of law, in particular when they affect the proper functioning of public authorities and

²⁰ C-156/21, para 5

²¹ „*The independence of the judiciary presupposes, in particular, that the judicial body concerned is able to exercise, both under the relevant rules and in practice, its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body, and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.*” C-156/21, para 10

²² *Associação Sindical dos Juizes Portugueses*, C-64/16, para 32-36

effective judicial review, can seriously harm the financial interests of the Union. The Court points out that “*although the Union respects the national identities of the Member States, which are an integral part of their fundamental political and constitutional organisation, and the Member States therefore enjoy a margin of discretion in the application of the principles of the rule of law, it does not follow that that margin of discretion may vary from one Member State to another. Indeed, Member States, in addition to having a distinct national identity respected by the Union as an integral part of their fundamental political and constitutional order, also embrace the concept of the 'rule of law', which they share as a common value deriving from their own constitutional traditions and which they have committed themselves to respecting at all times.*”²³

The principle of the rule of law, as interpreted by the Court, is an objective constitutional value whose violation is essentially cumulative, typically occurring when a number of violations accumulate, cumulate and reach a certain threshold. However, the rule of law may also be infringed where the legislation of the State fails to ensure the application of a principle or rule of the rule of law, leading to a problem of the rule of law with general implications (for example, legislation does not always ensure effective judicial remedy).

The challenge of the rule of law and constitutional particularism

The Polish and Hungarian governments have not accepted the objectivist conception of the rule of law as expressed by the CJEU. According to the Hungarian and Polish governments, the content of the rule of law may differ according to particularistic constitutional traditions, and consequently the ECJ's interpretation of the rule of law is fraught with conceptual uncertainties and inconsistencies, and these uncertainties may jeopardise the interpretation of EU values.²⁴ The concept of the rule of law can at most serve as a point of reference, compliance with which can only be judged relatively.²⁵ According to the Hungarian and Polish Governments, the values of the Union contained in Article 2 TEU are political and not legal in nature, and therefore

²³ C-156/21, para 233-234

²⁴ *ibid*, para 199

²⁵ *ibid* para 200-201

cannot be precisely defined or uniformly interpreted because of the obligation to respect the national identity of each Member State.²⁶ Therefore, the practice of the Luxembourg court, which, despite the profound uncertainty of the concept of the rule of law, attributes an objective meaning to it, can be interpreted as a kind of overstepping of competence. The Hungarian and Polish Governments thus link the obligation to respect the national identity of the Member States to the notion of constitutional particularism, claiming that the principles enshrined in Article 2 have a generally shared common content. The conclusion drawn from this is taken most consistently by the Polish Constitutional Tribunal when it questions the general binding force of the judgments of the European Court of Justice.²⁷ In essence, they have taken the position that the EU constitutional system is a political alliance of national constitutional systems, and that the pursuit of a common European law is a function of the Member States' own particular constitutional standards. According to the Polish Constitutional Tribunal, "European integration has entered a "new phase" on the basis of EU law and its interpretation by the Court of Justice of the European Union, and as a result (a) the bodies of the European Union act beyond the powers conferred on the Republic of Poland by the Treaties, (b) the Constitution is no longer the supreme law of the Republic of Poland, whose validity and application prevail, and (c) the Republic of Poland cannot function as a sovereign and democratic state."²⁸

The Polish government's and the Constitutional Tribunal's ideas about the constitutional order of the Union are essentially based on the denial of the principle of the Union as a legal community. Given that they are quite alone among the Member States in this, they have left themselves very little political room for manoeuvre. Either they back down and accept the general binding force of the judgments of the European Court of Justice, or they leave the Union. We now know that they chose to back down in the end. Protecting the EU budget under the rule of law proved to be an effective tool in the end.

²⁶ *ibid* para 222

²⁷ B. Grabowska-Moroz, "How was the „rule of law” dismantled in Poland and what does it mean for the EU? The decision of the Polish Constitutional Tribunal of 7 October 2021 (K3/21) the European game changer or a quasi-judicial bluff?" *La Unión Europea y el reto del Estado de Derecho* (ed. Susana Sanz Caballero), Pamplona, 2022, pp. 277-294

²⁸ The decision of the Polish Constitutional Tribunal of 7 October 2021 (K 3/21)

The Hungarian government and the Hungarian Constitutional Court have never launched such a frontal attack on the European institutions, nor have they ever openly questioned the binding force of the Court's judgments. They have not openly adopted a position of constitutional particularism, but have used the concept of constitutional identity to present their particularist position as a variant of constitutional pluralism. A classic example of this was the Constitutional Court's decision 22/2016.²⁹

After the Polish Constitutional Court's decision in October, the Hungarian Constitutional Court's decision in December was also highly anticipated. The Hungarian Constitutional Court did not go as directly against the principle of the primacy of EU law as the Polish decision, but the decision significantly widened the possibilities for the government to deny primacy. But the decision does employ arbitrary dogmatic solutions that make it represent a deeper level of particularism.

