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Constitutional identity and judicial independence

I. Introduction

This chapter focuses on constitutional identity and judicial independence.[1] First, we try to anchor the discourse on constitutional identity in the context of judicial independence. By doing so, we seek to link constitutional identity and national sovereignty in the context of judicial independence. Then we link the current debate on sovereignty and judicial independence with scholarly literature on autocratic populism.[2] We argue that judicial independence can only be understood in autocratic populist constitutionalism through a hyper concentration of power in the hands of the Executive and this serves as an anti-thesis to the doctrine of separation of powers in the Hegelian sense, so, it attributes to a vision on the unity of the state.[3]
We reason in this chapter that the current debate over judicial independence and sovereignty is a game-changing struggle over a three folded problem, or more precisely a three-dimensional question:

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[1] The author owns special thanks for comments and ideas for Associate Prof. Judit Tóth and Assistant Prof. Endre Orbán and Senior researcher, Boldizsár Szentgáli-Tóth.

[2] Tjitske Akkerman, 'Populism and Democracy: Challenge or Pathology?' (2003) 38 Acta Pol. 147–159.; Daniele Albertazzi and Duncan McDonnell, *Populists in Power* (Routledge 2015); Manuel Anselmi, *Populism: An Introduction* (Routledge 2018); Rogers Brubaker, 'Why populism?' (2017) 46 Theory and Society 357–385.; Jack Balkin, 'Constitutional Crisis and Constitutional Rot' in Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018) 16-17.; Paul Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism' (2013) 15 EuConst 519, 520, 542.; Paul Blokker, 'Constitutional Reform in Europe and Recourse to the People' in Xenophon Contiades and Alkmene Fotiadou (eds), *Participatory Constitutional Change. The People as Amenders of the Constitution* (Routledge 2016) 31-51.; Paul Blokker, 'EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 249-269.; Paul Blokker, 'Populism as a Constitutional Project' (2019) 17 ICON 536–553.; Alessandro Ferrari, Kaul Volker and David Rasumussen, 'The populist upsurge and the decline of diversity capital' (2018) 44 Philos. Soc. Crit. 345–504.; Martin Krygier, 'The Challenge of Institutionalisation: Post-Communist 'Transitions', Populism, and the Rule of Law' (2019) 15 EuConst 544–573.; Silvia Suteu, 'The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy Part of the Solution?' (2019) 15 EuConst 488–518.; Nicola Lacey, 'Populism and the Rule of Law' (2019) 15 Annu. Rev. L Soc. Sci. 79–96.; Steven Levitsky and Daneil Ziblatt, *How Democracies Die* (Crown 2018); Cas Mudde and Cristobal Rovira Kaltwasser, *Populism: A Very Short Introduction* (OUP 2017); Jan-Werner Müller, *What Is Populism?* (Univ. Pa. Press 2016); Laurent Pech and Kim Lane Scheppele 'Rule of Law Backsliding in the EU' (2017) 19 C.Y.E.L.S 3–47.; Kim Lane Scheppele, 'The opportunism of populists and the defense of constitutional liberalism' (2019) 20 GLJ 314.; Boldizsár Szentgáli-Tóth and Marco Antonio Simonelli, 'Populism and Liberal Constitutionalism: A Proposal to Define the Impact of Populism on the Constitutional Framework' (2023) 7 Pub. Gov. Admin. Fin. L Rev 139–155.; Nadia Urbinati, 'Populism and the Principle of Majority' in Rovira Kaltwasser, Paul A. Taggart, Paulina Ochoa Espejo and Pierre Ostiguy (eds), *The Oxford Handbook of Populism* (OUP 2017) 571–587.; Sean Leo Hanley and Milada Anna Vachudová, 'Understanding the illiberal turn: democratic backsliding in the Czech Republic' (2018) 34 E. Eur. Pol. 276.; Neil Walker, 'Populism and Constitutional Tensions', (2018) 17 I.J.C.L 515–535.; Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 Foreign Aff. 22–43.

[3] Kosař argues that Central European countries always gravitated towards a centralisation of power (often culminating in a cult of personality) and that basic imperatives of the principle of the separation of powers were sidelined even during the occasional democratic periods in these countries' histories. Moreover, the interwar regimes left little room for an active and pluralistic civil society and the communists openly suppressed it. These historical legacies of Central European countries, a strong push toward centralisation and a lack of a robust civic political and legal culture, have left a deep imprint on the Central European mindset. See David Kosař, Jiri Baroš and Pavel Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (2019) EuConst 459.

1) First, according to the sovereignty argument, the judiciary is within the domain of national legislations since states are not restricted in designing their own constitutional structure, including their judicial system. The claim is that an independent sovereign state must have its independent judiciary. So, the question accordingly is who has supremacy over national judiciary, the Union or member states?
1) The second question is who has (real) ownership within the doctrine of separation of powers in a sovereign member state over the judiciary, or more precisely, who has the supreme power over the judiciary?
2) and third, who has monopoly over the interpretation of the law. We further present that challenging the judicial monopoly for interpreting the law is indeed a very strong move forward in populist constitutionalism.
Our hypothesis is that those who have the monopoly over interpretation of the statutes (and interpretation over the text of the Constitution) together with those who have real ownership over the judiciary, in illiberal constitutionalism are the totalitarian-like states, in contrast to constitutional democracies where the concept of judicial supremacy and separation of powers prevails. We further argue that 'Europe provides a laboratory in which these arguments about the consequences of undercutting judicial independence can be empirically examined'.[4]
In our analysis we use mostly examples of Hungary and aim to conceptualize our findings in a higher abstract level. The ultimate goal of this chapter to provide a synthesized overview and a systematic analyzes of the theory and practice of judicial independence in the context of constitutional sovereignty.

II. The concept of constitutional identity in judicial context

We don't know what constitutional identity is. We know however that Member States call for constitutional identity when they want to deviate from the law of the European Union. Neither scholarship nor the jurisprudence of constitutional courts and the Court of the Union (CJEU) provided until today any reliable standard as to what constitutes an ultra vires argument from constitutional courts. One might conclude that there are 'risks associated with its use, including the fact that opponents of constitutional democracy can use it as a great weapon, as there is no objective standard in terms of its content'.[5]
The first academic works of this kind on constitutional identity appeared only at the turn of the millennium. With inherent inconsistence and uncertainty that has accompanied the whole identity discourse to this day.

[4] Pedro C. Magalhães and Nuno Garoupa, 'Populist governments, judicial independence, and public trust in the courts' (2023) 15 J.E.P.P. 427.
[5] Endre Orbán, 'Constitutional identity in the jurisprudence of the Court of Justice of the European Union' (2022) 2 Hun.J.Leg.Stud. 142.

Constitutional identity is a popular topic in modern public law,[6] although it is not always clear exactly what scholars mean by this concept.[7] Furthermore, the question of constitutional identity is closely related to the question of state identity. Indeed, the identity of constitutions can be understood in a broad framework. One would argue that the concept of constitutional identity can be defined as a set of key characteristics of a given constitution. On the other hand, the notion of constitutional identity can also mean a linkage between the constitution and the culture it represents. but the national, religious, ideological identity of the country[8].

The main reason for uncertainty stems from the vagueness of the basic assumptions. What is constitutional identity really about? Is it the identity of the people or the nation? Or is it the identity of a state as a public entity? Is it the identity of the constitution such as? It also remains an open question how to derive constitutional identity or identities: from the community from which constitution was drafted by? Or rather from those historical and political moments in which those constitutional documents were drafted or adopted? (Some call them constitutional moments)[9]. Or shall we focus only on the most essential elements of the current constitution in force when formulating constitutional identity? What does identity has to do with the idea of constitutional values?[10] These are open questions to be answered stemming from the ambiguity inherent in the concept being discussed.

American legal scholars, when formulating the concept of constitutional identity, tackled the characteristics of individual's identity and endeavored to apply them appropriately within the legal framework. This approach was pioneered by Gary J. Jacobson. According to Jacobson, the identity of a constitution derives from its text on the one hand and from the practice based on it on the other, and, thirdly, from the traditions of the past. This is ventured through a process of political, judicial and academic dialogue. Constitutional identity is thus is a dynamic concept,

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[6] Leonard F. M. Besselink, 'National and Constitutional Identity before and after Lisbon' (2010) 6 Utrecht LR 36–49.; Laurence Burgorgue-Larsen, 'The Constitutional Dialogue in Europe: A "political dialogue"' (2015) 21 Eur J Curr. L Stud.; Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 CMLR 1417–1454.; Laurence Bourgorgue-Larsen (ed), *L'identité constitutionnelle saisie par les juges en Europe* (Pedone 2011); Callies and van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism'* (n 23); Marta Cartabia, *'"Taking Dialogue Seriously" The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union'* (New York USL 2007); Monica Claes and Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) GLJ 917–970.; Monica Claes, 'National identity: Trump card or up for negotiation?' in Alejandro Saiz Arnaiz and Carina Alcoberro Llivina (eds), *National constitutional identity and European integration* (Intersentia 2013) 109–140.; Tímea Drinóczi, 'Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach' (2020) 21 GLJ 105–130.; Faraguna, 'Constitutional Identity in the EU – A Shield or a Sword?' (n 29) 1617–1640; Mattias Kumm and Victor Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union', (2005) 3 ICON 491, 492.; Mattias Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism', in Matej Avbelj and Jan Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 39–65, at 51.; Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) 1 EuConst 96–137.; Anna Śledzińska-Simon, 'Constitutional identity in 3D: A model of individual, relational, and collective self and its application in Poland" (2015) 1 ICON 124–155.; Julien Sterck, 'Sameness and Selfhood: The Efficiency of Constitutional Identities in EU Law' (2018) 24 ELJ 281–296.; Monika Polzin, 'Constitutional Identity as a Constructed Reality and a Restless Soul' (2017) 7 GLJ 1595–1616.; Orbán, 'Constitutional identity in the jurisprudence of the Court of Justice of the European Union' (n 5) 142–173; Várnay, 'The Hungarian sword of constitutional identity' (n 23).

[7] Michel Rosenfeld, Michel, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community. In Sajó, András – Uitz, Renáta (eds), *Constitutional Topography: Values and Constitutions. The Hague*, Eleven International Publishing; továbbá Jacobshon 2010.

[8] Michel Rosenfeld, *The Identity of the Constitutional Subject* (Routledge, 2010) 30–41.

[9] Bruce Ackerman, *We the People, Vol 1: Foundations*, Harvard University Press: 1991.

