University Doctoral (PhD) Dissertation Abstract

Guarantees of Constitutional Adjudication: Specific Aspects of the Judicial Independence in Hungary, Germany, Poland, and Myanmar

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I. Introduction and Research Background

The dissertation "Guarantees of Constitutional Adjudication: Specific aspects of Judicial Independence in Hungary, Germany, Poland, and Myanmar" is a research on the advantage of Myanmar for her future in building democracy and a federal state. There have been several conflicts between the governmental organizations since a long time ago and no solutions in Myanmar.

The research base starts from the violation of the independence of the judiciary: the removal of the first nine Constitutional Tribunal's justices by the impeachment process in Myanmar. Then, similar infringements of judicial independence are found in the European Union: Hungary and Poland. It is beneficial information for the dissertation and similar phenomena to answer the research questions. Exploring the German legal system and its Federal Constitutional Court, although the composition of the Court is not fit with the judicial independence's norms, is credible for its competencies.

The important thing is that "judicial independence" is a fundamental constitutional norm and necessary legal standard to protect a state's whole society, including the judges, legislators, and administrators. If the judiciary is not accessible, the other collective legal protections for civil, economic, and political rights, women's rights, child protection, labor rights, and the other constitutional guarantees will be collapsed. The judge and courts should be free from the external and internal dominance of the legislature and executive.

Thus, I chose the topic for the public good in general and the reestablishment of Myanmar for her future specifically. After studying the inconsistencies between the political institutions and judiciary in Hungary, Poland, and Myanmar in the different regions, we could receive several notes. However, the norms of judicial independence were crashed down. Furthermore, discrimination on age became connected to political notions. Discrimination on age is prohibited domestically, regionally, and internationally. The second article of the Treaty on the European Union expressly protects discrimination between men and women. It can be said that the infringement of judicial independence is the beginning of the violations of fundamental human rights and freedoms.

How is judicial independence important in this regard? Establishing an independent judiciary is connected to political stability after studying the phenomena in Myanmar, Hungary, and Poland. Analyzing historical backgrounds of the constitutional laws and the existence of the constitutional courts in Hungary, Poland and Myanmar appeared to alter the state systems into democratic countries. It meant that the states' governing authorities agreed with each other on the critical role of the constitutional courts in the constitutional changes and transformations of the states' system. Therefore, keeping an independent judiciary is the responsibility of a state's governing authorities.

In implementing an "independent judiciary," aspects of the composition of the constitutional courts, tenure, the budget and autonomy, and competencies of the courts are mentioned in the dissertation. On the other hand, recognizing the political institutions: especially the legislature and executive, on the resolutions of the constitutional courts is parallelly essential to implementing the independence of the judiciary. That is why political reconciliation is central to achieving judicial independence. Although many theorists and states' constitutional laws express that the "judiciary should be independent, "judges subject only to the law," and

"Guardian of the constitution is vested with the constitutional courts or highest courts'[1], the implementation is concerned with the governing parties and states' authorities. Theoretical parts are mentioned with the cases involved in each Chapter.

II. Research Structure

The dissertation has two main parts with four chapters together. After the introduction, the first part mentions the constitutional problems: especially infringement of judicial independence and removal of judges in Myanmar, Hungary, and Poland by tracing back their respective constitutional histories. The cases concerned with the violation of judicial independence in Myanmar, Hungary, and Poland have been explained in the second Chapter. The other international landmark cases that support the dissertation's structure are also cited. It is undeniable that each country has different legal traditions and cultures. However, the primary legal norms and standards in line with international law and treaties are obligatory for all countries.[2]

The second part starts from Chapter III, the German legal system and how they established their Federal Constitutional Court (Hereinafter: The FCC) successfully is the second center of the dissertation. According to the literature reviews,[3] the FCC is significant worldwide, and it can handle political issues within the legal framework.[4] Besides, Germany is a founding member of the EU, and its legal concepts of human rights protections are fresh. In the EU and according to the precedents of FCC, democracy is implemented by the protection of human rights. In addition, Bundestag also represents democracy, and Bundesrat stands for federalism.

Moreover, cooperation of powers is applied between the legislature, executive, and federalist instead of the judiciary. These notions are exciting and valuable for the dissertation to trace back to the establishment of reconciliation between the governmental organs through political stability. Political stability is the more critical and formal thing to building a stable constitutional court. But, then, the FCC became significant because of its legal reasonings and adequate human rights protections. Therefore, it is essential to get recognition of the two other branches on the legally binding force of the FCC.

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[1] The Military is the guardian of the Constitution in Myanmar even in theory.

[2] *Jus Cogens (peremptory norm of international law)*: it designates norms from which no derogation is permitted by way of particular agreement.
Retrieved from https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml#:

[3] Several legal and political scholars are interested in the existence of the FCC and its prominence, then, they published about it in the several journals and as the books. Most of the authors created comparative analysis between the FCC and Supreme Court of the United States although the countries practice different legal systems. Those two countries are developed and top ones in economic, education and politics as well. Their federal systems, separation of powers, and legal systems are worth studying because of their fame in general. The clear differences of competences between the Constitutial Courts and Supreme Courts are that civil case matters are concerned to Constitutional Courts and both civil and criminal matters are connected to the Supreme Courts. The dissertation focuses on the Constitutional adjudication and its related matters.

