



Rule of Law: Supranationalization from the Perspective of Central and Eastern European Countries. The Case of Hungary

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Abstract. This paper seeks to develop an accurate understanding of the rule of law from a Central European perspective and to highlight contemporary challenges in its protection, focusing on Hungary within the context of increasingly constraining supranational oversight. The first section revisits the definitional foundations of the rule of law, applying them to Hungary and emphasizing its distinctive reception and implementation. The second section addresses interpretative issues arising from the transitional constitutions, while the third one underscores the crucial role of judges, particularly regarding the internationalization of rule of law protection. The fourth section examines the specific case of Hungary, which has been subjected to continuous and increasingly punitive scrutiny over its compliance with the rule of law, exploring the underlying causes and assessing the consequences of such oversight.

Keywords: rule of law, constitutional justice, supranational judiciary, EU rule-of-law mechanisms, constitutional transition, legal federalism, judicial activism

1. Introductory Remarks

The doctrine and constitutional principle of the rule of law are highly complex. One would say that a broad and abstract concept encompasses diverse theories that develop according to specific social, political, and cultural contexts. The rule of law is the third and most recent of the three pillars of modern constitutionalism. Alongside sovereignty and democracy, it ensures the constitutional functioning of modern society. While sovereignty gives the state the capacity and freedom to act, and democracy legitimizes public authority, the rule of law requires that

political action conform to legal normativity, thereby legalizing the use of public power. Both democracy and the rule of law impose limits on sovereignty. Yet the rule of law may also conflict with democracy: it can challenge the legitimacy of power in the name of legality when power is exercised contrary to legal, especially constitutional requirements. Thus, the principle is as much useful as it is dangerous: it prevents illegal or abusive use of power but can also restrict the adoption and implementation of democratic decisions.

2. Definition

The idea of limiting public power, despite the absolute character of sovereignty, even when that power is democratically legitimized, is as old as modern constitutionalism and the modern constitutional state. The first constitutional charter, the *Declaration of the Rights of Man and of the Citizen*,¹ declared that the abuse of power must be avoided through legal principles like the separation of powers. However, at that time, constitutions were regarded more as political declarations than legally binding instruments and lacked judicial mechanisms to ensure conformity to their principles. Although human rights were subject to legal protection in case-law, particularly in common law countries, it was not until the second half of the 19th century that two major schools of thought on the rule of law emerged.

It is important to briefly recall the doctrines developed by these two schools, even though they are not directly related to Central and Eastern Europe. The countries of the region largely followed the main models of constitutional development and evolution found elsewhere, making their histories relevant to this discussion. Moreover, the manifestation of the rule of law cannot be properly understood without reference to the contexts in which the doctrine originated. Naturally, it helps to understand how its implementation may produce unique effects and interpretations, given that it is strongly linked to the social and political backgrounds.

The rule of law, with this English name, first appeared in common law systems. The basic idea was to counterbalance the political power exercised by political institutions through the judiciary. In the United Kingdom, the question arose in the second half of the 19th century, though the United States of America had already followed a different constitutional evolution. Across the Atlantic, the Supreme Court had decided, at the very beginning of the 19th century, to apply judicial review to the functioning of political institutions under constitutional provisions.²

1 Declaration of the Rights of Man and of the Citizen (*Déclaration des Droits de l'Homme et du Citoyen*), adopted by the France's National Constituent Assembly between the 20th and the 26th of August 1789.

2 Decision of the Supreme Court, *Marbury v Madison*, 5 U.S. 137 (1803).

In Great Britain, the question emerged differently. With the strengthening of the parliamentary character of the regime – since Parliament was the revolutionary institution that gained ground against the Monarch by the second half of the century –, the sovereignty once held by the Monarch became parliamentary. The power of Parliament lost all existing institutional limits. As scholars noted, Parliament could do anything except change a man into a woman. However, the common law justice system, judging in equity and following centuries of established precedent, could efficiently counterbalance such political power. As judges were not limited by political decisions but could decide freely under judge-made law, the judiciary appeared to have the right institutional framework to balance political power by ensuring efficient protection of individual rights. These individuals, whose interests are translated into rights, are protected against political action implemented in the common interest. In this system, the rule of law requires access to justice, judicial independence, fair trial, legal security, equality before the law, and the legality of administrative acts, thereby ensuring effective protection of rights, especially fundamental ones.

Although the English term ‘rule of law’ is now generally used, especially at the supranational level, a clear distinction must be made between the above-described common law doctrine and the German doctrine that later gained great success in continental Europe and in Central and Eastern European countries during the 20th century. This doctrine, the so-called *Rechtsstaat*, possesses a lot more general and abstract normative content than the British concept. Inspired by Kantian³ philosophy, it appeared after the unification of Germany under the sovereignty of the Prussian Emperor. According to Enlightenment legal philosophy, rationality could create perfect law, and such perfection could restrain the exercise of sovereignty. The law, therefore, stands above the action of the state’s institutions. According to this doctrine, law is more than a simple set of legal provisions, it can become a social value.