[10] Ivan Halasz, Az alkotmányos identitás fogalma és funkciója, in Fruzsina Gárdos-Orosz – Iván Halász (ed), *Bevezetés az Alkotmányjogba*, Dialog Campus 2019. 125-127.

which develops and is shaped through discourse.[11] And it is often based on a collective memory, which – by nature - is part of the cultural identity of a nation.[12]

The concept was further developed by Michel Rosenfeld. Rosenfeld put constitutional identity in a broader historical context. He argues that constitutional identity is in fact an integral interface between the constitution and those for whom it was constituted.[13] In his study, Michel Rosenfeld also draws on historical processes models of constitutional identity and, in this context, types of constitutionalism.[14]

Constitutional identity is currently one of the most frequently circulated concepts in European constitutional discourse. The initial boost to the debate was given by the adoption of the Lisbon Treaty in Article 4(2) of the Treaty on European Union (TEU). Accordingly, the Union shall respect member states' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions.[15]

It is clear from this wording that the whole provision is intended to protect the essential elements of the Member States with particular reference to their constitutional arrangements. The adoption of this provision of the TEU has thus further specified and politicized the academic debate on constitutional identity. Constitutional identity is not a dogmatic-theoretic question any more, rather it has become a technical point of reference, a toolbox in the hands of national constitutional courts and the supreme courts to object EU provisions. As a result, the whole issue was further shifted from its original scholarly dimension into a political dimension.

It was the Treaty of Lisbon itself, that opened the gate for a new framework of interpretation of margin of maneuver for member states and its institutions. Under the collective aspect of constitutional identity, member states determine little latitude to their national institutions within the European legal space. At this point, the inherent tension should be highlighted: member states can preserve their unique characters but should also conclude agreements in certain fields to establish unitary regulation within' the European Union.[16] Some argue that this leads to a cooperation and coordination, or with another word: to a dialogue between member states and the Union.[17] "European constitutional dialogue" is very fashionable[18] as a permanent

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[11] Gary Jeffrey Jacobsohn, *Constitutional identity*,. (HUP 2010). 133-135.

[12] Gary Jeffrey Jacobsohn, "Constitutional identity". The Review of Politics, Vol. 68. No. 3. 370, 373.

[13] Michel Rosenfeld, Constitutional identity, in Michel Rosenfeld and András Sajó (ed), *The Oxford Handbook of Comparative Constitutional Law*, Oxford Handbooks Online 2012.

[14] Some theoriest that support nationality (national identity) within the framework of liberal democratic offsets, including individual autonomy and social equality are: Kymlicka, Miller and Canovan. See: Will Kymlicka, *Multicultural Citizenship*. Oxford University Press, 1995; David Miller, *On Nationalism*, Oxford University Press, 1995.; Margaret Canovan, *Nationhood and Political Theory*. Edward Elgar, 1996.

[15] Article J. 4 of the Treaty on the European Union [1992] OJ C191/108. Article 4 (2) TEU does not use the term 'constitutional identity'. It operates simply with the requirement to respect 'national identity'. However, the latter concept is considered to be equivalent to the obligation to respect constitutional identity in the vast majority of the literature. See Denys Simon, 'L'identité constitutionnelle dans la jurisprudence de l'Union européenne' in Laurence Bourgorgue-Larsen (ed), *L'identité constitutionnelle saisie par les juges en Europe* (Pedonne 2011) 27.; Orbán, 'Constitutional identity in the jurisprudence of the Court of Justice of the European Union' (n 5) 145; Gerhard van der Schyff, 'The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU' (2012) 37 ELJ 563.

[16] Armin von Bogdandy, 'The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe' (2005) 2-3 ICON 295–315.

[17] See for example: Constitutional Dialogues Alec Stone Sweet, Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach*, 127–161.

[18] The notion became à la mode. See Ernő Várnay, 'The Hungarian sword of constitutional identity' (2022) 2 Hun.J.Leg.Stud. 80; Christian Callies and Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2019); Luke Dimitrios Spieker, Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi Between the Court of Justice and National Constitutional Courts' (2020) 2 CMLR 361–389.; Orbán, 'Constitutional identity in the jurisprudence of the Court of Justice of the European Union' (n 5) 143; Glenn Alexander Magee, *The Hegel Dictionary* (A & C Black 2010) 262.

reference in contemporary academic literature, it means something like an informal and formal communication between EU court and national courts as well as in between national courts, „in the application of comparative law methodology, also in the way courts are inspired by one another.[19]

So, the Lisbon Treaty of 2009 fertilized the discourse over constitutional identity. This Chapter addresses constitutional identity and judicial independence. We argue that, in the context of colliding competencies between EU courts and national (mostly constitutional courts) constitutional identity is an idea national courts rely on to prevail over EU jurisdiction.

We further argue that identity argument in the judicial context is a single edge sword from nation state to EU courts. According to Faraguna, constitutional identity protects nations states (and they serve as shield). If national courts use constitutional identity as a weapon against the values of the European Union, the identity argument serves as a sward against European constitutionalism.[20]

Scholarship distinguishes two or three periods in the practice and institutional development of constitutional identity.[21] They all argue however that the starting point is the 1970s, the fundamental rights reservation period, by Solange I[22] or (from EU perspective) Handelsgesellschaft decision[23] and the focal point is the ultra vires reservation invented in relation to the Maastricht Treaty.[24]

We don't share the notion that CJEU is of much concern to widen up the interpretation for national courts at the expenses of EU's self-restrain. Hungarian scholar László Blutman goes as far as coining the ultra vires period of national courts as a "rebellion (or revolution) of constitutional courts". He argues that as of 2012 a new chapter is opened with starting an era of active protection of sovereignty, followed by a number of case law until today.[25] (Czech Landtová decision - C-399/09, is the first in row).

III. Identity, Patriotism and Populism

It is paramount for states to ensure that citizens have some degree of identification with their own state: without a minimum measure of self-identification, it is implausible to govern elites and public policies. It is therefore inevitable given the functional imperatives of the modern state to develop a sense of cultural commonalities to be able to rule the elites to mobilize support behind ambitious regulatory programs.[26]

In the long term, a monopoly on violence alone (exercised by the state) is not enough to bring together a disunited nation. According to Habermas, the notion of 'the nation' transferred and framed the community's collective identity, vested with homogeneous national language and national culture. This helped to convert the populations into disciplined armies and efficient

[19] Tímea Drinóczi, 'Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System' (2017) 1 ICL Journal 146.

[20] Pietro Faraguna, 'Constitutional Identity in the EU – A Shield or a Sword?' (2017) GLJ 1617–1640; Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (n 16) 6–26.

[21] Orbán, 'Constitutional identity in the jurisprudence of the Court of Justice of the European Union' (n 5) 144.

[22] BVerfGE 37, 271, Solange I.

[23] Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125 (Case 11/70).

[24] Maastricht, BVerfG (Urteil vom 12. 10. 1993) 2 BvR 2134/92 und 2159/92; BVerfGE 89, 155.

[25] László Blutman, 'Az uniós jog elsőbbsége: alkotmánybíróságok lázadása [Primacy of EU law: the rebellion of constitutional courts]' (2022) 1 Közjogi Szemle 1.

[26] Ciaran Cronin, "Democracy and Collective Identity: In Defence of Constitutional Patriotism", European Journal of Philosophy. Volume11, Issue 1, April 2003. 19.

labour forces.[27] Not surprisingly, modern nation-states have usually attempted to transform into a political and moral community. In doing so, not only legal ties (formulated in citizenship) were enforced, but also cultural ties and educational linkage.[28] "This resulted in a double coding of citizenship – as a legal status defined by possession of equal rights, on the one hand, and as membership in an ethnoculturally defined community, on the other – and a corresponding split in the concept of sovereignty between internal sovereignty, defined in terms of citizen self-rule, and external sovereignty understood in terms of national self-assertion."[29]

In the case of nation states, it would be pointless to deny, national feeling has certainly played an important integrating role. It was often the notion led to the emergence of patriotism. Ethnicity as a source of national feelings attributed to the idea of national identity throughout the long 19th century up until the Second Word War. This theory laid the foundations for the later developed idea of constitutional patriotism emerging from the German scholarship after World War II. Political philosopher Dolf Sternberger, student and follower of Hannah Arendt, coined the theory of constitutional patriotism in the German context;[30] it was subsequently taken up by Jürgen Habermas,[31] and through his work became better known in the contemporary academic literature.[32]

Habermas was concerned whether particularistic identities are compatible with commitment to universal values such as freedom and equality.[33] Among prominent representatives of this view, Jürgen Habermas has proposed a comprehensive theory; he argued for a model based on loyalty to the principles and institutions of the constitution or more precisely, loyalty to constitutional democracy. Accordingly, in his theory, 'Verfassungspatriotismus' (constitutional patriotism) is a credible (and democratic) alternative to nationalism.

Habermas argues that collective identity can be framed by procedures. "Constitutional patriotism designates the idea that political attachment ought to center on the norms, the values, and, more indirectly, the procedures of a liberal democratic constitution"[34] For this end, democratic deliberation provides the interface in which citizens can constitute a normative collective identity through participation in a democratic 'constitutional project'.

Correspondingly, Habermas is advocating for a cosmopolitan approach of citizenship. A collective membership for all cultural and human rights. This ventures a collective identification for a postnational European Union.[35] The vision is based on a post-national and integrative European constitutional identity. by a European citizenship. A vision that promises a framework for the community of citizenry that can identify with European political values.

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[27] Jürgen Habermas, *The New Conservatism: Cultural Criticism and the Historians' Debate,* (ed. and trans. S. Weber Nicholsen). Cambridge, MIT Press, 1989. 253-254.

[28] Ivan Halasz, Az alkotmányos identitás fogalma és funkciója, in Fruzsina Gárdos-Orosz – Iván Halász (ed), *Bevezetés az Alkotmányjogba*, Dialog Campus 2019. 107.

[29] Ciaran Cronin, "Democracy and Collective Identity: In Defence of Constitutional Patriotism", European Journal of Philosophy. Volume11, Issue 1, April 2003. 3.

[30] Dolf Sternberger, Verfassungspatriotismus [Constitutional Patriotism], Frankfurter Allgemeine Zeitung, May 23, 1979.

[31] Jürgen Habermas, 'On Social Identity', in Telos, 19, 1974. 91–103; Jürgen Habermas, 'Moral Development and Ego Identity', in Habermas, Communication and the Evolution of Society (trans. T. McCarthy), Cambridge, Mass, MIT Press, 1979. 69–94.; Habermas, 'Citizenship and National Identity', 1996. 491–516. Jürgen Habermas, 'Popular Sovereignty as Procedure', in Habermas (1996), 463–90.