[4] Thomas Honey. (2019). Lectures in the Faculty of law, University of Debrecen. (The lectures about the German legal system, legal history and Weimer Republic, the Basic Law, the FCC and well-known cases during that time, 2019). Started from that time, I got an idea to move my research trend to German legal system after studying the removal of judges in Myanmar, Hungary and Poland as I could not find out the better ways to reconcile between the legislature and judiciary, and between the executive and judiciary to complete the dissertation's objectives. On the other hand, studying Myanmar and Polish constitutional crisis, removing of judges and violation of judicial independence in Hungary helps to reach the grounded feedbacks for the research questions. Combining the research's outcomes of the two parts makes the hypothesis justify.

III. Research Objectives

(1) The dissertation is composed of two parts. It could not be similar to the other research's contents and structure as the primary purpose of the dissertation is to support a targeted country, Myanmar's reformation in the future. I believe that the first part of the constitutional problems: infringement of judicial independence principle in Hungary, Poland, and Myanmar itself, and the second part of structuring the FCC and its legal reasonings focused on the society, democracy, and federal policies will be advantageous somehow for Myanmar to build national democracy or democracy federal (it is still confused which one should be the first or which one should be the latter, since long time ago) country what the majority want in the future. Now is the time to fight for democracy.[5]

(2) The direction of the dissertation especially is to figure out how to set up peaceful relations between governmental organs first and to build an independent judiciary consequently. Hungary, Poland, and Germany have had prominent legal cultures and traditions before the EU establishment. The legal culture of separate constitutional courts' trials on constitutional matters is also rooted in Europe. Accordingly, the existence of respective constitutional courts is also crucial to implementing the constitutional laws and regional and international law as far as the courts have the abilities and competencies. Regarding applying international law, legal and political scholars expect to achieve a minimum standard.

(3) The authentic research aims to learn the practical and reasonable structure of a constitutional court that can get along with the other political institutions: legislature and executive. The study aims to realize how the theories for the independent judiciary are working in practice based on the FCC under German constitutionalism. Judiciary alone cannot be liberal without the cooperation of the other branches. On the other hand, the judiciary is also responsible for implementing the independent judiciary. In Chapter III, there was a cooperation between the Federal Constitutional Court (Hereinafter: FCC) and other branches due to the literature reviews.[6] The FCC also did not use its interpretation power significantly to avoid conflicts with the other units.

(4) Besides, the dissertation aims to learn the German way of practicing the cooperation of powers[7] combined with federalism without sharing the unique capability of the judiciary to select the Constitutional Court's judges. The dissertation explored that the competencies of a constitutional court are efficient to make the Court independent, not counting on the composition of the Court and appointment of justices due to this research's aim.

IV. Methodologies

Comparative and interdisciplinary approaches cannot be separable from the dissertation because of the research's structure, objectives, questions, and chosen countries in different regions. A historical system is also a must, analyzing cases of the targeted counties to give

[5] Therefore, it is difficult to conclude the real situations regarding with the judicial independenc in Myanmar because Myanmar is now disorder.

[6] It was related with the appointment of the FCC's judges by the selected committee consists of Bundestag's members and the interpretation of the FCC on the FCC's Act. See it in the Chapter III about the composition of the FCC.

[7] John Locke's theory of cooperation of powers.

feedback for the research questions and confirm a hypothesis. Furthermore, the case study analysis is vital for the dissertation to conclude.[8] The comparison of a few countries has been described as "case-oriented" rather than "variable-oriented" since the analysis focuses on the specific unfolding of events and variation of political developments within each country than variation in macro-variables between countries.[9] Finally, the comparative method is applied comprehensively for the dissertation to determine how the guarantees of constitutional adjudication are secured theoretically and practically at the domestic, regional, and international levels. Exploring how the FCC is prominent and freedom at the domestic, European, and international levels, an interdisciplinary approach becomes essential as important as the comparative study of the guarantees of constitutional adjudication in Hungary, Poland, and Myanmar.

I used the comparative analysis of the judicial independence based on the constitutionalism of Myanmar, Hungary, Poland, and Germany with different locations and legal systems. Even though the Member States of the EU have different legal traditions, they shall respect the uniformity of EU law paying respect to the regional integration. It is a good knowledge that some removed judges in the EU could get back their jobs thank the regional integration process.

Nowadays, common law and civil law systems govern worldwide. Although practicing legal families are different, legal issues and constitutional problems in Poland, Hungary, and Myanmar are criticized similarly, emphasizing society.

Thus, in the dissertation, the comparative method is reasonable as a core methodology to learn more about the judicial systems of Hungary, Poland, Germany, and Myanmar within their different legal systems and their legal conflicts handled by their constitutional courts based on the society and legal background. Theoretically, the countries have different legal systems, but similar legal issues and crises remarkably appeared among the three leading governmental institutions in practice. Clarifying and analyzing the legal systems between the selected countries, Myanmar accepts the common law system, and the EU's countries recognize the civil law family. Going back to the dissertation's topic, "Guarantees of Constitutional Adjudication," the aspects to evaluate the independent judiciary are the formation of the constitutional courts, term of offices, and competences of the respective courts. Because all is included to define the guarantees of constitutional adjudication, judicial independence is in line with the "Introduction" Chapter. Surprisingly, the modes of appointing the constitutional courts' judges in the respective countries, even in the EU, are similar.

Nevertheless, it deviates from the international norms for the independent judiciary. There is no uniformity of law in selecting the constitutional courts' judges in the EU. The tenures of the office concerned in Germany, Poland, Myanmar, and Hungary are varied, and it does not matter to help the substantial independence of the judiciary. Nonetheless, keeping the official

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[8] I am not a practicing lawyer or a judge, I am a student at the University of Debrecen, and experienced as a lecturer at Law Department, Taunggyi University, Taunggyi, Myanmar. I release the position of a university's teacher participating in the Civil Disobedience Movement (CDM) for the Spring Revolution, Myanmar. It is a peaceful demonstration to prove that we do not agree with the Military junta: especially their inhumanity, brutality, and autocracy to the citizens. The sensitive Military junta removed every CDM staffs from their positions and added the names in the blacklisted not to have any governmental or private jobs in their future. In fact, politics is not everything, but policies are changed when the politics changes, what I have acknowledged in practice. (At least, I can impart the importance of judicial independence as far as I have learnt as an independent researcher, during the time I cannot go home as a lecturer, because I know that my duty in studying Ph.D. is to share my knowledge with the students.)