While effective protection required judges, first, the doctrine held that such perfection should be explored by rational thoughts, hence the content of the principle and its requirements should be determined by eminent jurists most competent to seek such a perfection. It is clear how the German legal elite, content with national unification but wary of abuse by the Emperor and his Chancellor, elaborated the subsequent theory to limit arbitrary political actions. The doctrine, as noted, met with great success in the 20th century when the effective protection of a rational and hence perfect legal framework was guaranteed by constitutional judges. Since the administrative acts of the state are considered to be acts of power, citizens require protection. This doctrine helps to overcome the arbitrary use of public power or, even worse, totalitarian political actions. At the same

3 Kant, 1998.

time, however, it represents an obstacle to the democratic use of power, which can be legitimate only if it is also legal.

We should add to the two main schools explaining the origin of the principle a third model, one that emerged in special contexts that significantly impacted the doctrine, meaning, and normative content of the rule of law: the French model where, after the Revolution, the concept of popular sovereignty became dominant. Neither the monarch nor the parliament could be regarded as sovereign; power resided in the Nation, represented by its institutions. In this context, the fundamental idea of representation prescribed that political action should directly reflect the will of the Nation. Hence, no limitation of this action can be justified, not even by legal provisions.

This explains why, in France, even though a strong and centralized public power had developed, neither the rule of law nor the *Rechtsstaat* doctrines could really be implemented. It is therefore understandable that one of France's most renowned constitutional scholars, Carré de Malberg,⁴ who taught at Strasbourg, spoke German, and had access to the works of German legal philosophy, wrote about the police state and 'law state' (the word-for-word translation of *Rechtsstaat*) condemning both. He argued that in a police state everything is permitted to rulers in the name of common good, often prejudicial to individuals. Conversely, in the 'law state', power cannot effectively act for the common interest, as excessive obstacles are raised to protect individual rights. To him, both extremes should be avoided through what he called the legal state, where rights are guaranteed alongside well-defined faculties for legal action. The American regime offers a good example of such a system, though it cannot be fully established in a country adhering to continental law. His theory is particularly interesting, as it points to the dangers of the *Rechtsstaat* doctrine. It also demonstrates that in a country grounded in popular sovereignty, it is difficult to institutionalize constitutional justice, a case evident in France, where even today the Constitutional Council examines conformity to the constitution only in limited ways and functions as a political as well as a legal institution.

For East-Central Europe, and particularly for Hungary, the *rule of law* and the *Rechtsstaat* do not share the same meaning, as each doctrine arose from a different context and offers different approach to the same problem but with different consequences for proper implementation. As mentioned earlier, these countries, including Hungary, followed the main models of constitutional development. Hungary's traditional constitutional evolution resembled the British constitutional regime, yet no historical room existed for developing a strong or case-law-based judiciary. The protection of individual rights could only be ensured by political bodies, such as the general councils of the counties, until the end of the 19th century. Under the Habsburg Empire, for the Hungarian Nation,

4 Carré de Malberg, 1920.

limiting the sovereignty of the monarch was pursued more through political competences claimed for Hungarian institutions than by individual rights. After the First World War, when the idea of judicial protection of constitutionalism by specialized constitutional judges appeared in the former Habsburg countries, Hungary, which had lost two-thirds of its historical territory and one-third of its ethnic population, did not wish to limit its national sovereignty again for the sake of individual rights. It rather tried to strengthen it for the revival of the nation after such tragedy.

The German doctrine of *Rechtsstaat* gained significance only after the fall of the Berlin Wall, to overcome the legacy of totalitarian, socialist regime. Yet, in Hungary, the protection of individual rights and the limitation of national sovereignty are acceptable only as long as they do not weaken the independence of the Nation and the State. As we shall see, this special approach is essential for understanding the Hungarian case.

3. Interpretation

Understanding the definition of the rule of law, as it has developed in various social and political contexts according to the specific characteristics, is not an easy task. One must pay particular attention to identifying which doctrine applies and consider the context, as it can change the very meaning of the principle. Although the German doctrine is most commonly applied today, an important distinction must still be made when interpreting the legal principle of the rule of law, namely between its formal and substantive approaches. The game-changer character of this distinction became clear in Hungarian constitutional history after the democratic transition. As the well-known statement of the Hungarian Constitutional Court declared in its decision on whether the crimes committed during communism remain punishable: ‘The rule of law cannot be realised against the rule of law.’⁵ One cannot understand the real meaning of the sentence without understanding the difference between formal and substantive rule of law. It prescribes that political action must conform not only to the law’s form but also to its sense and objectives. Even when aiming at rightful objectives, such action must also respect formal requirements. Conversely, compliance with legal form alone is insufficient if the substance or direction of political action contradicts the fundamental requirements of the rule of law. Thus, the Constitutional Court could sanction a national act seeking to restore property rights, a substantive requirement of the rule of law, if the manner of its realization violated the formal requirements of the principle.⁶