[32] Jan-Werner Müller - Kim Lane Scheppele. 'Constitutional patriotism: An introduction', I•CON, Volume 6, Number 1, 2008. 68.

[33] Ciaran Cronin, "Democracy and Collective Identity: In Defence of Constitutional Patriotism", European Journal of Philosophy. Volume11, Issue 1, April 2003. 1.

[34] Jan-Werner Müller - Kim Lane Scheppele. 'Constitutional patriotism: An introduction', I•CON, Volume 6, Number 1, 2008. 67.

[35] Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy*.MIT Press, 1996. 491 – 515, 566 – 567. Jürgen Habermas, *The Inclusion of the Other*. MIT Press, 1998. 105 – 154

According to Habermas, we need to define "what forms of patriotic attachment are still possible in pluralistic liberal democracies"[36], especially in the light of the most obvious contraversy of the idea of national identity: identity such as (individual or collective) is usually formed against something. Thus, the political conception of "the nation" is ethnocultural predetermined and can be easily appropriated to stigmatize non-nationals as inferiors, aliens or enemies.[37] "The ethnocultural component of nationalist conceptions of citizenship and sovereignty inspired or facilitated internal repression of 'aliens' and external aggression against 'enemies' in the name of national self-assertion"[38] According to Habermas, the history of German nationalism represents an extreme example of the "discriminatory potential of an ethnocultural definition of the nation."[39] As Hungarian scholar András Sajó in 1999 summarized it: 'the constitution offers identity, while identification is perhaps impossible. We are the people, but whom can we exclude from among us? And to voice the more dangerous possibility, when can *we* be excluded?'[40]

The emerge of populism as a counter argument to constitutional patriotism

Habermas's thesis is that pluralistic democracies should foster a 'postnational' form of identification because "nationalism is beset by an inherent ambivalence that fosters discrimination in the domestic sphere and chauvinistic self-assertion in international relations."[41]

As a contrast to a postnational universal notion enhanced by Habermas and his followers,[42] in the early 21st century, modern autocratic populism emerged, basically as an anti-thesis to universality and 'European constitutional project' as a backlash to European integration.

Paul Blokker denotes that populist constitutionalism rejects the existing legal-constitutional order to restore (an ideal of) a preceding, historical order.[43] The hierarchy of the legal constitutional order is not to be replaced by an inclusive, more universalistic order, but rather by a realization of the past, that is, of a traditional order, based on 'natural' hierarchies related to ethnicity, family, and tradition. [44] According to populists, constitutional patriotism and universality leads to the erosion of the historical nation. Consequently, populist are Eurosceptics.

Populism has different aspects. Hungarian scholar Gárdos-Orosz emphasizes that the reinterpretation of popular sovereignty, constitution making, and the creation of a constitutional identity are three elements to be measured in populist constitutional change.[45] Similarly Luigi

[36] Ciaran Cronin, "Democracy and Collective Identity: In Defence of Constitutional Patriotism", European Journal of Philosophy. Volume11, Issue 1, April 2003. 1.

[37] Ciaran Cronin, "Democracy and Collective Identity: In Defence of Constitutional Patriotism", European Journal of Philosophy. Volume11, Issue 1, April 2003. 3

[38] Ciaran Cronin, "Democracy and Collective Identity: In Defence of Constitutional Patriotism", European Journal of Philosophy. Volume11, Issue 1, April 2003. 3.

[39] Ciaran Cronin, "Democracy and Collective Identity: In Defence of Constitutional Patriotism", European Journal of Philosophy. Volume11, Issue 1, April 2003.Footnote 7. 21. See: Jürgen Habermas, *The New Conservatism: Cultural Criticism and the Historians' Debate,* (ed. and trans. S. Weber Nicholsen). Cambridge, MIT Press, 1989. 254-255.

[40] András Sajó, 'Limiting Government: An Introduction to Constitutionalism' (1999) CEU Press 6.

[41] Ciaran Cronin, "Democracy and Collective Identity: In Defence of Constitutional Patriotism", European Journal of Philosophy. Volume11, Issue 1, April 2003. 2.

[42] See for example: Attracta Ingram, A. (1996), "Constitutional Patriotism," in Philosophy and Social Criticism, 22/6. 1996. 1-18.; Barber, B. R. (1996), "Constitutional Faith", in J. Cohen (ed.) For Love of Country: Debating the Limits of Patriotism, Boston: Beacon Press. 1996. 30-37.; Andrew Mason, 'Political Community, Liberal-Nationalism, and the Ethics of Assimilation', in Ethics Volume 109/2, January, 1999. 261–86.

[43] Blokker, 'Populismas a Constitutional Project' (n 2) 5.

[44] Blokker, 'Populismas a Constitutional Project' (n 2) 5.

[45] Fruzsina Gárdos-Orosz, 'The reference to constitutional traditions in populist constitutionalism – The case of Hungary' (2020) 61 Hun.J.Leg.Stud. 23 25-31.

Correas underlines that populism can be seen as a constitutional theory which combines specific readings of the theories of constituent power, popular sovereignty and constitutional identity.[46] Paul Blokker claims the four aspects of popular sovereignty are in present: popular will, majoritarianism, legal resentmentation and constitutional instrumentalism.[47]

Hungarian scholar András Pap argues that constitutional identity under the current challenges of autocratic populism, means nothing more than the community takes priority over individuals, and state protection does not protect individual autonomy any more, rather it protects the autonomy of the community.[48] Best example is Hungarian Prime Minister's speech on the national holiday, 2024. Accordingly: 'it does not make us free if everyone does what they like. That is not enough for us. Freedom for us is to be able to build a homeland without a landlord over our heads. That is why it is important for none but us Hungarians to survive. We know, the Hungarian quality of existence is a special, unparalleled, high form of human life. The greatest thing that can happen to us is to be born Hungarian. In the Western world, it is also imagined that man just exists, in himself. It is entirely up to his free choice which state he becomes a citizen of, he decides whether he will be a boy or a girl, the family is what he invents for himself, and the homeland is just a field of action. We Hungarians do not believe in that. We know that if you stand alone in the world, you are not free, you are lonely.'[49]

The position of citizens who do not necessarily believe in the meaning of 'Hungarian' community as the basis of the membership in the political community is fragile.[50] Prime Minister of Hungary states: there are great opportunities ahead. We are facing a sovereign revolution in America and Europe. Accordingly, all can find their own identity, and we can open a new great era for the nations. Everyone except those who have broken their oath to serve the nation. Those who have betrayed their country, treasonously stabbed it in the back. No, they will not find their considerations.[51]

Political philosopher János Kis argues that the new populist Hungarian Fundamental Law of 2012 identifies the sovereign people as the totality of ethnic Hungarians, excluding Hungarian citizens of a non-Hungarian ethnicity and including individuals of Hungarian ethnicity not living under Hungarian law. It attributes to the legacy of the Hungarian Holy Crown, a symbol of the Greater Hungary that was ruled for a millennium by the ethnic Hungarian nobility.[52] The national Avowal of the Fundamental Law provides for example: 'we honor the achievements of our historic constitution and we honor the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State'.

Populists are not blind to equality. They link equality and national identity. However, populist understanding of identity is restrictive in the sense that it aims to narrow down identity to

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[46] Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (n 16) 6–26.

[47] Blokker, 'Populismas a Constitutional Project' (n 2) 2–9.

[48] András László Pap, 'Who Are 'We, the People?' Biases and Preferences in the Hungarian Fundamental Law' in Zoltán Csehi, Balázs Schanda and Pál Sonnevend (eds), *Viva vox iuris civilis: Studies in the honor of László Sólyom on the occasion of his 70th birthday* (Szent István Society 2015); Zsuzsanna Fejes, Fanni Mandák and Zoltán Szente (eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development, Discussing the New Fundamental Law of Hungary* (L'Harmattan 2015) 59–67.

[49] Prime Minister Viktor Orbán's speech on the 176th anniversary of the 1848-49 revolution and the fight for liberty (15 March 2024).

[50] András László Pap, 'Személyiségkép és alkotmányos identitás a Nemzeti Együttműködés Rendszerében (I. rész) [Images of Personality and Constitutional Identity in the System of National Cooperation (Part I)]' (2014) 4 Közjogi Szemle 1.

[51] Prime Minister Viktor Orbán's speech on the 176th anniversary of the 1848-49 revolution and the fight for liberty (15 March 2024).

[52] János Kis, 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law' in Gábor Attila Tóth (ed), *Constitution For a Disunited Nation, On Hungary's 2011 Fundamental Law*, CEU Press 2.

sameness and radicalize this notion.[53] Corrias further argues that the blueprint of political legitimacy in modernity is when the same people are both ruling and being ruled.[54] Here we need to realize however, that by no means the absolutization of Rousseau's *volonté general* – the legacy of the supreme political will – is alien to the European tradition. What is new here is that under populist constitutionalism it is not counterbalanced by an equally important tradition deriving primarily from the Anglo Saxon tradition of limited government, whereas the representative of the majority exercises self-restrain and ties its own hands. In the limited government tradition sometimes we use the Ulysses metaphor. As Norwegian social scientist Jon Elster points out in his famous metaphor, Ulysses ties himself to the mast to avoid to listen and to follow the seductive voice of the sirens, knowing that he will not be able to resist to their temptation.[55] The temptation in the metaphor is the unrestrained power of the state. Perhaps the most picturesque elaboration of the limited government doctrine is provided by Hungarian scholar, András Sajó in his classic book on Limiting Government.[56] He argues that the denial of absolute power and the desire for plurality are motivated by historical fears of tyranny.[57] András Sajó denotes: ''Power corrupts and absolute power corrupts absolutely,' so says Lord Acton. This is also true about our own power. 'People have one serious enemy, their own government,' as Saint-Just noted (..).''[58] Sajó argues that constitutionalism means the restriction of state power in the preservation of public peace.[59]

IV. Sovereignty and judicial independence

As we noted earlier, recent developments in Central Europe in the area of constitutional identity are associated with the idea of national sovereignty in which margin of movement for member states to shape their judiciary is much tolerated, if not triggered and in political philosophy this approach is related to Euroscepticism, some use the distinction between nation state and post-Westphalian states.[60]

The national visions of constitutional identity rely on the arguments of Sieyes,[61] Carl Schmidt[62] and Carl Bilfinger,[63] especially on the distinction between the constitution-making and the constitution-amending power, which envisage greater margin of movement for member states to shape their constitutional structure, including their judiciary. This line of argumentation is based on different assumptions, one standingly authoritative argument suggests that each national constitution includes some core principles, which should not be amended unless a new constitution would be enacted by the sovereign power. This model might serve as a coherent