[9] Todd Landman. (2008). Issues and Methods in Comparative Politics: An Introduction, 3rd Edition, Routledge, Taylor & Francis Group, London, p-69.

terms of office guaranteed as their respective constitutional laws is critical because of the core cases cited in Chapter II. Constitutional courts' competencies can also be comparable in different legal systems.

In Myanmar part, it is clear to criticize that the Constitutional Tribunal of Myanmar does not have the power to human trial rights or constitutional rights violation cases. Nevertheless, the Supreme Court of Myanmar has human rights protection by issuing writs of habeas corpus, mandamus, prohibition, certiorari, and Quo Warranto. [10] In Hungary, Poland, and Germany, just submitting constitutional complaints is enough to solve human rights violations. Both writs and constitutional complaints are the procedures to claim legal remedy before a constitutional/highest court. However, claiming writs is not the same as constitutional complaints. There are certain writs for certain kinds of violations by certain authorities. It is just an explanation, and the research does not intend to compare the writs and constitutional complaints as the Myanmar Constitutional Tribunal cannot issue writs. However, the things the dissertation mentioned about the constitutional complaints and the procedures are relevant. It was one of the mains to evaluate the judicial independence of Hungary due to the Andra Baka case. Furthermore, the intentional modification of the Constitutional Court's ability made the Court inability to allow the right to hear, giving the reason for courts reorganization. Later, the Hungary government replaced the old Constitution with the new one in 2011/12.

Why the respective governments tried not to promote the abilities of the respective constitutional courts in Myanmar, Poland, and Hungary? It is different in Germany, as the FCC is free to update the ways to interpret the Basic Law when the Basic Law does not mention expressly what to do. Although Germany applies civil law, sophisticated legal reasonings of the FCC's judge on the basics are recognized. Usually, the codification of rules is a core of civil law. Law is not enough to decide the cases, and the discretionary power of judges is always needed to combine to make judgments. In doing so, legal precedents are cited with other legal principles. On the other hand, Myanmar practices a standard law system, and practically, interpretation shall be emphasized in the text of statutes.

Those are why I rely on the comparative approach between the different countries with different legal systems. Some are similar, and of course, some are not. The advantage of using the comparative method is to collect the differences and similarities that can lead to the research's results and findings in the final step.

Again, being a developed or developing country or practicing different legal systems does not matter according to the dissertation findings. How the governments and their highest courts handle the legal problems within the constitutional framework following the essential legal norms will be a backbone to completing the dissertation's aims. I could point out some pertinent findings regarding the necessity of establishing an independent judiciary among these three countries using comparative methods to pay attention to the textual approach.

Myanmar is the least developed country because of the political instability and trying to solve several related problems for a long time. In contrast, Hungry and Poland are developed countries located in Europe. Therefore, economics, education, living standards, history, and cultures are different. But the legal theories these three countries accept nowadays are similar

[10] It is, in my opinion, similar like the ECJ that can interpret the EU law and does not have the function for the human rights protection expressly. Therefore, the individual who has been violated their EU citizenship rights bring a suit to the ECtHR not to the ECJ. As a result, there were/will be several legal conflicts between the ECJ and the FCC because of the ECJ’s interpretation of the EU treaties is just interpretation and it does not focus on the human rights matters.

because of the existence of the Constitutional Courts respectively. Indeed, the legal systems between the countries are also different. Therefore, there are several similarities and differences in forming the constitutional courts concerned. The focal point of using the comparative study in the dissertation is that the cases in the respective three countries were linked to the "irremovability of judges" and infringement of the institutional and individual guarantees indirectly.

Another crucial reason I have focused on some EU countries compared with Myanmar's legal system is because of a constitutional Court in Myanmar, even if it practices a standard law system. The origin of the constitutional Court is from Europe.[11]

The Constitutional Court or Kelsenian Court originated in Europe and was widely accepted in Europe first. In Hungary and Poland, the Courts were set up to transform a socialist-communist system into a democracy. In Myanmar, the Constitutional Tribunal (Hereinafter: Tribunal) has the function of solving the related problems. But the Tribunal was not successful in serving its primary function within two years after its establishment. According to "Wojciech Sadurski," the younger democracy is likely easy to backslide."[12] Logically, Myanmar started implementing democracy by setting up a separate constitutional court (Tribunal), which was unsuccessful because of the legislature's impeachment. The Constitution 2008 says that the resolutions of the Tribunal are final and conclusive. However, it was not in practice. Therefore, I would like to seek the possible ways to reconcile the three main branches by learning how the judicial machinery runs in Hungary, Poland, and Germany via Constitutional Courts within the legal framework of the European Union.

V. Hypothesis and Research Questions

The research hypothesis is that "the Judiciary cannot be independent of the external influence whenever the judiciary itself has the political characteristics." The hypothesis should be tested, and it has been confirmed by studying the implementation of domestic laws, regional laws, international law, and legal theories dealing with the guarantees of constitutional adjudication: judicial independence in the respective chosen countries and cases.