The government's proposal referred to the "ineffectiveness" of EU expulsion rules and the impossibility of implementing expulsions and claimed that as a result a large number of foreigners who had entered Hungary illegally are permanently stranded on Hungarian territory.³⁰ According to the governmental petition, this directly affects Hungary's inalienable right to dispose of its population, which is guaranteed by Article E (2) of the Fundamental Law. This is a fundamental element in the exercise of sovereignty and its inalienability is part of its constitutional identity.³¹

In its decision, the Constitutional Court granted the Hungarian State two types of empowerment to act against EU legislation on the basis of the Fundamental Law. The first is in the context of the protection of human dignity, where the state has a constitutional obligation to act in this regard, including against EU acts that threaten it. The other is in the context of sovereignty: where there is a lack of EU shared competence, the state is entitled to act unilaterally (to exercise shared competence itself) under certain conditions.³²

²⁹ Hungarian Constitutional Court, 22/2016 (XII. 5) AB Decision

³⁰ Hungarian Constitutional Court, 32/2021 (XII. 20) AB Decision, para 10

³¹ *ibid*, para 8-9

³² L. Blutman, "Decision of the Constitutional Court on whether the implementation of certain EU acts can be disregarded in the light of the Fundamental Law,"- in Hungarian *Jogesetek Magyarázata*, 2022/1, pp. 5-12, p. 7.

According to the interpretation of the Constitutional Court, “if the exercise of shared competence under Article E(2) of the Fundamental Law is incomplete as described above, would this infringe the right of the people living in Hungary to self-identity and self-determination deriving from human dignity (...) The reason for this is that, as a result of the incomplete exercise of competence, the traditional social environment of the persons living in the territory of Hungary may change without democratic authority or any influence on the part of the persons concerned, without any state control mechanisms. In this case, the Hungarian State is obliged to ensure the protection of this right in the context of its duty to protect institutions.”³³

A change in the social environment only causes a problem under constitutional law if it does not take place within the framework of the democratic exercise of power. If the EU's exercise of joint powers is deficient and the traditional social environment is changed as a result, this does not constitute a democratic exercise of power.³⁴ However, it is difficult to question whether the adoption of the Returning Directive³⁵ in the European Union in 2008 was not the result of a democratic exercise of power. As László Blutman points out in his study, “it is questionable whether a change of circumstances, such as the unenforceability of the readmission agreement, could deprive this legislation of this quality *ex post*. If the answer to this is yes, we introduce a kind of *public law clausula rebus sic stantibus* and open the door to dangerous arguments. Thus, any EU law whose inadequacies in enforcement change the traditional social environment in Hungary loses its democratic character and violates the right to human dignity. And the thesis abstracted from the line of thought - which would hardly be tenable - would be: a law that is not fully enforced cannot be considered part of the democratic exercise of power. The enforcement of such a proposition would, of course, not only cause upheaval in EU law, but also in the legal system of any state.”³⁶

If there is a lack of shared competence at EU level, this is already outside the scope of the shared competence mandate in Article E(2) of the Fundamental Law. In such a case, the European Union is not exercising its powers properly, but is in essence acting *ultra vires*. This allows Hungary to act unilaterally. This, as Blutman points out, becomes a sovereignty (competence)

³³ Hungarian Constitutional Court, 32/2021 (XII. 20) AB Decision, para 36-37

³⁴ Hungarian Constitutional Court, 32/2021 (XII. 20) AB Decision, para 41

³⁵ Directive 2008/115/EC, 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals

³⁶ L. Blutman, “Decision of the Constitutional Court, p. 8.

issue, irrespective of whether or not the lack of exercise of shared competence affects human dignity or the traditional social environment, whether or not it has democratic legitimacy. Empowerment is therefore more general than the specific constitutional problem on which the interpretation of the constitution is based.³⁷

The Constitutional Court has established four basic conditions for unilateral action: (i) the lack of competence must affect fundamental rights or limit the performance of a state obligation; (ii) it exists only as long as the European Union creates the guarantees for the effective implementation of EU legislation; (iii) unilateral action is possible only in accordance with the founding treaties and in furtherance of their objectives; (iv) Hungary must call upon the European Union to exercise its powers jointly.³⁸