5 Judgement of the Constitutional Court of Hungary No. 11/1992 (III. 5.).

6 Judgement of the Constitutional Court of Hungary No. 28/1991 (VI. 3.).

The modern doctrine of the rule of law, supported by efficient legal protection through constitutional justice, entered Hungarian constitutionalism after the transition. This became one of the most important characteristics of the period. Not only did the substantive approach form the core of new Hungarian constitutionalism, but the rule of law was also declared a constitutional objective, serving as a programme to be realized after the transition. Because of the constitutional activism of the judges of the first Constitutional Court, the rule of law is declared a social value. The principle was not only implicit in the newly adopted, merely modified constitutional text but was also found between the lines, as suggested by the theory of the invisible constitution.

It is well known that Hungarian constitution after its modification was a neutral document, lacking historical references or explicit social values. The revision merely modified the first written constitution of Hungary to facilitate democratic change. The idea was that once democratic reforms were consolidated, a legitimate and fully legal government could adopt a new constitution, one reflecting shared values and integrating Hungary's millennial constitutional development. However, as no compromise was found among the democratically elected new members of the parliament about a new text for more than two decades, the modified constitution remained in force, along with all the disadvantages of a modification. By the end of the period, even reproducing the constitution was difficult, as proven by a special edition containing imprecise and erroneous versions.⁷

More than the constitutional text itself, with all its errors and omissions, it was the principle of the rule of law, as an unwritten social value and the foundation of a constitutional programme, that became the true core of the new Hungarian constitutionalism. Many judgements of the Constitutional Court attest to this situation. The Court's highly versatile, exceptionally creative interpretation of the principle was instrumental in leading these judgements and making the constitutional transition real, as the transition itself was a constitutional programme. Yet, the absence of political debate and the lack of choices for constitutional justice in shaping this programme led to misunderstandings. Ultimately, the Court's virtue and restraint were the sole guarantee of a measured interpretation of the principle. Although often insightful, as contemporary criticism stated, it was not completely proportional. For many different acts where the Court disagreed with the underlying sense of political decisions, the annulment was argued with a rather flexible interpretation of the rule of law. Such overuse of the substantive doctrine inevitably led to a devaluation of the principle.

However, especially in a transitional regime, the rule of law serves as a crucial source for constitutional interpretation, offering an opportunity to make the

⁷ In the special edition of the *Hungarian Official Journal*, published for the twentieth anniversary of the constitutional transition, on the 23rd of October 2009, a provision that had already been modified in 1998 was maintained in the edited version of the text of the Constitution.

transition possible, as the principle contains several specific requirements that can be applied both formally and substantively. First, the rule of law demands the absolute pre-eminence of the law: every political action must be executed in compliance with the constitutional and legal framework. If the framework is incomplete, interpretation should provide a way to find unwritten rules to ensure legal conformity. The settled expectation of the law is another important requirement of the rule of law, especially in a transitional period. Politics must not only conform to the law, but the law itself should be clear and transparent. This second requirement is unfortunately often overlooked, as the rule of law is more frequently invoked against illegal political actions than against the errors within the legal system, which are often the result of bad institutional practice.

Then come the classical requirements: equality before the law and the efficient protection of fundamental rights. Here, the interpretation becomes essential, particularly when the new constitutional system lacks precision, for example, in the definition of basic human rights. Finally, the effective protection of any rights – one should not forget the contribution of the common law system to the principle of the rule of law – and the legality of the enforcement of acts must also be mentioned among the classical requirements.

Finally, turning to the problem of interpretation, with special attention to the distinction between formal and substantive approach, the question of the unconstitutional constitutional amendment should be raised. This question highlights the essence of the problem of such a distinction. Moreover, it is not merely theoretical, as demonstrated by the Hungarian Constitutional Court regarding the fourth amendment of the Fundamental Law of Hungary. The constitutional judges declared that the so-called transitional provisions added to the Fundamental Law by specific amendments were not in conformity with the Fundamental Law itself.⁸ The problem did not concern the procedure or the form in which the amendment has been adopted. Their reasoning held that the amendment caused contradiction within the text and violated the principle of the rule of law in its substantive sense. However, the constituent power, the two-third majority of the National Assembly disagreed with the judgement of the Constitutional Court. They maintained that defining the text fell within their competence, and that the constitutional judges were only entitled to interpret the text in a formal manner. Of course, if the procedure for adoption violated constitutional provisions, only then the amendment could be sanctioned by the Constitutional Court. Finally, the Fundamental Law was amended, and now, with respect to constitutional amendments, the Constitutional Court holds competence only for formal control.