The first and second parts of the dissertation intend to outline the research questions:

(1) "When can the executive and the legislature influence the judiciary and its independence?
(2) Which organization most influences the judiciary? How?

VI. Chapter I- General Aspects of the Guarantees of Constitutional Adjudication

Guarantees of constitutional adjudication, in general, are defined in the first Chapter. But, of course, the dissertation does not mention every detail for that, just for the international perspectives of constitutional guarantees regarding judicial independence. Nevertheless, guarantees of judicial independence under the Bangalore principles on judicial conduct, judicial independence's essence under the UN's Basic Principles on the freedom of the

[11] It is my first and foremost intention to do PhD research in the EU, and I have not found any universal differences between common law and civil law systems. In my opinion, legal families are mixed because some common law countries accept constitutional courts system and the constitutional courts in the civil law countries also emphasis on the legal precedents besides the coded laws. The theme is to implement fair and justice for the society, to get public trust for the government through the legal courts and it is a solution to get a stability between the government and the governed.

[12] Wojciech Sadurski (2018). How Democracy Dies (in Poland): A Case Study of Anti-Constitutionalist Populist Backsliding, Sydney Law School, The University of Sydney. p-11(Pp1-71)

judiciary, judicial independence under the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) are explained broadly to make sure its meaning under the international perspective. Furthermore, the European view of protection of judicial independence is also described, and some legal theories of legal and political scholars are also cited.

The research focuses on the external influence of the political institutions on the judicial system, then the internal one. Nevertheless, the courts and judges work together to be independent judiciary. However, according to the cases mentioned in the second Chapter, internal independent is also automatically influenced if the bench is influenced externally. So, the theme of Chapter I is said about the components of the independent judiciary to make more understanding of the political dominance of the independent Court mentioned in the second Chapter.

According to the separation of powers, the judiciary is one of the government's branches. It guarantees a less dangerous one than other branches of power, different from the other political holders.[13] The Inter-American Court of Human Rights held that one of the main objectives of the separation of powers is judicial independence.[14] Judiciary stands for the people and justice. It is also an essential institution to check the arbitrary actions of the authorities, including judicial officers. Only a state's supreme judicial Court can be the guardian of a state's constitutional law due to constitutionalism. A constitution can prescribe the minimum standard of individual liberty and the principle of the rule of law. The judiciary is responsible for protecting those fundamental rights and safeguarding the Constitution due to the constitutional mandate.

Alexander Hamilton explained that the judiciary as a minor dangerous branch of government. The courts do not have the legislative power or the ability of the executive to implement political policies. They may not enforce their judgment without the support and approval of the other executive and legislative officials. Hamilton agreed with Montesquieu's recommendation that there is no liberty if the judicial power is not separated from the legislature and executive. He indicated that the independent judiciary is required in the limited Constitution.[15] Two safeguards to protect judges' and courts' independence are to secure the appointment process and tenure of their term of office.[16]

The judiciary cannot be independent if petitioners do not enjoy independence, especially the right to a fair trial and seek justice.[17] The impartial adjudication of disputes is crucial to a peaceful, prosperous, and democratic society.[18]

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[13] Daniel Smilov. (2012). The Judiciary: The Least Dangerous Branch? in Michel Rosenfeld and Andra Sajo, The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, United Kingdom, p-864 (Pp 859-873).

[14] Dr.Franziska Rinke, Dr. Monica Castillejos-Aragon and Aishwarya Natarajan. (2018). Judicial Independence Under Threat? Global Conference in Strasbourg, Conference Report, p-29.

[15] Alexander Hamilton. (1788). Federalist No.78. See also Lisa Webley & Harriet Samuels. (2018), p-115.

[16] Everyone's Parliament. (2015). The Role of the Judiciary, factsheet. (Accessed on 5 November 5, 2021) Retrieved from www.parliament.qld.gov.au.

[17] Alec Stone Sweet. (2007). A *juridical coup d'état* and the Problem of Authority.

[18] Frans van Dijk and Geoffrey Vos. (2018). A Method for Assessment of the Independence and Accountability of the Judiciary, *International Journal for Court Administration*, Vol-9(3), p-2 (Pp 1-21). (Accessed on 29 November 2021).
Retrieved from https://www.iacajournal.org.

VII. Case and Historical Methods: Judicial Issues in Hungary, Poland, and Myanmar

In the second Chapter, I apply the collective case study to learn about the judicial independence of Hungary, Poland, and Myanmar. The case study is one of the major research approaches in comparative political countries. In this approach, a group of similar cases is studied to examine a particular phenomenon. [19]

The cases between Hungary, Poland, and Myanmar are similar, and the countries violated the "irremovability of judges" principle, although the constitutions concerned promulgated judicial independence. The cases expressed that removing the constitutional courts' justices is the central question of breaking judicial independence than the other elements that I have written in the first Chapter. But the other relevant legal violations like human rights violations are also connected with the infringement of the independent judiciary. I did not intend to focus on human rights protection; an interdisciplinary approach became essential to apply for the third and fourth Chapters.

In the author's book, the case study approach is essential in theory development. I agree with the author and with the original theorist as well. The research answers and findings are also the outcomes of the comprehensive understanding of case studies of the chosen four countries combined with the legal theories and literature reviews.

In the second Chapter, the historical research methods approach is necessary to recall the judicial independence of the nominated countries in their legal changes and how the legal history is relevant to the cases of the violation of judicial emancipation. For this purpose, I used the critical approach.

The critical tradition of historical writing is one that views all social phenomena and historical events from the point of view of continually changing systems of social relationships and dependencies.[20]

Chapter II is all about the cases of Myanmar, Hungary, and Poland and their constitutional histories and legal background. The changing of politics and legal theories under the constitutions after the World War II, the establishment of constitutional courts and purposes, the number of judges, the selection of the constitutional courts' justices, their competencies and alternations by the statutes, and the selected cases led to the contravention of judicial freedom.