The Constitutional Court has thus partially relinquished constitutional control (sovereignty control) over EU law. As László Blutman points out, the state (in practice, the Government and the parliamentary majority) has been given broad discretion to determine in advance the conditions for unilateral action and, on that basis, to derogate from EU law without having to initiate constitutional court proceedings in specific cases.³⁹ While the Constitutional Court may have the possibility of ex-post constitutional review of State acts arising in this context - if any reviewable act arises at all - its role remains limited. This control is ex post, indirect (it can be directed at the act of state) and (because of procedural and jurisdictional constraints) not mandatory, but only possible.⁴⁰

The background to this decision is the problem that the implementation of an EU law (the Returning Directive) is increasingly having negative consequences for a Member State due to changed circumstances, i.e. mass migration and the stalled implementation of the readmission agreement with Serbia. Hungary has sought to address this by returning foreigners to the border - in other words, by violating certain guarantees of the directive in order to compensate for the problems of implementing the readmission agreement. As Blutman pointed out⁴¹, full compliance with the Returning Directive has become a major disadvantage for Hungary. What has not been enforced, or has been enforced incompletely, is the readmission agreement between the European Union and Serbia. When the Constitutional Court mentions the

³⁷ Ibid,

³⁸ Ibid, p. 10.

³⁹ Ibid, p. 11

⁴⁰ Ibid, p. 11

⁴¹ Ibid, p. 10

responsibility of the European Union, it never includes the responsibility of the Member State party. It considers the European institutions as if they were completely independent of the Hungarian legal order. What is completely absent from the Constitutional Court's thinking in this decision is the idea of shared responsibility for the achievement of EU policy goals.

The findings of the decision can be interpreted as meaning that EU law does not take precedence over Hungarian constitutional rules in certain cases. In the case of incomplete enforcement of EU rules adopted under shared competence, the state is entitled to act alone. In the case of incomplete EU legislation, this means unilateral action, which may include not implementing the EU legislation in question, unilaterally interpreting it or adopting national legislation that differs from it. The constitutional norm from which such a mandate derives takes precedence over the EU legislation in question in the cases described by the conditions.⁴²

By partially relinquishing constitutional control, the Hungarian Constitutional Court has essentially handed the question of compliance with EU law to the political decision-maker.

It is in this context that the astonishing and cynical construction of the right to a traditional social environment as a sub-justification of the right to human dignity can be understood.⁴³ This

⁴² Ibid, p. 12

⁴³ The decision is based on a particular, particularistic understanding of the concept of human dignity. It is worth quoting at length the argumentation on this point:

“According to the practice of the Constitutional Court, ‘the right to human dignity also implies the autonomy of natural persons, that is to say, a core of self-determination, outside the control of all others, whereby man remains a subject and cannot become a means or an object’ (...) Human dignity is, according to the Fundamental Law, the dignity of the individual living in society, who bears the responsibility for social coexistence. According to the values of the Constitution, the framework of social coexistence (...) is the family and the nation. A person is born into a particular social environment, which can be defined as his or her traditional social environment, in particular through ethnic, linguistic, cultural and religious characteristics. These circumstances create natural ties determined by birth, which have a decisive influence on the self-identity of the members of the community (...) These circumstances are not, or only with difficulty, changeable by the individual, and thus become a defining element of their personality and an integral part of the human condition, which derives from the dignity of the human person (...).) Constitutional protection must not protect the individual in the abstract, removed from his historical and social reality, but must take account of the dynamic changes in contemporary life. (The) State (...) must also ensure, in view of its duty to protect institutions, that changes in the traditional social environment of the individual can only take place without significant damage to these defining elements of identity.

At the same time, the Constitutional Court observes that, where the situation giving rise to the change in the above-mentioned personality traits is beyond the control of the individual, the individual is forced to change the direction and content of the free development of his personality in respect of a fundamental characteristic, in such a way that the circumstances giving rise to that compulsion are outside the scope of the principle of popular sovereignty. (...) The traditional social environment of a person, as a natural bond determined by birth, determines the development of his personality, the direction and framework of his self-identity, and as such must be assessed in terms of the quality of human life.

If (...) it is not democratically changed by the state (or by any other organisation outside it), it may violate both the individual's self-identity and his self-determination to change it (...) The traditional social environment,

conception completely neutralises the emancipatory element inherent in the concept of human dignity, the horizon of the individual's freedom of self-determination, which typically involves the shaping and changing of the traditional social environment, whatever that may be. It is, in fact, at the mercy of the prevailing majority moral concepts and the public authorities which typically represent them, that individual rights are protected, that is to say, that they are essentially abolished. It dissolves human dignity in a completely impartial and arbitrary concept of the traditional social environment. this line of thought runs counter to everything we believe about the meaning and function of fundamental rights protection in Europe.