[53] Luigi Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (2016) 12 EuConst 6–26.
[54] Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (n 16) 15.
[55] Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality: Revised Edition* (CUP 2013). Also cited by András Sajó, see Sajó, 'Limiting Government: An Introduction to Constitutionalism' (n 20) 7–8.
[56] Sajó, 'Limiting Government: An Introduction to Constitutionalism' (n 20) 9.
[57] Sajó argues that constitutionalism is the restriction of state power in the preservation of public peace. Although this definition is obviously inadequate, but the imperfection is comforting, says Sajó. See Sajó, 'Limiting Government: An Introduction to Constitutionalism' (n 20) 9.
[58] Sajó, 'Limiting Government: An Introduction to Constitutionalism' (n 20) 7.
[59] Sajó, 'Limiting Government: An Introduction to Constitutionalism' (n 20) 7.
[60] Orbán, 'Constitutional identity in the jurisprudence of the Court of Justice of the European Union' (n 5) 144.
[61] Emmanuel Joseph Sieyès, *The Third State* (1789).
[62] Carl Schmitt, *Verfassungslehre* (Duncker & Humblot, 2017) 55.
[63] Panu Minkkinen, 'Political constitutionalism versus political constitutional theory: Law, power, and politics' (2013) 3 ICON 560–610.

interpretative framework in the German constitutional surrounding,[64] where the eternity clause has been identified as the core provision of the German Basic Law as the source of constitutional identity,[65] however, for instance in Hungary, the Constitutional Court failed to identify these core principles.[66] Moreover, due to a supermajority of populists in national assemblies, just like in the case of Hungary, the stable two-third pro-governmental Parliament serves both as a constitution-making and constitution-amending power.

We argue in this chapter that as a matter of principle, the counterclaim for separation of powers is the supremacy of the state, "a unitary power", this unitary power is "the sole representative" of popular will. Therefore every illiberal,[67] autocratic[68] or hybrid state,[69] anti-constitutional populist state[70] as a matter of principle[71] refuses judicial independence. Corrias emphasizes that under this theory, the populist leaders are the sole representatives of state unity. In sum, the people is present as one, with one (common) interest, and one will. That is the true meaning to sovereignty.[72]

What makes this constitutional debate very special is that judicial independence is connected with idea of popular sovereignty. Contrary to this, separation of powers are 'part of Europe's DNA',[73] associated with the idea of judicial supremacy and rule of law.

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

[65] Armin von Bogdandy and Stephan Schill, 'Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag' (2010) 4 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 712.

[66] Petra Bárd, Nóra Chronowski and Zoltán Fleck, 'Use, misuse and abuse of constitutional identity in Europe', in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar, 2023) 619–620.

[67] Cesare Pinelli, 'Populism and Illiberal Democracies: The Case of Hungary', in Fejes, Mandák and Szente (eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development, Discussing the New Fundamental Law of Hungary* (n 12) 211–219.; Renáta Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making?' (2015) 13 ICON 279-300.; Tímea Drinóczi and Agnieszka Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland' (2019) 20 GLJ 1140–1166.; András László Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy* (Routledge 2018).

[68] Kim L. Scheppele, 'Autocratic Legalism' (2018) 85 UCLR 545–584. The term authoritarian is also used by: Mark Tushnet, 'Authoritarian Constitutionalism' (2015) Cornell L Rev 100 391–462; Helena Alviar Garcia and Günter Frankenberg, *Authoritarian Constitutionalism, Comparative Analysis and Critique* (Edward Elgar 2019).

[69] Gert Verschraegen, 'Hybrid Constitutionalism, Fundamental Rights and the State' (2011) 3 R&R 216–229.; Mátyás Bencze, "Judicial Populism and the Weberian Judge – The Strength of Judicial Resistance Against Governmental Influence in Hungary' (2021) GLJ 1282–1283; András Bozóki and Dániel Hegedűs, 'An externally constrained hybrid regime: Hungary in the European Union' (2018) 25 Democratization 1173.

[70] Martin Krygier, Adam Czarnota and Wojciech Sadurski (eds), *Anti-Constitutional Populism. Cambridge studies in law and society series* (CUP 2022).

[71] Some authors use the expression of authoritanism: Ozan O Varol, 'Stealth authoritarianism' (2015) 100 Iowa L.Rev. 1673–1742. An overview and roadmap of different concepts of autocratic populism, see: Fabio de Sa e Silva, 'Law and illiberalism: A sociolegal review and research road Map' (2022) 18 Ann.Rev.L.Soc.Sci 193–209.

[72] Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (n 16) 10.

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

On the other hand, in illiberal states,[74] the idea of "judicial independence" is affiliated with national sovereignty. We can argue that most contemporary constitutional scholars somehow bridge constitutional identity, sovereignty and illiberal constitutionalism.[75]
We can conclude in this subsection that an important aspect of constitutional identity is its pride manifestation of the sovereignty of the member states against the enlarging power of the Union and its jurisdiction. A visible example from Hungary is Article R (4) of the Fundamental Law, (Constitution) that provides: protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State. In order to protect constitutional identity, an independent organ established by a cardinal Act shall operate.

V. The jurisprudence of the Court of the European Union on judicial independence, sovereignty and constitutional identity

National identity in the judicial context came up first in the European context in the O'Brien case, where the request for preliminary ruling on behalf of a British court aimed at clarifying the applicability of EU law on judges employed in part-time.[76] The Latvian Government in its intervention held, that the application of EU law on the judicial system of a member state infringes the national identities of member states. The CJEU held that the competence of the member states to construct their own judiciary should not lead to the disregard of fundamental values derived from EU law. Therefore, member states could decide, whether judges fell under the category of employed persons, however, the potential exclusion of certain judges from this group should not be arbitrary.[77]
In the Torresi case, the CJEU once more rejected the argumentation of a member state based on national identity.[78] An Italian citizen who obtained his law degree in Spain intended to establish a law practice in Italy, in his country of original citizenship, however, the Italian Bar Association turned to the CJEU and argued, that the freedom to practice law does not mean to obtain a legal qualification in another member state and then immediately return to his country of origin to open a law firm. The CJEU did not agree with this approach and ruled that freedom of establishment of such a legal practice should not restricted by the constitutional structure of a member state.[79]
As elaborated in details bellow, the Hungarian constitutional framework was changed in 2011, including the system of administration of justice. The new Hungarian legislation lowered radically the age of retirement for judges from 70 to 62 years in a sudden procedure, without admission period. The CJEU held that the altering of the retirement age was discriminatory according to 2000/78/EC for equal treatment in employment and occupation, and as a consequence, the fundamental values of the EU legal order should prevail. However, in this

[74] In the academic literature some argue that we experience a so called illiberal constitutionalism. See for example Gábor Halmai, 'Illiberal Constitutionalism in East-Central Europe' in Antonina Bakardjieva Engelbrekt, Andreas Moberg and Joakim Nergelius (eds) *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Hart 2021) 51–74.; Martin Belov (ed), *Populist Constitutionalism and Illiberal Democracies: Between Constitutional Imagination, Normative Entrenchment and Political Reality* (Intersentia 2021)
[75] See also: Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power', (2005) 12 Constellations 223; Martin Loughlin, 'The concept of constituent power', (2013) 12 Eur.J.Pol. Theory; András Sajó, *Ruling By Cheating, Governance in Illiberal Democracy* (CUP 2021).
[76] Orbán, 'Constitutional identity in the jurisprudence of the Court of Justice of the European Union' (n 5) 142–173.
[77] CJEU, Case C-393/10 *Dermod Patrick O'Brien v Ministry of Justice*, ECLI:EU:C:2012:110.
[78] Orbán, 'Constitutional identity in the jurisprudence of the Court of Justice of the European Union' (n 5) 142–173.
[79] CJEU, Case C-58/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerat*, ECLI:EU:C:2014:2088.

case the judiciary was scrutinized, but Hungary did not rely on constitutional identity argument against the directive,[80] as we shall see in our chapter further elaborated, Hungary started to call for sovereignty arguments against changes of the judicial system only years later, after the Polish case of 2019.

In 2019 Hungary supported Poland in a case of compulsory retirement of judges (Case C-619/18). Here the Polish legislation lowered the retirement age limit from 71 to 65 years with a very short deadline, judges already attained this new limit could not continue their activity unless upon request the president of the Polish Republic. However, unfortunately, the decision of the President of the Republic was not subject to any objective criteria.[81] Poland with the support of Hungary argued in case C-619/18 that national rules on the judiciary system cannot be the object of a review of the CJEU (in the light of the second subparagraph of Article19(1) TEU and Article 47 of the Charter). Because the organization of the national justice system constitutes a competence reserved exclusively to the member states, therefore the EU cannot arrogate competences in that domain. Poland claimed that there is no link whatsoever with EU law and national legislations on the judiciary to call for or rely upon. Moreover, under TEU and the Charter of the EU,[82] general principles of EU law such as the principle of judicial independence, are applicable only in situations governed under EU law.

CJEU in its judgement, declared its supremacy and the infringement of Article 19 of TEU,[83] and stated that the principle of rule of law and effective judicial protection, provides the irremovebility of judges. The Court clearly declared that judicial independence is a value protected by Union law. The court emphasized, even if the organization of justice in the member states falls within the competence of those member states (as Hungary and Poland argues), the fact remains that, when exercising that competence, the member states are required to comply with their obligations deriving from EU law.[84] Moreover, the Court stated, requiring the member states to comply with those obligations, the European Union is not in any way claiming to exercise that competence itself nor is it, arrogating that competence to itself.

CJEU in its judgement C-619/18 interpreted the requirement of independence for the judiciary. The Court ruled that according to TEU it has two aspects.[85] The first aspect, requires that the court concerned exercises its 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 or influence.

The second aspect, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the judicial body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that judicial body to external

[80] CJEU, Case C-286/12 *European Commission v Hungary*, ECLI:EU:C:2012:687.

[81] Jakub Jaraczewski, 'Age is the limit? Background of the CJEU case C-619/18 Commission v Poland' (VerfBlog, 28 May 2019) <https://verfassungsblog.de/age-is-the-limit-background-of-the-cjeu-case-c-619-18-commission-v-poland> accessed 10 May 2022.

[82] TEU, Article 19(1), second subparagraph; Charter, Article 47.

[83] Infringement of TEU, Article 19(1), second subparagraph.