The table below summarizes the differences and similarities between Hungary, Poland, and Myanmar constitutional courts' compositions under the respective constitutional laws. The compositions between the Hungarian Constitutional Court, Polish Constitutional Tribunal, and Myanmar Constitutional Tribunal have the same legal phenomenon of selection of judges by the legislature with the President's approval are the same. However, the competencies of the Courts are different in general and complicated in specific matters like the constitutional or minimum human rights protections according to the review of the case.

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[19] David E. McNabb. (2010). Research methods for Political Science, 2nd Edition, p-237, M.E. Sharpe Inc, London, England. (Pp 1-425).

[20] David E. McNabb. (2010). Research Methods for Political Science, p-245.

Therefore, Myanmar and some European countries, Hungary, Poland, and Germany, seemed unable to compare because of economic, social, traditions, and legal culture differences. However, the selected core cases[21] in the second Chapter are the reasons to compare the different systems of countries. The case method has long been one of the most popular approaches followed in public administration research. Cases study can be written to serve as examples of what a public administrator ought not to do and what should be done. The core purpose is to suggest to public administrators what other administrators are doing.[22]

Hungarian and Polish cases were concerned with the discrimination on age in general. Hungary's case is different from the Polish one. But the ECJ judgments were different in the similar cases of Hungary and Poland. The ECJ referred only to the discrimination on age under Directive/2000/87, and the Court mentioned the disobedience of judicial independence for the Hungary case. The ECJ's legal reasoning was more detailed than in the Hungarian case in the Polish case. The ECJ explained the violation of the EU law, EU Charter of Fundamental Rights for effective legal protection and judicial independence in the Poland case. Poland violated the EU primary law, and Hungary infringed the secondary law by reviewing the ECJ's judgments. The EU started the rule of law procedure of Art 7 of the TFEU, fining Poland to pay a period penalty payment of 1 000 000 EUR per day. My opinion for the EC J's judgments in similar cases could not be the same because the Hungary government won the election with the majority vote and made the new Constitution. The Polish President did not win the majority votes, and he could not amend Constitution but enacted statutes that affected judicial independence. However, Hungary was also declared to pay a fine before the ECtHR according to Andra Baka v. Hungry. Hungary violated the right to hear and freedom of expression against individual judges. The EU integration is working and reliable in some cases, but it cannot run to the domestic legal affairs within a reasonable time.

Myanmar's case was different, and the responsibility also was on the Constitutional Court's judges. Because the impeachment proceeding is started based on the disqualification of judges by the legislature, it is the first Constitutional Tribunal and the first time of impeachment process. The Constitution expresses impeachment to the judges, and the legislature consumes it. The legislature should have thought of the other possible way to avoid the conflicts, and it can be said that the cooperation of powers like Germany. But only collaboration without giving the practical functions to the Court cannot work and sufficient for the public trust. Cooperation, vetting the functional judiciary abilities of the Constitutional Courts, whether transitional period or not, and accepting the Courts' decisions as final and conclusive according to the constitutions will be equibalance to establish political and judicial independence.

[21] (1) *Pyithu Hluttaw v. the members of the Constitutional Court of the Union, (2012) Reference 1:1-23, (2) European Commission v. Hungary* C-286/12, *(3) European Commission v. Republic of Poland C-791/19. (4) Baka v. Hungary, no.20261/12, SS 17-23.*

[22] David E. McNabb. (2010). Research Methods for Political Science, p-248-249.

Summary of the provisional independence of the Constitutional Courts of Hungary, Poland, and Myanmar

	Hungary	Poland	Myanmar
Regional Integration	EU Member State	EU Member State	ASEAN Member
Legal System	Civil Law	Civil Law	Common Law
Composition of Constitutional Court/Tribunals	15	15	9
Terms of Office of the Judges	12	9	5
Nomination	Legislature and Executive	Legislature and Executive	Legislature and Executive
Human Right Protection	Domestic and European Union Citizenship rights	Domestic and European Union Citizenship rights	Non- competency
Interpretation	Will of the Legislature	Will of the Legislature	Will of the Legislature

VIII. Interdisciplinary and Comparative Law:

German Basic Law and its Guardian: Can the protection of human rights by the Federal Constitutional Court contribute to the development of the EU legal system?

Part I and II of Chapter III are the composition of German Federal Constitutional Court (hereinafter: FCC) and the Federal Constitutional Court's competencies under the Basic Law and the Act on the FCC. I chose to study the German legal system because of the FCC's significance and to learn how it is significant or how it carried on the judicial problems with the other branches. It can be helpful for Myanmar and some other countries as well. The FCC is well-known, and I know about it through the literature. The composition of the FCC is similar to that of Hungary and Poland. It is not different from Myanmar as well. Findings after Part I, the selection of the FCC's judges is not significant in general. It also deviated from the international standard of judicial independence in forming courts.

Nonetheless, Germany practices democracy, federal and social policies. So, German's reason for not following the international norm for selecting the FCC's judges is because of federalism. Bundesrat chooses half of the FCC's judges as a legislative organ, but it represents federalism. And Bundestag selects another half, and the executive approves their selection. There is no judicial council to consult with the legislature in the appointment process. They do not have cases for the removal of judges so far, so the tenure of judges is stable. The budget is also submitted separately by its own body.