In this decision, for example, it recalls the construction of the general right to personality developed in German constitutional court practice⁴⁴, which was also adopted in the early practice of the Hungarian constitutional court⁴⁵, which aims to protect the autonomy and self-determination of the individual, and to this end the constitutional court uses this construction of subsidiary fundamental rights protection, which allows the court to derive from the right to human dignity a further right to be protected. To use this dogmatic construction to protect the 'traditional social environment' in order to deprive vulnerable people of their due process rights is a level of cynicism that is difficult to associate with European values.

This twisted dogmatic language of the Hungarian Constitutional Court's decision is more insidious (because it does not openly deny the implementation of the CJEU judgment), deeper and more radical in its opposition to European law than the frontal attack of the Polish decision. In fact, the Hungarian court essentially suspends the rationality criteria of European legal dogmatics and creates a particularistic and completely arbitrary conceptual world with which it is impossible to engage in a meaningful dialogue.

which the individual occupies at birth and is independent of him, shapes the individual's self-determination, and the self-determination of the individuals who make up society creates and then shapes the collective identity, i.e. the identity of the community, the nation. (...) In view of its institutional duty to protect the fundamental right, the state must therefore create the framework which ensures the right conditions for the exercise of the fundamental right to human dignity and its individual rights, as well as a balance between the legal interests involved in the exercise of the right. (...) At the same time, the Constitutional Court notes that the State's duty to protect institutions in the above circumstances must be assessed, with regard to the protection of fundamental rights, in this case human dignity, in the context of Hungary's constitutional identity (...) and as a fundamental State function affecting the public order of Hungary, which, inter alia, Article 4(2) of the Treaty on European Union provides that the European Union must respect. In addition to the fact that, for an individual born into the traditional social environment referred to above, that environment constitutes a natural condition of life protected by the State, the right of the individual, deriving from his human dignity, to participate, in the democratic exercise of power, in the taking of decisions which substantially affect his right to self-determination.”

Hungarian Constitutional Court, 32/2021 (XII. 20) AB Decision, para 37-43

⁴⁴ See: E. J. Eberle, “Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview” *Liverpool Law Review* (2012) pp. 201-233.

⁴⁵ Hungarian Constitutional Court, 8/1990 (IV. 23.) AB Decision

The decision is a very clear expression of the attitude of the Hungarian autocratic system towards law, which it regards as a mere instrument of power, and the rational system of legal doctrine on which consistent judgments are based has been replaced by a cacophony of thought processes tailored to individual cases, giving the appearance of dogmatic constructions.

Constitutional pluralism as a scapegoat?

Following the 2016 ruling of the Hungarian Constitutional Court, it is widely believed that the primacy of EU law is most threatened by the normative concept of constitutional pluralism, which acts as a screen to hide autocratic aspirations based on constitutional particularism that deny EU law and its fundamental values. According to Daniel Kelemen, for example, “Constitutional pluralism is a bit like nuclear power. It has beneficial peace-time uses, but it is inherently dangerous and can easily be weaponised in times of war. In an age when liberal, constitutional democracy is facing a clear and present danger, the time has come to dismantle constitutional pluralism.”⁴⁶

According to Sajó and Fabbrini⁴⁷, the concept of national constitutional identity, as applied by a growing number of constitutional courts, poses a real and present danger to the process of European integration, as the doctrine is neo-sovereignist in its features and is contrary to the rule of law. But while legitimate doubts can be raised about the concept of constitutional identity, in reviewing the practice of constitutional courts, the authors mix together cases of loyal and destructive disagreement.⁴⁸

⁴⁶ R. D. Kelemen – L. Pech, “Why autocrats love constitutional identity and constitutional pluralism. Lessons from Hungary and Poland”, *Reconnect – Working Paper No. 2* – September 2018, p. 22

⁴⁷ F. Fabbrini – A. Sajó, “The Dangers of Constitutional Identity”, *European Law Journal*, 25, (2019) pp. 457-473

⁴⁸ T. Flynn, “Constitutional pluralism and loyal opposition” *International Journal of Constitutional Law* 19 (2021) pp. 241-268, p. 265-266.