[84] See, by analogy, Case C-247/17 *Oikeusministerö v Denis Raugevicius*, EU:C:2018:898 [45]; Case C-202/18 Rimšēvičs and ECB v Latvia, C 202/18 and Case C-238/18, EU:C:2019:139 [57] and, in particular, from the second subparagraph of Article 19(1) TEU (see, to that effect, Case C-64/16 Associação Sindical dos Juízes Portugueses, EU:C:2018:117 [40]).

[85] Case C-64/16 Associação Sindical dos Juízes Portugueses, EU:C:2018:117 [44] and the case-law cited.

factors and its neutrality, particular, that freedom of the judges from all external intervention or pressure, which is essential.

The European Court held that the principle of irremovebility of judges requires, in particular, that judges may remain in post until they have reached the obligatory retirement age or until the expiry of their mandate. The Court noted that in the present case, it must be outlined that the Polish judicial reform raised reasonable concerns as regards compliance with the principle of the irremovebility of judges. Moreover, by granting the President of Poland discretion to extend the period of judicial activity of judges beyond their fixed retirement age, Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU.[86]

In a recent case of 2023 (Commission versus Poland, C-204/21) the Commission (supported by Belgium, Denmark, the Netherlands, Finland, Sweden,) initiated infringement procedure against Poland for failure to fulfil obligations under Article 258 TFEU. The Court declared the failure of Poland to fulfil obligations not only under Article 19(1) TEU but only Article 47 of the Charter of Fundamental Rights of the EU. We shall note, that previous decisions on judicial system in a member state did not rely on direct provisions of the Charter.[87]

The Court held inter alia, that the reorganization of court jurisdiction in a Member State comes, in principle, under the freedom of the Member States guaranteed by Article 4(2) TEU, that reorganization must not, in particular, undermine respect for the rule of law set out in Article 2 TEU and the requirements arising from the second subparagraph of Article 19(1) TEU, especially those relating to independence, impartiality and the previous establishing by law of the courts and tribunals called up to interpret and apply EU law.[88]

According CJEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, and therefore States enjoy a certain degree of discretion in implementing the principles of the rule of law. Whilst they have separate national identities, inherent in their fundamental constitutional and political structures, which the European Union respects, the Member States adhere to a concept of 'the rule of law' which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times and members of the European Union.[89]

Member States cannot be exempt from the obligation to comply with the requirements arising from the principle of rule of law, judicial independence and right to effective judicial protection. Therefore Article 4(2) TEU must be read taking into account the provisions, of the same rank, enshrined in Article 2 and the second subparagraph of Article 19(1) TEU.[90]

The Court held that, there is no ground for maintaining that the requirements arising, in the European Union, from respect for values and principles such as the rule of law, effective judicial protection and judicial independence, enshrined in Article 2 and the second subparagraph of Article 19(1) TEU, are capable of affecting the national identity of a Member State, within the meaning of Article 4(2) TEU.[91]

The obligations of member states to respect judicial independence and the competence of the EU to review national judicial reforms in this respect have been also confirmed in 2018 in a case concerning the salary of Portuguese judges. Although the temporal deduction of payments in the judiciary did not breach in itself EU law, the CJEU underlined its demand to review national judicial reforms to avoid serious undermining of common European values.[92]

[86] Case C-64/16 Associação Sindical dos Juízes Portugueses, EU:C:2018:117 [49] and the case-law cited.
[87] Case C-204/21 European Commission v Poland, ECLI:EU:C:2023:442.
[88] CJEU, Case C-204/21 *European Commission v Poland*, ECLI:EU:C:2023:442. [263].
[89] CJEU, Case C-204/21 *European Commission v Poland*, ECLI:EU:C:2023:442. [73].
[90] CJEU, Case C-204/21 *European Commission v Poland*, ECLI:EU:C:2023:442. [72].
[91] CJEU, Case C-204/21 *European Commission v Poland*, ECLI:EU:C:2023:442. [72].
[92] Case C64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117.

V.1. Populist legal scholarship against European Courts' arguments on judicial independence

Since the Hungarian judicial reform is inextricably linked to the jurisprudence of Chief Justice of the Hungarian Curia, Professor András Zs. Varga, it is worth elaborating on his article on the jurisprudence of CJEU, in particular,[93] on the Polish judgement C-619/18[94] and subsequently order of CJEU in Case C-791/19 R Commission v Poland where the CJEU in April 2020 inter alia suspended the Polish Disciplinary Chamber of the Supreme Court to hold cases.[95] The Court of Justice's order in Case C-791/19 R is unprecedented to the extent that the Court demanded the immediate suspension, until delivery of the final judgment, of the processing of all disciplinary cases.[96]

Professor Varga, points out that the CJEU's decision seems fine at first reading facially, but it is substantially wrong. There is no mandate for any EU institution – not even EU Court – to determine the judicial system of its member states. More worryingly, the ruling is a clear challenge to judicial independence, quite ironically in the name of judicial independence. According to Professor Varga the independence of the judiciary in Hungary is an achievement of our historical constitution which has become an identity element, and which would therefore be difficult to give up on, even if one wished to do so. However, the order of the Court of Justice of the European Union in the case of Poland, not only allows, but also expects, Member States, even traditional constitutional democracies such as Poland or Hungary, to surrender the independence of their courts. Chief Justice Varga is of the opinion, the Polish judgement served as pretext for the urgent Opinion of the Venice Commission[97] that reinforced the supremacy of EU law. It shows only that European Council and the Commission are unduly intertwined.[98] According to the sovereignty argument when the legislature passes a law that judges do not agree with, it is not a violation of judicial independence, but a manifestation of independence. As a hard limit, the judge cannot depart from the text of the legislation when interpreting it. Unlimited freedom of interpretation would unilaterally elevate the judiciary above the legislature. And therefore Chief justice concludes, the CJEU's position is a challenge against which it is urgent to rediscover and reassert the natural limits on judicial independence.[99]

VI. Sovereignty and judicial independence in Hungary: theory and practice

VI.1. Theory of sovereignty in the populist in Hungary

[93] András Varga Zs., 'Védi vagy kiüresíti a bírói függetlenséget az EU Bírósága? [Will the Court of Justice of the EU protect or undermine judicial independence?]' (Mandiner 2020) < https://mandiner.hu/kulfold/2020/04/vedi-vagy-kiuresiti-a-biroi-fuggetlenseget-az-eu-birosaga> accessed 10 May 2022; See also: Dobrotka Mayer Annamária, 'Interjú Varga Zs. Andrással, a Kúria elnökével [Interview with Andras Zs. Varga, Chief Justice of the Curia]'. (2021) 7 Fontes Iuris 5.

[94] CJEU, Joint Cases C-585/18, C-624/18 and C625/18 *A. K. and Others v. Sad Najwyzszy, CP v. Sad Najwyzszy and Do v. Sad Najwyzszy* ECLI:EU:C:2019:982.

[95] https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf

[96] Laurent Pech, 'Protecting Polish judges from Poland's Disciplinary "Star Chamber": Commission v. Poland (Interim proceedings)' (2021) 58 CMLR 137–162.

[97] CDL-PI(2020)002-e Poland - Urgent Joint Opinion on the amendments to the Law on organisation on the Common Courts, the Law on the Supreme Court and other Laws, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure.

[98] Varga Zs., 'Védi vagy kiüresíti a bírói függetlenséget az EU Bírósága? [Will the Court of Justice of the EU protect or undermine judicial independence?]' (n 54).

[99] Varga Zs., 'Védi vagy kiüresíti a bírói függetlenséget az EU Bírósága? [Will the Court of Justice of the EU protect or undermine judicial independence?]' (n 54).

The post-2010 system is based on a particular concept of sovereignty in Hungary, the notion that the government (through Parliament, but often bypassing it) is the only sovereign on the basis of legitimacy. We maintain, this concept of sovereignty challenges the courts' monopoly of interpretation of the law, so we argue, the 'real' game changing struggle is for the monopoly (or authority) over the interpretation of the law.

In this subsection we focus exclusively on the doctrinal-theoretical aspects of separation of powers, to provide an academic concept for the nature of judicial independence in an illiberal state. We take in our analysis Hungary only as an example.

Independence of the judiciary in Hungary turned into a sovereignty argument after the 2010's political changes which resulted in a supermajoritarian victory of the right wing in the Hungarian Parliament. This majority soon turned its political will into a *pouvoir constituant* – a constituent power[100] – for the framing and adoption of the new Hungarian Fundamental Law. As we noted earlier, an inevitable consequence of this reading of the doctrine of popular sovereignty is the open denial of the separation of powers and – to a large extent – denial of the independent judiciary, a doctrine previously prevailing for a hundred and fifty years of European history of law.

We can argue that under illiberal anti-constitutionalism,[101] the judiciary is overweighed by the sovereign will of the state.[102] According to political philosopher János Kis, the new Hungarian Constitution (Fundamental Law) of 2012, violates the principle of separation of powers by limiting the powers of the Constitutional Court, by increasing the number of constitutional justices and by allowing the present majority to appoint new justices without the concurrence of the opposition; by mandating early retirement to judges and granting the power to appoint their replacements in the hands of a politically appointed chief of the judiciary; and by allowing the chief prosecutor (elected by the populist majority parliament) to designate the proceeding court.[103]

VI.2. Practice of judicial independence and sovereignty in populist Hungary

[100] Christoph Möllers argues that the idea of a *pouvoir constituant* designates the subject of the founding act, the people, and it guarantees. Regimes under strong popular sovereignty usually have a revolutionary approach to constitution making process *vis-a-vis* the evolutionary approach favourized by some German tradition. Accordingly, the sovereignty approach is based on revolutionary tradition, and its claim is that their constitutiant and legislative decisions have a higher normativity. See C. Christoph Möllers, 'Pouvoir Constituant-Constitution-Constitutionalisation', in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart 2009) 169–170. and further. See also: Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (n 16) 14 and further.

[101] Hungarian prime minister, Mr. Orbán in 2014 stated that 'the new state we are building is an illiberal state, a non-liberal state', similarly to Singapore, China, India, Turkey, and Russia as countries of reference for Hungary. See Hungarian Spectrum, 'Viktor Orbán's speech at the XXV Bálványos Free Summer University and Youth Camp, July 26, 2014, Băile Tuşnad (Tusnádfürdő)', hungarianspectrum.wordpress.com (2014) <http://hungarianspectrum.wordpress.com/2014/07/31/viktor-orbans-speech-at-the-xxv-balvanyos-free-summer-university-and-youth-camp-july-26-2014-baile-tusnad-tusnadfurdo/> accessed 10 May 2022. The expression of anti-constitutionalism is coined by W. Sadurski. See Krygier, Czarnota and Sadurski (eds) *Anti-Constitutional Populism. Cambridge studies in law and society series* (n 70) 401–433.