All are based on the qualitative research methodology. Comparative law is one of the most fruitful fields for experimenting with interdisciplinary research involving other sciences. It is no surprise that comparative law is interdisciplinary by its very nature.[23] The dissertation found that only competencies of the FCC are brilliant to support judicial liberty. The primary competence of the FCC is the adequate protection of human rights. It is connected to society, and the scope becomes broader. Therefore, the interdisciplinary approach is relevant in the dissertation besides the comparative methods, and case studies approach with historical analysis and the other minor strategies.

German's way of protecting human rights can be connected to its history of human rights infringements. But, nowadays, the Federal Constitutional Court is famous for its jurisdiction, adequate human rights protection, and implementation of democracy.

Hungary, Poland, and Germany are the Member States of the European Union (EU), and they have the responsibility to follow the EU Treaty and values. Art 2 of the Treaty on European Union (TEU) is the fundamental values of the EU's primary and secondary law. The Union is founded on the value of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of a person belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.[24] It is like a principle of *jus cogen*, and violated the Member States can be brought a suit before the European Court of Justice by the European Commission.

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[23] Note 22, Girgia Guerra. (2018). An Interdisciplinary Approach for Comparative Lawyers: Insight from the Fast-Moving Field of Law and Technology, *German Law Journal*, Vol 19(03), p-585, Pp (579-612). (Accessed on 21 May 2022). Retrieved from https://www.cambridge.org/core/service/aop-cambridge-core/content/view/

[24] Art 2, TEU, 1992.

In my opinion, Treaty on European Union is the law to obey for the Member States, and Treaty on the European Union is the procedural law to conduct when the law is disobeyed. From Art 1 to 19 of German Basic Law is the fundamental rights and all of them cannot be altered by the majority votes. Besides, Art 20 is the basic principle in interpreting the Basic Law. The most important basic right is human dignity, and it cannot be violable.[25] The leading cases of the FCC are cited with its legal reasoning. The conflicts between the ECJ and the FCC are also related to human rights violation under the German Basic Law. In the PSPP case, the Commission did not continue to bring Germany before the ECJ, although Germany was accused of breaching the primacy of the EU law principle. It seems that the principle is supreme when a Member State's authority violates the common values of the EU. Otherwise, the EU will not define that supremacy principle because the primary purpose of founding the EU is to keep the peace and tranquility in the region. The Member States also must promote the role of the EU as the EU itself is just an organization, and the Member States are the founders. Thus, the FCC's legal notions in the constitutional adjudication will be respectable. Legal principles such as human dignity, proportionality, implementation of democracy by the protection of human rights, and the leading case of the FCC are the contribution to the EU judicial system. It means that the legal certainty of Germany is higher ranked.

Nevertheless, the German legal system is also not constituent with the international standards of selecting judges. The significant thing is that the protection of human rights effectively and the absolute interpretation power is vested with the FCC. There is still no case for the infringement of judicial independence: removing of justices. It can be concluded that Germany practices cooperation of powers among the governmental organs instead of separation of powers. It can be strong support for the political reconciliation to establish a stable judiciary and independent judiciary. According to the cooperation of powers, Bundestag represents democracy, and Bundesrat stands for federalism. But to be a democracy, federal and social State, the FCC is acting as a legal representative for society.

Conclusion

I have found the following important points after studying constitutionalism, especially in the EU. First, judicial independence is one of the guarantees given by the Constitution.

- The judiciary's role is weak than the legislature and executive in the domestic, regional, and international legal theories and practice.
- Judicial independence is vital for the promotion of democracy and human rights.
- Independence of the Judiciary is related to Constitutional problems and political issues.
- Sometimes, that linkage between political issues and legal inefficiency can cause constitutional crises between the legislature, executive, and judiciary.

[25] Art 1, the Basic Law, 1949.

When I studied judicial independence in Hungary, I focused on the functions of the Constitutional Court of Hungary, and I had to learn the EU law and values. As Hungary became a member of the EU in 2004, I learned how Hungary had tried to become a democratic country and implement a democratic system.

After attending the national and international conferences that could make my dissertation developed, I understand that

- The advantages of regional integration between the EU and the Member States.
- The EU law has a legally binding force on the Member States.
- The EU standards of judicial independence are based on international standards.
- Obligatory maintenance of the EU law and values in the Member States
- Essential Functions of Hungary Constitutional Court in Hungary
- The Polish constitutional crisis and the progress of regional integration.
- The broad EU citizen rights that are vested to the Member States

In conclusion, the judicial system of Hungary under the Constitution 2011 still needs to be independent under theories and in practice. Under the integration theory, Member States have to share their competencies with the EU, and their citizens can enjoy both the fundamental rights and the rights that the EU law gives them. Therefore, the ones that had violated their fundamental rights in their countries and when their Constitutional Courts refuse the right to hear, they can claim damages of their violated rights to the European Court of Human Rights. And then, the European Commission can allege the State that did not follow the EU law to the Court of Justice under the integration theory. It is remarkable machinery except for the time before the ECtHR and ECJ.

The European tradition of Constitutional judiciary developed chiefly after the Second World War, as a natural reaction against the brutal trampling by Nazi and fascist dictatorships, upon the system of values and democratic principles.

After 1930, the Kelsenian Court model and the Constitutional Court system were exercised in Germany, Italy, Spain, Portugal, Middle European countries, and others.

Therefore, the establishment of the Constitutional Courts in Europe aims to promote democracy. Because democracy can support

(1) the mutual respect between the government and the governed,

(2) it can make sure the principle of the separation of powers among government organizations,

(3) it can grow up human rights,

(4) it can create peace and security for a State and

Finally, it can guarantee the judiciary's independence which is essential to implement the previous facts mentioned from (1) to (4). The important thing is that democracy should be stable. So, the interconnection between the independence of the judiciary and the separation of powers is much more linked with a stable democracy. The norms of judicial independence in Europe can be checked by learning the practical uses of the decisions and judgments decided by a Constitutional Court for the public in a European country and the effective influence between the legislature, executive, and judiciary of it.