For Kelemen the abuses of constitutional pluralism in Hungary are sufficient grounds for abandoning constitutional pluralism as an idea altogether. However, the argument that the conduct of the Hungarian state requires the abandonment of constitutional pluralism can be extended, with very little effort, to the argument that this conduct requires the abandonment of democratic constitutionalism itself.⁴⁹ Should we also give up the conception of the right of general personality because the Hungarian constitutional court has abused it? The Hungarian autocratic government simply uses indiscriminately all means to defend its power. We must learn to distinguish between legitimate and abusive disagreement, between loyalty to European values and disloyalty to them.⁵⁰ As Flynn put it, “We must not let the legalistic fetish for perfection and smooth institutional intercooperation cloud the observable fact of the difficulties of reconciling the different layers of a composite legal order.”⁵¹

The most important principle of the relationship between legal systems is the principle of legality. On this basis, national courts must start from a strong presumption that they are bound to enforce EU law notwithstanding national constitutional provisions. As a general rule, the principle of primacy of EU law takes priority in the interest of stability of cooperation. But the primacy principle is not absolute. It can be limited to protect subsidiarity, democracy and fundamental rights.

In the practice of political institutions, the principle of legality is closely linked to the principle of separation or division of powers. The normative focus of the principle of separation of powers is to prevent the arbitrary and exclusive exercise of power, which can be guaranteed by the separation of powers, a system of checks and balances and the expectation of mutual cooperation between the branches of power, so that they see themselves as part of a common constitutional enterprise.⁵² Actions against arbitrary exercise of power are legitimate versions of constitutional conflicts. The idea of limited power and the principle of legality can be stabilised through constitutional conflicts. The limits of legitimate constitutional conflicts are defined by the expectation of mutual cooperation. When institutions can no longer see

⁴⁹ T. Flynn, *The Triangular Constitution*, p. 225.

⁵⁰ A. Bobić, “Constructive Versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU”, *Cambridge Yearbook of European Legal Studies*, 22 (2020) pp. 60-84.

⁵¹ T. Flynn, , “Constitutional pluralism and loyal opposition” p. 263.

⁵² A. Kavanagh: “The Constitutional Separation of Powers”, in *Philosophical Foundations of Constitutional Law* (eds.) David Dyzenhaus and Malcolm Thorburn, Oxford, 2016, pp. 221-240, p. 235-236.

themselves as part of a joint enterprise, it becomes a destructive constitutional conflict. In the institutional practice of European law and in the history of the development of law, constitutional conflict is not an exceptional occurrence; indeed, it is an important element in the functioning of the system.

That is why I agree with Flynn that it is worth introducing the concept of loyal opposition when distinguishing constitutional conflicts, because in a functioning democracy it should be possible to oppose the policies of the current government without being branded as traitorous or subversive. A serious structural problem of European politics is that it is divided into 'pro-European' and 'Eurosceptic' camps, because there is no room for a loyal opposition in this two-tiered space. The consequence of this, according to Flynn, will be that “intolerance of reasonable national court objection to the application of the primacy principle in particular cases catastrophises legitimate legal dissent into a constitutional crisis.”⁵³

Flynn proposes two criteria for distinguishing between loyal and destructive opposition.⁵⁴ The first is *the independence of the judiciary*, which allows us to speak of destructive opposition if there is substantial evidence that the apex court of a given member state cannot be considered a sufficiently independent judicial body. In this case, any invocation of constitutional identity, the protection of fundamental rights or the control of sovereignty to justify a derogation from EU law should be considered illegitimate and abusive.

Another aspect of the distinction between loyal and destructive opposition is whether the decision of the national court is based on a *convincing consideration of common European and international standards*; whether EU law and the case law of the CJEU are substantively addressed by the national court. The latter may be persuasive evidence if the national court initiates a preliminary ruling procedure before the CJEU.

⁵³ T. Flynn, “Constitutional pluralism and loyal opposition” p. 244.

⁵⁴ *Ibid*, p. 245-246.

Conclusion

If these aspects are taken into account, the destructiveness of Hungarian and Polish oppositionism can be clearly identified without compromising the otherwise defensible normative ideal of constitutional pluralism. The Polish and Hungarian Constitutional Courts are “captive courts” under the unilateral influence of governments after the amendment of the nomination rules, which in the judgments under review have not even attempted to explore the substantive content of EU law and to cooperate in good faith with the CJEU. Whether the rule of law mechanisms will have any impact on these institutional practices is an open question. On the basis of developments in recent months, it seems that the Polish government is inclined to reach an agreement, while on the Hungarian side we can expect a prolongation and deepening of the conflict, the impact of which on European cooperation cannot yet be predicted.

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