This last question is significant from the point of view of a formal or substantive interpretation of the rule of law. It also clearly illustrates how the

8 Judgement of the Constitutional Court of Hungary No. 45/2012 (XII. 29.).

constitutional transition of Hungary was concluded with the adoption of the Fundamental Law. While the substantive approach to interpreting such a general principle was tolerated during the period of the neutral, modified constitution, the political power, exercising sovereignty and democratic legitimacy chose to adopt a new and complete constitutional text. The Fundamental Law no longer requires a substantively interpreted rule of law, as it contains, according to the constitutive political majority, all the provisions necessary for interpretation.⁹ The programme aimed at realizing the rule of law now secured under the new Fundamental Law.

4. Application

As we have seen, judges play an essential role in interpreting the rule of law and, consequently, its application case by case. The very abstract nature of the principle, coupled with the concrete and often severe consequences of its application, makes the interpretative work of judges very important. When they adopt a complex doctrine and substantive interpretation of the principle, they are able to review the actions of a democratically legitimate political power and annul the acts of institutions. These acts are adopted by state organs in pursuit of the common interest and in accordance with democratically formed political opinion. However, those political choices made undoubtedly for the wealth of the national majority can be limited by the legal protection of individual or minority interests. In such cases, judicial prudence is more crucial than ever to create a balanced constitutional structure.

4.1. The Politicization and Internationalization of Application

The politicization of the rule of law, especially its internationalization, has made this interpretative task even more challenging. The second half of the 20th century revealed that the rule of law is more than a mere legal doctrine; it has become a foundational principle for the contemporary international community. Traditionally, this community was not concerned with the constitutional regime of a sovereign state. However, the rise of totalitarian and socialist regimes generated a new challenge. It became obvious that clear opposition to such regimes was necessary to protect people against the violent abuses of power. However, in confronting the ideology of communism, the Western world lacked a corresponding ideological counterweight. This tool was finally found, unsurprisingly in law, with liberalism. The opposition between liberal and totalitarian regimes, theoretically elaborated after the Second World War, became

9 Article R, paragraph 3 of the Fundamental Law of Hungary.

central during the fight against communism. The rule of law served as the principle distinguishing liberal states from totalitarian regimes: its efficient control became a question of international political matter. To acquire international legitimacy, a state should demonstrate that the rule of law was a respected principle.

Consequently, respect for the rule of law and its requirement has become as much a question of political appearances and perception as of genuine constitutional practice. Especially after a constitutional transition, states seek to justify their legitimacy in the eyes of the international community by portraying themselves as adherents to the rule of law, even when the conditions are unmet or its basic requirements are systematically violated in daily political life. As we have seen, the realization of the rule of law functions more as a long-term legal programme that requires allowing democratic power to act effectively, especially in transitional contexts. Achieving a balance between political efficiency and respect for the rule of law is never simple. It is even more difficult when the international community subjects political aspects to external scrutiny, often through political institutions whose judgements carry severe political consequences such as the loss of international legitimacy. One should also remark that for domestic population – whose opinions matter deeply in a democratic regime – the effectiveness of political actions executed for the common interest serve as much a source of political legitimacy as the democracy itself or the rule of law.

When applied only for international legitimacy, the respect of the rule of law fails to produce the desired outcomes of democratization and the consolidation of a proper legal culture. Yet, it will create significant legal obstacles that hinder political authorities from taking necessary actions in difficult contexts, as constitutional transitions often bring economic and social challenges. The political appearance and external perceptions of a state's adherence to the rule of law can therefore be counterproductive.

As mentioned earlier, it is difficult to find the balance between what the rule of law requires and what citizens demand as legitimate democratic actions by national organs. The balance is even more difficult to maintain when national decisions are subject to review by international control mechanisms, including political bodies. Effective control over compliance with the rule of law must be moderate and proportionate, yet severe and precise, exercised by judges, whether national or international. Also, there should be a development that aims at the creation and the consolidation of a political culture of self-restriction. Such a political culture is one of the key conditions for the implementation of the rule of law. However, the rule of law cannot be properly implemented if it is treated as a social or political programme enforced by judges. Nor can constant foreign political attention consolidate a constitutional culture respecting the fundamental idea of rule of law: the general acceptance of the primacy of proportional legal requirements. Once again, those requirements must be elaborated through a case-

by-case analysis of political decisions, where the legal provisions are applied while ensuring that their application remains proportionate.