In general, the principle of the separation of powers is exercising as vertical and horizontal based on the requirements of the regions. The working vertical separation of powers can be learned in Germany and its Constitutional Law. On the other hand, the United States of America is popular with using the horizontal separation of powers. However, these types of separation of powers can be mixed in practice like the common law and civil law systems.

"Results and Findings"

In my research, I presented some judicial problems in Hungary, Poland, and Myanmar. Coincidently, the issues regarding judicial independence and constitutional guarantees according to their constitutional laws were similar. As I mentioned in the second Chapter, the legal systems are different between Hungary, Poland, and Myanmar. However, similar conflicts among the governmental organizations arose when there was no legal certainty among them in the initiative for the public good. Therefore, the responsibility to abstain from the frictions is on all branches, especially the legislature and executive, to raise the judiciary's role. The courts and judges should be independent due to the international and national laws. There are several criteria to keep the judicial branch independent. But dominance of the rule of law and mutual respect between the legislature, executive and judiciary are much more essential.

In Europe, a unique and isolated court is created to implement the independent and impartial Tribunal. The necessary guarantees according to legal norms for the establishment of an independent constitutional court or Tribunal are the judges' appointment proceeding, their term of office, budget, and autonomy. However, the research on judicial independence between Hungary, Poland, and Myanmar shows that the terms of office of the judges are more vulnerable than the other norms. It can be a consequence of the appointment process deviated recommended in the international standards. But some democratic countries like the United States and Germany in Europe have no legal provisions in their constitutional laws to allow the institutional freedom to appoint judges for the highest courts. In the United States, the President shall appoint judges of the Supreme Court with the consent and advice of the Senate.[26] In Germany, half the judges of the FCC are set by the Bundestag and half by the Bundesrat.[27] On the other hand, the principle of "irremovability of judges" becomes a possible solution to secure the legal tenure of constitutional courts' judges. In this case, several constitutions expressly guarantee that judges should be subject only to the constitutions and law. It is also not proper solution for the judges and their independence according to the leading cases in Myanmar, Hungary, and Poland.

In Europe, modes of appointment vary significantly according to different countries and their legal system. Further, they can differ within the same legal system according to the types of judges to be appointed.[28] The selection and career of judges in the light of European standards should be based on qualifications, integrity, ability, and sufficiency. Even if the judicial Commission makes the proposals, parliamentary elections are discretionary. Therefore, political considerations may prevail over objective criteria. The conducting of judicial appointments by the Parliament may result in the politicization of judicial appointments.[29]

The UN's Basic Principle on the Independence of the Judiciary mentions only briefly and does not say in detail about the liberty of judicial appointments like any other international legal document.[30] The IBA standards suggested in a specific way that "the judicial appointment by the participation of the legislature and executive is not consistent with the judicial independence." There is an exception anyway that the appointment by the non-judicial body in countries where judicial appointments carried out satisfactorily will not be considered

[26] Art 2, Sec 2, Constitution of the United States, 1787.
[27] Art 94(1), the Basic Law, 1949.
[28] Para 7, Venice Commission on Judicial Appointments, Opinion No 403/2006. (CDL-AD (2007) 028).
[29] Para 10, Venice Commission on Judicial Appointments, Opinion No 403/2006. (CDL-AD (2007) 028).
[30] Para 10, the Basic Principles expresses that “Any method of judicial selection shall safeguard against judicial appointments for improper motives”.

inconsistent with judicial independence.[31] It is a strange norm of exception. It can be against the uniform application of international law in all the countries worldwide. The world's powerful countries like the US and Germany can have those exemptions even if their appointment operations are not compatible with judicial independence. They are democratic states, and the President in the US and the Parliament in Germany conduct their highest courts' allocations. They can be members of the drafters of that IBA minimum standard on Judicial Independence, and it seems to be inequality before the law. It is similar to the International Law's weak points and difficulty adjusting the differences among the countries based on the economy, culture, traditions, and politics.

Impeachment proceedings on judges are the exact mechanism in most countries, and the legislative branches can make it on the grounds of judges' disqualifications prescribed by the constitutions and statutes. However, the legal developed countries are trying to avoid it to establish an independent judiciary.

The guarantee for the term of office of judges is to appoint for life first. Secondly, they should serve their courts until their mandatory tenure provided by laws. IBA standards mention that the power of removal of a judge should preferably be vested in a judicial tribunal. The legislative may be vested with the ability to remove judges with the recommendation of a judicial commission.[32] In Hungary, Poland, and Myanmar, judges may be removed by the impeachment process under the Constitution like Myanmar case, and enacting law can also remove judges before their term of office due to the cases in Hungary and Poland. In Hungary, judges were removed by the law and its retroactive effect.[33] In addition, several judges and law officers were removed from their serving offices by law on the ground of the reorganization of courts. As a result, several judges could not get back their positions. Then, we may conclude that there is not enough for judges to be subject only to the law when the law does not have certainty for the public benefits but the private good violating the fundamental rights. Regarding this, the IBA already suggested that "legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding offices when passing the legislation unless the changes improve the terms of service. And, in

[31] Para 3, Ibid.
[32] Para 4 (b/c), IBA Minimum Standards of Judicial Independence, 1982.
[33] *Baka v. Hungary 20261/12.*

case of reform of courts by law shall not be affected to the judges serving in these courts, except for their transfer to another court of the same status.[34]