[102] An account of populist/authoritarian or illiberal constitutionalism by Gárdos-Orosz, 'The reference to constitutional traditions in populist constitutionalism – The case of Hungary' (n 64) 1. See also: Anselmi, *Populism: An Introduction* (n 2); Walker, 'Populism and Constitutional Tensions' (n 2) 515; Théo Fournier, 'From Rhetoric to Action, a Constitutional Analysis of Populism' (2019) 20 GLJ 362–381.; Zoltán Szente, 'Populism and populist constitutionalism' in Fruzsina Gárdos-Orosz and Zoltán Szente (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (Routledge 2021); Kurt Weyland, 'Clarifying a Contested Concept: Populism in the Study of Latin American Politics' (2001) 34(1) Comp.Pol. 1–22.

[103] Kis, 'Introduction: From the 1989 Constitution to the 2011 Fundamental Law' (n 21) 1–2..

As early as in 2011 the Venice Commission signaled that the adoption of a new Constitution (Fundamental Law of Hungary, FL) represents a backsliding, a major step, which 'appears to be only the beginning of a longer process of establishment of a comprehensive and coherent new constitutional order. This implies adoption or amendment of numerous pieces of legislation, new institutional arrangements and other related measures.'[104] The Venice Commission was concerned if the processes based on the largest consensus possible within Hungarian society.[105] Similarly, Hungarian civil society representatives claimed in 2011[106] that the new Hungarian constitutional order regarding the judiciary can be identified by centralization and 'concentration of powers'.[107] Hungarian scholar, Mátyás Bencze also noted the 'Hungarian judiciary is highly centralized and judges are under administrative control'.[108] The new populist Fundamental Law was enacted in April, 2011. Not much later the same populist supermajority in the Parliament ratified the new legislations on the organization and administration of Hungarian court system and on the status and remuneration of judges[109] which generated salient international criticism for putting unprecedented super-powers the hands of the very few.[110]

As we have already underlined in this chapter our main claim is that the concept of judicial independence can only be understood in populist constitutionalism through the concentration of powers and the unity of the state. We claim that this designates the discourse within which judicial independence is (re)-interpreted. We further argue that under these circumstances the real question in stake is 1) who has (real) ownership over the judiciary, or more precisely, who has the supreme power over the judiciary? 2) and who has monopoly over the interpretation of the law. We further argue that questioning the judicial monopoly for interpreting the law is indeed a very strong statement of ours. This is a direct challenge against liberal constitutionalism.[111]

As for the latter argument (who has monopoly over the interpretation of the law), we argue that It is clearly indicated in Article 28 of the new Hungarian Constitution (Fundamental Law) that courts should interpret the law according to guidance laid down in the Constitution. And the Constitution is designed and drafted in accordance with the will of the Parliamentary supermajority. So, the Fundamental Law stipulates binding rules to the Judiciary how to

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

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

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

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

[108] Bencze, "Judicial Populism and the Weberian Judge – The Strength of Judicial Resistance Against Governmental Influence in Hungary' (n 69) 1297.

[109] Hungary, Act CLXI of 2011 on the Organisation and Administration of the Courts (hereinafter: Act CLXI); Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

[110] Magyar Helsinki Bizottság, 'A módosított bírósági törvények kritikája' *Helsinki.hu* (2012) <https://helsinki.hu/wp-content/uploads/MHB-TASZ-EKINT_Modos%C3%ADtott_birosagi_torvenyek_kritikaja_201209.pdf> accessed 10 May 2022.; Magyar Helsinki Bizottság, 'Assessment of the Amended Hungarian Laws on the Judiciary' Helsinki.hu (2012) <https://helsinki.hu/wp-content/uploads/HHC-HCLU-EKINT_Assessment_of_the_Amended_Hungarian_Laws_on_the_Judiciary_092012.pdf> accessed 10 May 2022

[111] So, for example, Barber in his influential book argues that the main aspect of the separation of powers is the requirement that the judiciary be independent of the executive branch. See Nicholas William Barber, *The Principles of Constitutionalism* (OUP 2018) 12.

interpret the law. This is a fairly new restricting approach given the Hungarian Constitution 1989-2011 did not have provisions on judicial interpretation leaving it to the Judicial Branch to decide how and when exercise their right to interpret legislations. Accordingly, Article 28 of the FL further provides that the 'the courts shall in principle interpret the laws in light of their purpose and in accordance with the Fundamental Law. Additionally, the Seventh Amendment to the Fundamental Law in 2018 further circumvented freedom of interpretation of the Judiciary by stating that in the course of legal interpretation, preambles of the legal norms and their explanatory memorandums shall be primarily taken into consideration.[112]

These deliberate restrictions on freedom of interpretation of the Judiciary can only be understood as a limitation of the scope of scrutiny of the courts to avoid the empowerment of the Judicial Branch which prevents them to fully exercise control over the sovereign power of the legislation and Government. In this context, the idea of an absolute Sovereign representing the highest will of the people is against the idea of judicial counterbalance.

Under the same account, one might underline the under-determined language of the Fundamental Law to describe the functioning and role of the judiciary: the lack of description on its structure and composition of the courts. Meanwhile the same restraint in the text cannot be traced in the retirement age of judges, which might be easily argued is unduly over articulated in the Constitution instead regulating these provisions in sub-constitutional level.

We argue, that this over regulation is a deliberate political interference with the integrity of the judiciary.[113] (Because as a result, the Fundamental Law dictates from now on the conditions under which judges are retired and new judges become eligible for the position instead concessing these decisions to judicial self-determination).[114]

We argue that in the struggle over the monopoly of the interpretation of the law between courts and law makers (often with the notion of *pouvoir constituant*) different peak point are traced inter alia, like curtailing the power of the courts, including the constitutional court; narrowing courts' scope of scrutiny; new procedures, new legal institutions can be implemented to expand the scope of the executive power at the expense of limiting judicial power. Or by rendering the judicial control mechanisms scrubbed (on the one hand), and by restricting the freedom of constitutional and legal interpretation on the other.

What remains constant in this conflict is that the courts are tied up gradually and their room for maneuver shrinks gradually until they are degraded to a de facto technical player (some would argue that courts become non playing characters) in the art of interpretation.

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[112] László Detre and Endre Orbán, 'The Main Dimensions of Constitutional Interpretation of Judicial Independence in Hungary' (2022) 19 Revista de derecho constitucional europeo 1.

[113] This provision of the Fundamental Law was adopted by Article 26.2 of the FL in 2011. Later this provision was reinforced by the Cardinal Law on Judiciary. The Cardinal Law however was put under constitutional scrutiny subsequently. In decision 33/2012 the Hungarian Constitutional Court declared the provisions of the retirement age unconstitutional. The Court argued that it can be deducted from the text of Constitution that an age limit is constitutional only if it means the rise and not arbitrary reduction of the age limit unless it is introduced gradually, over a sufficient transitional period, without prejudice to the principle of the immovability of the judge. Subsequently, Decision C-286/12 of the ECJ declared that Hungary has failed to fulfil its obligations under EU Law for establishing a general framework for equal treatment in employment for judges.

[114] Later (basically the original language of the Constitution) was repeated and reinforced by the Cardinal Law on Judiciary. This Cardinal Law however was put under constitutional scrutiny subsequently. In decision 33/2012 the Hungarian Constitutional Court declared the provisions of the retirement age unconstitutional in the sub-constitutional norm, but not in the Constitution. The Court argued that an age limit is constitutional only if it means the rise and not arbitrary reduction of the age limit unless it is introduced gradually, over a sufficient transitional period, without prejudice to the principle of the immovability of the judge. Subsequently, Decision C-286/12 of the ECJ declared that Hungary has failed to fulfil its obligations under EU Law for establishing a general framework for equal treatment in employment for judges. So, the retirement age in Hungary is unconstitutional on a subconstitutional level but still is in force in the provision of the FL.

Distinguished Czech legal scholar Zdeněk Kühn argues that non-liberal regimes are very skeptical towards the nature of interpretation of law, which—in their opinion—is nothing else than pure politics concealed behind a veil of legalistic jargon. Unfortunately, many court decisions prove non-liberal politicians right. Too often, the courts put up their integrity in their decisions.[115]

Regarding interpretation of the law, the Hungarian Constitutional court was re-shaped by the new Fundamental Law (New Constitution of Hungary, FL) in 2012. Accordingly, the Constitutional Court lost some of its important (some argue its main power) jurisdiction over the legislation of the Parliament and its mandate was shifted towards the control of the judicial branch. (A type of jurisdiction over the courts that the Constitutional Court in Hungary has never had before). And therefore, the competing competencies of the regular courts and the Constitutional court have resulted the erosion of domains of both branches (courts and Constitutional Court) as a mutually adverse solution.[116]

In 2019 the Constitutional Court was granted oversight over complains from government bodies.[117] Due to international criticism, these provisions were revoked in 2023.[118] These provisions hold the risk for government bodies to "complain" against regular court decisions at a politically appointed Constitutional Court, a way to circumvent rather than comply with those unfavorable court decisions. (as noted above Hungarian Constitutional Court has power to overrule regular court decisions). Thus, these provisions interfered with the original intent of constitutional complain to provide remedy against state actions in fundamental rights violations.

Regarding interpretation of the law, another controversial provision granted the right to the Prosecutor General to challenge the legality of references for preliminary ruling from proceeding judges to the CJEU. Accordingly, the preliminary ruling from a proceeding judge was overturned by the Hungarian Curia (Supreme Court), finding it illegal 'in the interests of legality' to refer a case to the European Court. the CJEU ruled that such decision by the Curia is contrary to EU law. EU law precludes national supreme courts to interfere with the legality of the lower courts when referring the cases directly to CJEU.[119] Although this case has never been referred as a constitutional identity case, in fact the merit of the case is based on a sovereignty argument,[120] which claims that the Hungarian Curia has a final say on referring a case to CJEU against a national judge. The referring court, sitting as a single-judge formation at the Central District Court in Budapest, on a criminal proceeding referred a case to CJEU. Among other things, the referring judge asked:

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

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

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[115] Zdeněk Kühn, 'The Judiciary in Illiberal States' (2021) GLJ 22 1245–1246.

[116] Zoltán Szente and Fruzsina Gárdos-Orosz, 'Juridical deference or political loyalty?' in Zoltán Szente and Fruzsina Gárdos-Orosz (eds), *New challenges to constitutional adjudication in Europe* (Routledge, 2018) 89–110.