This is a very important legal challenge to be faced: finding the right proportion between the exercise of national sovereignty and the respect for individual rights and freedoms. As we have already mentioned, the former is accomplished in pursuit of the common good, yet the acts adopted and executed by state organs may be invalidated by judges applying legal tools designed to protect individual interests. Evaluation, therefore, is as much a key element in the application of the rule of law as interpretation itself. When judges evaluate a case before them – and interpret the principle of the rule of law –, they should remain aware that the rule of law is akin to a state objective. They are not responsible for the realization of a programme, but they should make the right decisions that allow this programme to be realized by the whole society.

This objective or programme must be realized in the everyday functioning of the state, with the contribution not only of the judiciary but also of political bodies, and with the acknowledgement of public opinion. From this perspective, one may admit that the rule of law is a social or even a cultural value. However, this unique nature of the constitutional principle does not simplify its application, rather it makes it even more complex. Given the increasing politicization and internationalization of the principle, it is difficult to provide good guidance for its application. We highlight two major dangers.

The first danger arises when judges – national or international – or political bodies tasked with monitoring the rule of law assume the role of educators of a country's political institutions or even its citizens, themselves. It is neither the task of judges nor, even less, of political institutions to instruct democratically legitimized constitutional organs on what they should do and how they should do it. Judges, or at times political organs, may only decide the compliance of an already executed political action. Doing that, they may contribute, albeit indirectly, to the development of a political culture, much as university professors contribute to the professional formation of their students. The second danger occurs when judges seek to become emancipators, attempting to free people from political or social constraints through a single judgement. Just as a judge cannot create a political culture on their own, neither a judge nor a political institution from outside the country can free people against their will or without knowing the context and reasons behind those constraints. There should be more patience and even the recognition that some freedoms may be applied differently depending on the local context, provided the interpretation of the law and the appreciation of the case are accurate.

4.2. The Invention and the Innovation of Supranational Law

The politicization and the internationalization of the rule of law represent major tendencies that began after the Second World War. The adoption of the Universal Declaration of Human Rights in 1948¹⁰ and the Treaty of London in 1949¹¹ already signalled the beginning of this international movement. However, to fully realize the consequences of the tendency, one should wait until the end of the Cold War. Simultaneously, the rise of supranational legal orders began during the same period in European history. Both of those phenomena can be understood within a broader context of radical changes in international cooperation.

First, international cooperation was strengthened by the generalization of multilateral cooperation within the framework of international organizations. Although such organizations had existed before the two world wars, their importance became increasingly tangible during the second half of the 20th century. Second, a more value-based cooperation has been introduced, grounded in the universal requirement of respect for fundamental human rights. Third, this period witnessed the consolidation of mechanisms for efficient protection, initially within nation-states but, increasingly, at the international and supranational levels, of constitutional principles and the broader idea of constitutionalism. It is within this context, and not independently of these different tendencies, that supranational legal orders arose.

The invention and consolidation of the supranational legal orders can be seen as revolutionary developments in the law. For three centuries in Europe, legal systems were inextricably tied to sovereign states: only the sovereign could legislate, execute, and control the execution – or even the adoption – of legal acts. The revolutionary transformation that followed allowed entities above the state to perform the same functions, albeit within restricted domains. These supranational legal orders differ from traditional international law not only in their autonomous origins and dynamics but also in their non-neutral character. On the one hand, a value-based legal order emerged through the Council of Europe, while, on the other hand, an interest-based legal order took shape in the European Communities that later became the European Union. For both Europes, establishing their legal orders was essential, but, lacking sovereignty, each required a special foundation.

Within the Council of Europe, the *Strasbourg Convention* (the European Convention on Human Rights) and the establishment of the *European Court of Human Rights* gave the opportunity to create a supranational legal order. Although the Convention may be considered as a classical instrument of international

10 Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations, Paris, on the 10th of December 1948.

11 Statute of the Council of Europe, also called Treaty of London, signed on the 5th of May 1949.

law with the engagement of the States as contracting parties, the case-law of the Court – particularly under the *living instrument doctrine* – became an independent source of legally binding obligations without a proper engagement of the Member States. Its value-based nature is evident in the Court's aspiration to act as the conscience of Europe. Meanwhile, the law of the European Union evolved into a supranational, indeed, quasi-federal legal order, even under its former designation as community law. The Court of Justice made it clear in its case-law by declaring the principles of direct effect and primacy.¹² Arguing for the efficiency, the Court made it clear that this new legal order was justified by the underlying compromise that defined the European integration process. By opting for the so-called 'Monnet method', the Member States chose to proceed together in what they thought were their shared interests.

Once again, the existence of proper courts and judges within both systems made such a revolutionary innovation possible. As they operate independently and interpret freely the written commitments – bearing in mind that EU law includes numerous secondary sources adopted under conferred competences within supranational institutions –, they can enforce legal requirements without a formal and exact engagement of sovereign Member States. Although such an engagement existed initially, it was usually grounded in the respect of shared values or the enforcement of what were perceived as common interests, without the exact parameters of the obligations being elicited. Determining what these values entail, or what efficient execution of common interest requires, is left to the courts. Consequently, legal acts – whether rights as interpreted by the European Court of Human Rights or treaty provisions, secondary EU norms – apply not only to states but also to citizens, significantly affecting state sovereignty.