Therefore, according to the cases in Hungary, the legislature can infringe the fundamental rights and individuals independent of judges. In this case, the legal saying is that "judges shall subject only to the law to secure judicial independence" would be misused by the political organizations when they do not respect the principle of the rule of law. According to the EU objective, the rule of law is foundational for all other legal values and principles. Otherwise, the rule of law is a vital policy to cultivate democracy, human rights protections, and political stability. The remarks on the human rights protections in German drawing conclusions relied on the case study. Germany implements democracy through the protection of human rights. The FCC always declares that the ECJ's decisions are not met with the BL pointing out the violation of human rights. Germany had an unforgotten history of the severe violation of human rights. It still becomes new whenever we hear about human rights violations in a country. Thus, Germany safeguards its citizens' rights effectively within the constitutional framework by vesting the effective powers with the FCC. The legislature and executive branches also play an important role by accepting the binding force of the FCC's judgments. Legal finding force here is crucial based on the Myanmar case, as the Tribunal's resolution was not final and conclusive due to the legislature's impeachment. It is an essential thing to establish conciliation among governmental organs. Federalism in Germany supports democracy and separation of powers significantly: Germany follows John Locke's theory of cooperation of power. The latter are also comprehensively modified democracy.[35] The FCC keeps democracy sustainable, supporting the human rights and human dignity that society needs nowadays. Human dignity here is everything for society. Violating it can happen the bad things in our lives. Because human beings lead the world, they can do the bad and the good things for themselves and others. For example, the Germans had met the serious infringements of human rights in the Nazi regime in Germany. Therefore, nowadays, the Germans do not accept any kind of human rights violations due to the FCC's judgments. They respect their Constitution and their constitutional rights. They trust the FCC as it has effective functions supported by the BL theocratically and practically the legislature and executive branches. The FCC is also well-founded with the basic needs, competencies, and judges' extensible legal reasonings. People in Germany seem satisfied with the FCC's legal reasoning,

[34] Para 20 (a/b), IBA Minimum Standards of Judicial Independence, 1982.
[35] These are my opinion and thoughts based on the conflicts between the governmental institutions in Myanmar and its political instability since long time ago.

and they believe their domestic Court than the EU's Court.[36] The public's recognition and trust in the judiciary have appeared. Otherwise, the ECJ and the FCC might compete to protect human rights within their legal frameworks for the public interests and not for their sovereignty. Therefore, the cases mentioned in Chapter III proved that the "primacy of EU law" also has limitations. Thus, the courts and other governmental organizations should not forget their existence to help society and the people. Then, they should have expressed aims and objectives what they will carry out for the society and public good. These are the fundamental requirements for any group or cooperation. Those aims and objectives became values, norms, and standards for the institutions concerned. The highest governmental bodies must know that they have responsibilities for their positions. In a democratic country, the highest political authorities shall be punished with removal, retirement, or impeachment if they cannot properly perform their duties. Although we talk a lot about the rights and responsibilities, it is not enough without having a constitution as a piece of evidence. So, a constitution will show the rights and responsibilities of a government and the citizens.

A constitution, whether written or not, is essential for a state. The significant criteria and pointed-out sections are always inserted in a constitution. The values set up are important for successful existence and implementing the organization's objectives like the EU. Thus, it should be noted that an organization's aims, objectives, and values are necessary guidelines in theory. It is much more important to implement them properly in practice. In this way, several principles are coming out for the public needs, and some principles are not uniform either. In this case, policymakers should not be mediators concurrently. The third organization, which is not composed of a member from the principal's makers and supporters of it by approving: like the executive, is needed. The third organ should have sufficient efficiency to solve the problems that the principles makers could not do. Therefore, the judicial organizations to fill the gaps between the government and citizens are erected in different structures worldwide. These are the logical thinking about the origination and evolvement of judicial courts fundamentally. The issues nowadays come back again based on those situations. There is plenty of law, principles, policies, rules, and regulations internationally and nationally. There are several problems based on those laws in parallel. The theory and practice are not coincidental, and it cannot be possible to do it depending on time and situation. However, a judicial branch can be suitable to do about it. Judiciary becomes a guardian of the Constitution accordingly. It means that it can interpret the whole Constitution to solve

[36] See the landmark cases: *Solange I, II, III, the Lisbon Treaty Judgment*, and *the Maastricht Treaty*.

constitutional matters. Judges should also define the ways of interpreting the constitutions, including constitutional rights. All the judges and authorities always acknowledge this basic infrastructure and notions. The constitutional requirements such as democracy, human rights protection, the principle of the rule of law, federalism, decentralization, separation of powers, due process, and the independence of the judiciary have been connected and support each other. The practical conflicts are always concerned with the theoretical foundations. Integration or cooperation of the judges and courts domestically, regionally, and globally could be a solution to defend the dominance of the political branches on the autonomy of the judicial system by referring to the cases in Hungary, Poland and Myanmar. In exceptional circumstances, the judges were removed by law as the political victims in Hungary. They lost their jobs because of lack of due process even though the regional integration was working partly. Besides, the case[37] before the ECtHR took around two more years to get the final judgment. In addition, judges did not receive effective remedies. However, the financial penalty could not be enough to prevent a Member State's infringement of corporate law and judicial independence from getting the public trust. Finally, it can be said that "maintaining the judicial independence and basic principle of irremovability of judges" is the responsibility of the legislature and executive. Otherwise, the judiciary cannot be released from the dominance of the political institutions, according to the dissertation's findings.

[37] *Andra Baka v. Hungary (20261/12).*

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