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

[118] 2023 Rule of Law Report, European Rule of Law Mechanism.

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

[120] See Ernő Várnay and Mónika Papp, *Magyarázat az Európai Unió jogáról* (Wolters Kluwer 2023) 371.

If [Question 1] is answered in the negative, in that case can the suspended criminal proceedings be continued given that the preliminary ruling proceedings are pending?
2. Must the principle of judicial independence, established in the second subparagraph of Article 19(1) TEU, in Article 47 of the Charter and in the case-law of the Court of Justice, read in the light of Article 267 TFEU, be interpreted as meaning that that principle precludes disciplinary proceedings being brought against a judge for having made a request for a preliminary ruling?'

According to the opinion of advocate general Pikamäe, the Curia reviewed the lawfulness of the initial order for reference in the light of Hungarian national law. Thus, the judgement of the Curia seems to undermine the referring judge's right to refer questions to the Court for a preliminary ruling and therefore infringes Article 267 TFEU.[121] CJEU judgement further declared that Article 267 TFEU must be interpreted as precluding the supreme court of a member state from declaring, a preliminary ruling by a lower court unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute. According to the principle of the primacy of EU law, it is required that the lower court disregard such a decision of the national supreme court.[122]

In another account a case was brought to the ECHR in 2022 by a Judge from the metropolitan tribunal claiming that in an undue decision she was classified incompetent to her position as a judge and lost her job.[123] Applicant complained that there is no remedy against classifications of judges, therefore she could not appeal.[124] Accordingly, it can seriously undermine public confidence in the judiciary if neither the selection nor the dismissal of judges is based on foreseeable rules and cannot be challenged afterwards in a fair procedure.[125]

Freedom of interpretation for the preceding judge was further restricted in Hungary in 2020, by the introduction of the so-called "limited precedent system". (This also resulted a higher concentration of power in the hands of Chief Justice). Accordingly, each leading decision of the Curia (Supreme Court of Hungary) is legally binding to all lower courts.[126] Any deviation from the precedent must be justified by the lower courts and this justification can be overruled by the higher courts.[127]

VI. 3. Centralization of powers in the judicial branch without counterbalance

Considering the fact that the Chief Justice of the Curia holds key powers within the judiciary in most countries, including Hungary, both in the final adjudication of cases, in ensuring the uniformity of the jurisprudence of Hungarian courts and in the management of the apex courts,

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

[122] Case C-564/19. Section 85. Later on, the rule of law negotiations between the EU and Hungary, Hungary has adopted amendments to the law to withdraw the challenged provisions.

[123] Eszter Zalán, 'Hungarian judge claims she was pushed out for politician reasons', *Euobserver* (2021) <https://helsinki.hu/en/another-scandal-at-the-judiciary-no-effective-remedy-for-judges-dismissed-from-the-bench/> accessed on 10 May 2022.

[124] Eszter Zalán, 'Hungarian judge claims she was pushed out for politician reasons' (n 105).

[125] The applicant is represented by the Hungarian Helsinki Committee. Magyar Helsinki Bizottság, 'Újabb bírósági botrány: nincs hatékony jogorvoslati lehetőség kirúgott bíróknak' Helsinkifigyelő, 'Egy bírónő meghurcolása, avagy fenyegetés minden magyar bírónak' *Helsinki figyelő* (2021) <https://helsinkifigyelo.444.hu/2021/07/06/egy-birono-meghurcolasa-avagy-fenyegetes-minden-magyar-bironak> accessed on 10 May 2022.

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

[127] See Zoltán Szente, 'Hungary', in André Alen and Dvaid Haljan, *International Encyclopaedia of Laws: Constitutional Law* (Kluwer 2022). 209-210.

it goes without further explanation that when further concentration of power granted by law to the Chief Justice - such as the appointment of lower court judges, direct impact on the career path of judges, right to delegate cases and judges between different jurisdictions, direct interference with the composition of court panels – it will result a hyper power in the hand of (a politically appointed) head of the Branch.[128]

The undue and premature termination of the mandate of András Baka, former President of the Supreme Court, was the first step in the series of systemic attacks against the integrity of the judiciary. President of the Court lost his mandate in mid-term due to the provisions of the new Constitution and its reinforcing cardinal laws. This resulted in ECHR decision 20261/12 against Hungary, declaring the termination of the applicants' mandates as President (Mr. Baka) and Vice-President (Mr. Erményi)[129] unlawful. (The expression 'undue' and 'premature' is in the language of the ECHR decision.)

Next, the political appointment of the new Chief Justice (Mr. András Zs. Varga) of the Curia (Curia is the renamed former Hungarian Supreme Court) was a further step[130] in a 'far-reaching reform of the judicial system, initiated by the governing majority in 2010'.[131] The main effect – if not the main goal – of these measures has been to hamper the constitutionally protected principle of judicial independence in Hungary. As a result, the independence of justice system and institutional checks and balances under separation of powers, are now under threat. – As noted by several international and regional bodies, such as the Human Rights Committee, the Venice Commission, the CoE Commissioner for Human Rights and the European Commission.[132] The Chief justices of Curia was appointed in spite of the manifest objection of the competent judicial body (NJO) to evaluate the application. Chief Justice was elected in 2021 after a series of legislative enactments paving the path to make his appointment legally possible.

As noted before in the Chapter, criticism also arose from the under-determined language of the Fundamental Law of 2012, to describe the functioning and role of the judiciary, including its structure and composition, basically providing a carte blanch for the Legislator. We denoted above in this Chapter that the functioning of courts were arbitrary under-determined in the FL while the constitutionally redesigned retirement age of judges were arbitrary over represented in the text resulting a counter example for legal certainty.

The concentration of power as a counterpoint of separations of powers is particularly tactile in the academic scholarship of the Chief Justice. Prof. Varga Zs. head of department of administrative law at the Catholic University, Budapest,[133] has elaborated on his concept on the rule of law quite articulately.

Prof. Varga notes that the separation of powers cannot mean that, in the name of rule of law, judicial bodies acquire for themselves the final, unconstrained right to decide. It is the task of constitutional courts to defend so-called "normative justice", and nothing more.[134] Chief Justice refers to the work of Canadian Professor Ivan Martin who, in his book. designates courts as "The Most Dangerous Branch"[135] Chief justice relies on Martin when he adds: we once thought that the judiciary are the least dangerous branch of power,[136] we have now had to admit that

[128] Amnesty International, Nem vészel, csak átalakul – A kormány tovább korlátozza a bíróságok függetlenségét, amnesty.hu (2020) <https://www.amnesty.hu/wp-content/uploads/2020/10/ELEMZE%CC%81S.pdf> accessed on 10 May 2022.

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

[130] Szente, 'Hungary' (n 109) 209.

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

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

[133] Pázmány Péter Catholic University, Budapest.

[134] András Zs. Varga, *From Ideal to Idol?* (Dialóg Campus 2019) 22-24.

[135] Ivan Martin, *The Most Dangerous Branch* (McGill-Queen's UP 2003).

[136] Ivan Martin borrows his title from American scholar Alexander M. Bickel: The Least Dangerous Branch. Bickel's book was written as a defence of judicial review and in the wake of what he called the School

they are the most dangerous. And why? Because it has no limits.[137] Prof. Varga highlights that modern constitutional democracies are heading towards an arbitrary system of rule of law and judicial supremacy under the unlimited power of constitutional courts.[138]

According to the theory of Chief Justice, constitutional courts and their highly powerful international counterparts, are essentially institutions with unlimited power, whatever they decide is the only rule of law, and there is no further from there. In contemporary, legal scholarship the concept of rule of law serves as a magic wand of the constitutional courts to justify their arbitrary decisions.[139]

Professor Varga notes: 'EU-interpretation of the rule of law, despite the endeavour to provide legal security, yields ground for arbitrary interpretation enforceable by judicial means. Albeit, in order to recognize that arbitrariness has become tyrannical, moreover, totalitarian'.[140]

The situation is less damaging in Hungary, because if ordinary courts decide in one way, it can be corrected by amending the law, and even the Constitution.[141] 'In international terms, this is more dangerous, since is it possible to amend the European Convention on Human Rights because someone does not like the Strasbourg ruling? And many people do not like that they cannot.'[142] – the European Union is a Union ruled by courts.[143] Chief justice denotes: Today's rule of law state has no natural constraints: today's rule of law is a judicial rule of law. The judicial rule of law is nothing but a state of totalitarianism. There is a reason to ask whether the rule of law by the judiciary has an anti-serum or counter-agent?[144]

So, Chief Justice goes on: there is a serious question in other countries as to what is the counterweight, what is the constraint or the limitation on the courts? He concludes that giving too much power to courts is like providing a *carte blanch*, a blank mandate to act arbitrary. It is like living under the tyranny of a monarch, because the judiciary's decision is just as arbitrary as the decision of the absolute monarch, only it is not made by the crown prince, but by the crown body.[145]

With regards to the scholarship of Chief Justice Varga, in the centre of his argument is how to circumscribe the unlimited power of courts? His central claim is that the absolute power of courts should be delimited. (This is a kind of reverse idea of limited government and separation of powers where judiciary and not Executive is restricted in order to maintain constitutional order.)[146] According to him, against the courts the 'counterweight cannot be solely the executive power', however that is a good starting point.[147] Eventually, only the legislative power, as the bearer of legitimacy, and the executive power, as the acting branch of the state, can serve together as a counterbalance against courts.[148] He further argues that 'against the tyranny of the rule of law' another counter serum is the Fundamental Law of Hungary itself and its

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Desegregation Decisions. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, YUP 1986).

[137] Martin specifically implies that the Canadian Supreme Court is the most dangerous branch. See Ivan Martin, *The Most Dangerous Branch* (McGill-Queen's UP 2003) 7. See also: Aranka Szávuly, 'Az életben a legtöbb döntést nem én hoztam meg' (2016) <https://jogaszvilag.hu/szakma/az-eletben-a-legtobb-dontest-nem-en-hoztam-meg/> accessed 10 May 2022.

[138] Varga, *From Ideal to Idol?* (n 116) 8–10, 101–102.

[139] Varga, *From Ideal to Idol?* (n 116) 14.

[140] Varga, From Ideal to Idol? (n 116) 19.

[141] Aranka Szávuly, 'Az életben a legtöbb döntést nem én hoztam meg' (n 119).

[142] Aranka Szávuly, 'Az életben a legtöbb döntést nem én hoztam meg' (n 119).

[143] Varga, *From Ideal to Idol?* (n 116) 25–29.

[144] Varga, *From Ideal to Idol?* (n 116) 27.