The European Convention on Human Rights seeks to ensure minimum standards for fundamental rights and freedoms. As such, it is an undeniably supranational tool for monitoring the rule of law. Minimum standards, given the subsidiary character of the Convention – as it may only apply where national legal systems fail to provide adequate protection – seem compatible with Member State sovereignty. However, as the Court's jurisprudence increasingly details those rights and, under living instrument doctrine, evolves a different meaning over time, it raises severe doubts about such reconciliation, as evident in several Court cases. Moreover, the active involvement of various institutions, such as the Venice Commission of the Council of Europe, further nuances the picture.

EU law represents an even more complex supranational legal system. Within its supranational institutional framework, new legal acts may be adopted through a complex system of attributed competences. Notably, most of those competences

12 Judgements of the Court of Justices in cases *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) 26/62 and *Flaminio Costa v Ente Nazionale per l'Energia Elettrica* (1964) 6/64.

are shared, meaning both the EU and Member States may act. However, as the EU's actions expand across a number of fields, Member States experience a tangible loss of sovereignty. For implementation, the quasi-federal legal order gives absolute priority to the EU law: no legal obstacle may hinder its unity, efficiency, or primacy. That causes a problem for the control of the legality and validity. The Court of Justice holds that such control must occur within the framework of EU law, leaving no room for national constitutional control, a position reluctantly accepted by most of the constitutional courts. Still, a dialogic controversy persists between European and national constitutional judges. For the latter, it is unacceptable that European legislation should rely exclusively on the interpretation of the Court of Justice, excluding the application of national law, particularly constitutional requirements.

5. The Hungarian Case

The politicization and even the internationalization of the protection of the rule of law arrived relatively late in Hungary. As we recall, Hungary has a millenary constitutional tradition. However, the concept and the doctrines of rule of law were not characteristic of Hungary's traditional constitutional development. Modernity and constitutional evolution reached Hungary simultaneously with periods of foreign occupation, first under the Ottoman Empire, then the Habsburgs. Although highly developed and distinctive constitutional institutions emerged in Hungary, the fundamental aim of constitutionalism remained the preservation of national independence and autonomy.

While liberal ideas of individual freedoms arrived to Hungary at the period of French Revolution and were implemented through the long 19th century, the British-like Hungarian constitutionalism did not see judicial protection of individual rights to counterbalance very strong parliamentary power that confronted the Habsburg Court in Vienna. The interwar period sought to safeguard the historic constitution, without the historic country and with a mutilated nation. The regime's legitimacy relied more on representing the national interest than on the legality of its actions, though formal respect for the historic constitution remained a core value for the political elite. The forty years of socialist totalitarian regime after the Second World War marked a total rupture with Hungary's constitutional tradition. The adoption of a communist written constitution in a state accustomed to an unwritten one, and the introduction of a totalitarian regime to a nation characterized by strong parliamentarism, symbolized a profound transformation.

5.1. The Implementation of the Rule of Law in Recent Times in Hungary

So, the rule of law as a constitutional principle, social value, and political objective arrived to Hungary only with the constitutional transition. After forty years of totalitarianism, conformity with the international standards and the implementation of the rule of law, along with legal, economic, social, and political reforms, became essential. It could be realized even with a value-neutral constitution, realized through the active jurisprudence of the Constitutional Court. Accession to the 'two Europes' was an absolute priority for the newly independent state. Hungary was the first post-socialist country to join the Council of Europe, on 6 November 1990, and ratified the European Convention on Human Rights in 1993. Hungary was also among the first Central-European countries to establish close cooperation with the European Communities, signing the treaty of association in 1991. Following the Copenhagen Summit's decision to extend EU accession to Central and Eastern European countries, Hungary presented its formal request for accession on 1 April 1994 and, ten years later, on 1 May 2004, became a Member State of the European Union.

Accession to these two European frameworks was very important for the protection of rule of law. For the Council of Europe, promoting democracy, the rule of law, and human rights was a core mission. Its *raison d'être* was to fight against communism and to uphold values that distinguished the Western from the Eastern blocs. After the fall of the Berlin Wall, it was evident that the Council of Europe can play an important role by supporting the democratic change and consolidating the rule of law. The Venice Commission was created to this end.

However, international institutions often possessed a very general and approximative knowledge of the complex and nuanced reality of the Central and Eastern European constitutional realities, which sometimes made intervention inefficient. These bodies assumed that the realization of rule of law can be achieved without special attention to local context, as post-socialist societies assumed to have a general political consent about liberalism. Yet the distinct economic, social, political, cultural, and legal context made such transitions far more difficult to realize than initially anticipated. Also, the eagerness of both sides to realize such a rapid change in short time blinded the actors' judgement by relying on short-term political outcomes rather than on deeper structural analysis. Nonetheless, Hungary succeeded in establishing a real constitutional structure with efficient protection of rights and principles.

As for the European Union, respect for rule of law was one of the fundamental criteria for the accession of new Member States from the region. After the socialist regime, Western countries questioned the capacity of these states to consolidate the achievements of their constitutional transition. They often overlooked or forgot that many of those countries had developed sophisticated constitutional

structures long before the arrival of the Red Army. The constitutional rupture of a long organic evolution in the region resulted from foreign intervention. Yet, as these countries had experienced socialist totalitarian regimes, they were viewed as new democracies by the West and had to prove their capacity to meet international standards forged during the second half of the 20th century.

However, as history showed, the rapid implementation of such standards did not always ensure the success of the new regimes. Without organic development, outcomes remained ambiguous, even if European institutions deemed the reforms enough for accession. Hungary received only three reports from the Venice Commission in the nineties and had to wait ten years for its accession only because of other countries' readiness. Alongside the Czech Republic and Poland, Hungary was considered ready to join the Union even earlier.

Parallel to its European accession and satisfying its international legitimacy, Hungary developed its own system of protecting the rule of law, both to satisfy the above-mentioned expectations and to reflect the professional conviction of its constitutional judges. As Hungary developed its system of protection of rule of law, the first period of the Hungarian constitutional justice was mostly characterized by strong judicial activism, especially around newly adopted principles that inspired a whole programme for building a new constitutional culture. The rule of law was applied flexibly and creatively, with evolving normative content. Although this approach was applauded by international academics, its social and political effects posed nuanced questions, and judicial activism soon became a subject of growing criticism.

The second decade of Hungarian constitutionalism saw a period of consolidation and more moderate jurisprudence. While the rule of law continued to be applied in both formal and substantive ways, its use became more restrained. Although the filtering of cases was not entirely successful, the application principle played an increasingly subsidiary role, being invoked only in major legal issues. The remaining substantive interpretation, particularly regarding constitutional amendments, sparked debates that eventually led to restricting the competences of the Constitutional Court. And the third period started after 2014, when the rule of law became mainly formal, its value-based or programme-oriented application faded, and it appeared in case-law as a state objective largely achieved. Such an approach aligned with the opinion of the constituent power that decided after the adoption of the Fundamental Law to end the transitional period and follow a more democratic and less judicial constitutional dynamic.

5.2. Supranational Critics of the Hungarian Rule of Law

The new period, beginning with the Fundamental Law and Hungarian constitutionalism attempting to establish a more balanced equilibrium, coincided

with increasing international criticism regarding the rule of law. Of course, mistakes were made during the constitutive period and even afterwards – as some amendments were questionable in professional quality –, but an increasing international scrutiny cannot be explained by legal reasons alone. It must be understood in the light of what we earlier described as the internationalization and politicization of the rule of law. Hungary's pursuit of a more organic, rooted constitutionalism caused trouble in the concept of a universal rule of law applicable uniformly across Europe. The constitutional development points only to one exact summit of rule of law that should be attained or at least approximated as close as possible. Such an ideological approach is the reason for Hungary's criticism of the rule of law – despite some mistakes, there are no structural problems of the pre-eminence of the rule of law. The government's emphasis on sovereignty and national interest does not mean that the fundamental standards are violated. Even if self-limitation of the power is less characteristic and political efficiency has become a key source of legitimacy, the main requirements of rule of law remain respected in political action.

Consequently, international and especially supranational institutions have become increasingly involved in monitoring Hungary's compliance with the rule of law. It was soon asserted and widely echoed that the rule of law was under threat in Hungary. At the same time, certain Hungarian national legislations adopted under the Fundamental Law were undoubtedly provocative, triggering political debate on constitutional matters and, eventually, litigation before supranational courts.

From Hungary's perspective, as discussed earlier, the argument most often invoked is democracy itself. Owing to the specific national political context, especially a weak opposition that lost all credentials and failed to reconstruct, a very strong two-thirds parliamentary majority stands strongly behind the government, enabling it to execute decisive and sometimes provocative measures. With such a majority, compromise becomes unnecessary, and the government tries to minimize legal or other obstacles to execute its programme. Some elements of this programme diverge from European mainstream politics, and the government openly expresses and promotes its dissent. But once again, in the eyes of the government and its parliamentary majority, their democratic legitimacy allows them to do so, provided they act within the constitutional framework they have adopted for themselves.