[145] Aranka Szávuly, 'Az életben a legtöbb döntést nem én hoztam meg' (n 119).

[146] It is common sense that the purpose of separation of powers is to protect the liberty of the individual by making tyrannical and arbitrary state action more difficult. **See** Barber, The *Principles of Constitutionalism* (n 93) 4.

[147] András Varga Zs., *Eszményből bálvány? [From Ideal to Idol?]* (Századvég 2019) 29.

[148] Varga, *From Ideal to Idol?* (n 116) 24–25; Varga, *Eszményből bálvány? From Ideal to Idol?* (n 129) 29.

interpretation by the restructured Hungarian Constitutional Court.[149] To this regard – Chief Justice argues – Hungary made significant steps by provision R (3) of the FL providing Article R) (1) which stipulates that Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution. With the same weights, the abovementioned provisions of Article 28 of the FL provides that courts shall interpret the law in accordance with their purpose. When ascertaining the purpose of a law, consideration shall be given primarily to the preamble of that law and the justification of the proposal for. When interpreting the Constitution (FL) or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good. [150]

Public good, according to Chief Justice is a theory behind we find cooperation and collaboration between branches of government, a dialogue between the Legislature and the courts as administrators of justice. Public good is the substantive counter serum against tyranny of the rule of law, based on "mutual respect and loyal co-operation between state organs" formulated in the opinion of the Venice Commission.[151] In this approach, the legislator or, in fact, the constitution-maker himself does not commit heresy if he changes the laws or the constitution itself in response to a previous judicial decision.[152]

To reflect practice on the abovementioned theory, the best example in Hungary is the annihilation of specific court decisions by a legislative act. First, in 2011 the Fidesz-majority Parliament declared nulled and void a range of judgements of the judicial branch related to a violent political protest back in 2006 by an Annulment Act. The Parliament annulled criminal court judgements on convictions for vandalism and violence in a right wing riot against the former democratic left wing Government.[153] Later, the Annulment Act was referred to the Constitutional Court for constitutional scrutiny. The politically packed Hungarian Constitutional Court found the provisions of this Act constitutional and upheld them.[154] The reason Presidential pardon or amnesty was not initiated to support politically motivated mischief and vandalism, because under presidential amnesty, convicts continue to be criminalized, therefore to certain extent stigmatized, presidential pardon would have provided only an exempt from further criminal sanctions.

Therefore, the Legislator chose to deny the court's competent power to base its judgement on its jurisdiction. This is an open denial of judicial supremacy and the principles of the rule of law. In this constitutional drama, the Hungarian Constitutional Court was assigned to the role of a non-playing character. The majority of the literature on this case has indicated that the Hungarian Constitutional Court not simply erred by upholding the Annulment Law on criminal convictions, but the Constitutional Court has surrendered to politics over "law", which meant a clear denial of judicial supremacy.[155] We argue in this Chapter that this was a symbolic

[149] Varga, *From Ideal to Idol?* (n 116) 130–132.

[150] Varga, *From Ideal to Idol?* (n 116) 29–30, 130-132.

[151] CDL-AD(2012)026 Opinion no. 685/2012 on the compatibility with constitutional principles and the rule of law of actions taken by the government and the parliament of Romania in respect of other state institutions and on the government emergency ordinance on amendment to the law no. 47/1992 regarding the organisation and functioning of the constitutional court and on the government emergency ordinance on amending and completing the law no. 3/2000 regarding the organisation of a referendum of Romania. https://www.venice.coe.int/webforms/documents/CDL-AD(2012)026-e.aspx

[152] Varga, *From Ideal to Idol?* (n 116) 25.

[153] See Hungary, Act XVI of 2011 on remedies for the convictions in connection with the riots of Autumn 2006. The riots targeted the left wing Hungarian Government demanding its resignation. Remedy was granted against public officials, criminal damaging, criminal trespasses, if the judgement was based exclusively on a police report or police testimony.

[154] See 24/2013(X.4) AB Decision.

[155] Mátyás Bencze and Ágnes Kovács, "Mission: impossible": alkotmánybíráskodás az alkotmányos értékek védelme nélkül' (2014) 6 Jogtudományi Közlöny 273.

capitulation of the rule of law. The metaphor of a journey from rule of law to autocratic populism. The Legislator's unhidden agenda was to provide a symbolic remedy for political purposes.[156]

To a lesser extent, the above mentioned "loyal co-operation and mutual respect" between court and executive can be tackled symbolically, as the Hungarian Government construed it, in a number of court cases where the Government exercised pressure on the judiciary by commenting, counter arguing or complaining against the courts' decisions in individual judgements. We should note that under the doctrine of separation of powers, however, the Government, is not by any means, in a position to be the interpreter or commentator of the independent Judicial Branch.[157]

So, we can conclude that the pattern of the sovereignty argument in constitutional populism is to shift emphasizes from the rule of law and separation of powers to 'shared responsibility' of administration of justice between branches of government (which many argues in practice means nothing more than the denial of judicial supremacy). Then a politically mutilated judicial body is granted a new Chief Justice with unprecedented super-powers in his hands to demonstrate how cherished judicial independence under a sovereign state is with a fully empowered Chief on the Branch. The newly appointed Chief has competencies over the arbitrary system of allocation of court cases, and more generally, exercises a unilateral concentration of power over court administration, to designate cases among jurisdictions, to appoint judges to the branch without adequate checks and balances.[158]

Arbitrary decisions as regards the career of judges has been a concern by the EU. Chief Justice did not respect applicable rules when appointing a number of judges to the Branch.[159] Moreover, the evaluation system in the application process prioritized candidates from the public administration over Judiciary candidates.[160] Accordingly, it can seriously undermine public confidence in the judiciary if neither the selection nor the dismissal of judges is based on foreseeable rules and cannot be challenged afterwards in a fair procedure.[161]

In 2018, the Hungarian Parliament passed legislation establishing a separate branch for administrative courts. The de facto establishment of administrative courts were postponed multiple times, eventually, the idea was withdrawn by the Hungarian Government due to substantial international criticism. Therefore, as we noted in general terms, now in the case of administrative courts, the new law (again) put a great deal of power in the hands of the very few without substantial counterbalance. The Minister of Justice had too much authority over the (new) design, structure, budget and size of the administrative courts, including the right to appoint new politically suitable judges on the administrative branch.[162] Further concentration

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[156] The preamble of Act XVI of 2011 declares the purpose of the Act „to remedy the violations of the democratic rule of law and the fundamental constitutional rights of citizens in the autumn of 2006".

[157] Mátyás Bencze, 'A magyar bírósági rendszer rezilienciája 2012 és 2021 között' in Fruzsina Gárdos-Orosz (ed), *A magyar Jogrendszer rezilienciája 2010–2020* (TTK–ORAC 2022) 376–394. Moreover, According to EU Rule of Law jeport, pro-government media launched smear campaigns against members of the Judicial Branch to silence judges. See 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary.

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

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

[160] 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary.

[161] The applicant is represented by the Hungarian Helsinki Committee. See Helsinkifigyelő, 'Egy bírónő meghurcolása, avagy fenyegetés minden magyar bírónak' (n 107).

[162] Kosař argues: to be sure, neither Orbán nor Kaczyński (nor Babiš nor Fico) are anti-institutionalists in an unequivocal sense. They like institutions as long as those institutions pursue their agendas, or at least behave in a neutral way and do not put up unwelcome obstacles. As Müller notes, populists 'only oppose those institutions that, in their view, fail to produce correct political outcomes. See Kosař, Baroš and Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (n 3).

of powers were enhanced in 2020 by the introduction of the abovementioned "limited precedent system".
Czech scholar Zdeněk Kühn highlights: 'It is well known that interpretation of the law is a contextual exercise. Nonetheless, if we give up on the idea that the law is capable of being at least partially an autonomous phenomenon, that is capable of limiting the government and parliament relatively independently of the value preferences of the individual judges, a gate will soon be wide open for government of the current political majority which is limited by nothing and no one." From this viewpoint, non-liberal democracy is, in fact, merely a transient phenomenon because, sooner or later, this will no longer be a democracy at all. If the ruling power is not limited in its activities in any way, it becomes completely unclear why it should let its own political support be repeatedly tested in democratic elections. Such unlimited political power will naturally get an appetite for adapting the election rules to suit it or modify the media environment to its own benefit. If we admit this, we will have to relive our recent history, even if with a different ideology, different political arrangements, and different actors.'[163]

VII. Conclusion

Judicial supremacy as part of rule of law which is an inherent part of the DNA of European constitutionalism suffered hardly irreparable losses in recent developments of new concept of constitutional identity (mostly but not exclusively in Hungary, to some extent in Poland and Czechia and increasingly more in Slovakia)[164] openly denying the supremacy of separations of powers as a core value of Europe its people and its ideas.
Constitutional identity (and its theory) offered a conceptual framework for judicial independence to be interpreted in a 'national way', removed from European constitutional traditions.
Accordingly, the pattern is that nation states first declare a withdrawal from main stream understanding of the supremacy of law arguing their disclaimer because the courts are ruling instead of the 'people' to govern. Thus, they argue courts have taken over and are dominating the public discourse through interpretation of the law.
Therefore member states in the 'stage of constitutional identity' (whatever constitutional identity means) first rely on ultra vires arguments to withdraw from the principle of rule of law, then call for a new concept of public good which means a "loyal co-operation between branches of government" by scaling back the powers and competences of the courts in favor of the executive and legislative branch. Finally, the mutilated courts are appointed by a new head of the Judiciary with unprecedented concentration of powers (in appointments of new judges, in final adjudication of cases, in transferring cases between court jurisdictions, in designating different courts of jurisdictions in deciding on the retirement of judges, in exercising final administrative decisions in the justice system etc.) in the hands of a political appointee.
We claim that under the outreach of European civilization complemented by the US traditions on limited government from Magna Charta to the US Constitution, from John Lock to the Federalists, there is no viable alternative to the very idea of judicial supremacy and rule of law. As Armin von Bogdandy put it: Europe is at high risk today. much is at stake. Kosař adds usually we only realize what separation of powers is, and what value it is to us, once we have

[163] Zdeněk Kühn, 'The Judiciary in Illiberal States' (n 97) 1246.
[164] See Kosař, Baroš and Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (n 3) 429–430.

lost it.[165] Although, the constitutional European project is not yet lost.[166] Breath are held and eyes are on Hungary.

[165] See Kosař, Baroš and Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (n 3) 431.
[166] Armin von Bogdandy, 'A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines Defending Checks and Balances in EU Member States' in Armin Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 399.