From the perspective of supranational organs, the protection of the rule of law principle should combine legal and political control. The rule of law is more than a simple constitutional principle, it is a value. One must recall that in the founding treaties, it is declared as one of the six values on which Europe was built. At the same time, Western political elites still view Central and Eastern European states as new democracies, even thirty-five years after the constitutional transitions and

despite their earlier democratic institution before the socialist regimes. These critiques are based on the belief that those countries lack a strong democratic political culture. This may be true compared with some core states of European integration. However, as explained earlier, this weakness stems from the rupture of organic constitutional development.

If an external impact once caused this rupture, by depriving these nations of sovereignty during decades of Soviet occupation, another external impact, now exercised by supranational European organs, is unlikely to establish a rule of law alien to national political culture. Yet, the educator's approach to intervention cannot lead to real results either. Nevertheless, this logic drives the actions of those supranational bodies. Unable to find governments and political majorities with such strong electoral support, they attempt to use the rule of law, interpreted in an increasingly substantive approach, to counter national actions. Thus begins a never-ending political and legal struggle that erodes the constitutional principle of the rule of law while satisfying the political interests of both sides: Hungary's governing majority presents itself as the defender of national interests, while supranational institutions assert their relevance through their engagement with a recalcitrant state. Both the Council of Europe and the European Union are highly active in this legally based yet politically driven debate.

The Council of Europe also participates in this debate. Although the number of negative judgements against Hungary is not as bad as for many other contracting parties, some cases have shown open resistance from Hungary in executing the judgements. In these instances, either structural issues caused the difficulty or political determination led to resistance. Nevertheless, after several votes in Hungary's favour, finally, the Parliamentary Assembly decided on 12 October 2022 to place the country under permanent monitoring. The Venice Commission has also been particularly active and productive in criticizing the Hungarian rule of law. It has adopted more than twenty opinions and reports on Hungary during the past fourteen years.¹³ When compared to only three opinions during the first twenty years of Hungarian membership in the Council of Europe, we can see that there is a special interest. Although these opinions have no direct legal consequences, they are frequently cited within the European Union as references when launching other procedures against Hungary.

The European Union is now undoubtedly very active in monitoring the rule of law in its Member State. It has developed several tools for this exercise, specifically against Poland and Hungary. After the fall of the PiS-led coalition, a politician very close to the European political elite became the new prime minister, Poland's case was dismissed, but Hungary remains under scrutiny. As noted earlier, although the EU has an almost federal legal system and a

13 Council of Europe, European Commission for Democracy through Law (Venice Commission), no date.

supranational institutional framework, it can adopt legal acts only within the competences attributed by Member States. One may therefore ask how, following the extreme politicization of the rule of law, more and more new procedures have emerged in the European framework.

Only the first two procedures are directly established by the treaties. According to Article 7, a Member State that poses a clear risk of breaching the values referred to in Article 2 may be subject to monitoring and advisory measures. The same article also authorizes institutions to sanction a Member State for serious and persistent breaches of those values. It is obvious that neither human dignity nor liberty or democracy in general terms are concerned here, and specific breaches of equality or fundamental rights are handled through other legal procedures. The rule of law alone of the six values listed in Article 2 justifies such a political intervention. At the same time, most analysts agree that invoking this procedure would have the impact of a ‘nuclear bomb’, leaving little room for future reconciliation. The procedure was launched for the risk of breach against Poland and later against Hungary, resulting in semi-annual reports without any concrete results.

Furthermore, there is the possibility of an infringement procedure, which, according to the treaty,¹⁴ can be launched by the European Commission. The Commission has become increasingly active in identifying cases against Hungary in which rule of law concerns are raised. As mentioned, Hungary has adopted several provocative legislations. This procedure, which ends before the Court of Justice in case of disagreement between the Commission and the state, is formally legal in nature. However, the Commission’s discretion in deciding when and against which Member State to implement it constitutes a deeply political tool. It is important to remember that the Treaty’s authors intended the Commission to have such an instrument, to encourage states to comply with their commitments as smoothly yet as firmly as possible. It is also noteworthy that the Court of Justice accepts the legal arguments of the state against the Commission in fewer than one case out of ten.

A procedure similar to the infringement mechanism was introduced for the Commission in 2014, specifically to monitor the rule of law by the Member States. Since no new procedures can be created without amending the Treaty, only one similar to the infringement procedure provided by article 258 could be granted to the Commission. Consequently, this 2014 innovation achieved little success, as the existing infringement procedure proved more effective. Other institutions also sought special mechanisms to participate in monitoring the rule of law. The Council introduced a dialogue among Member States, intended to create a more open, empathetic, and conciliatory discussion to resolve political conflicts that appeared as breaches of the rule of law by countries differing from the majority position. However, this dialogue failed to achieve its goals, as the

14 Article 258 of the Treaty on the Functioning of the European Union.

political background grew increasingly hostile to compromise, with both sides pursuing conflict instead.

The European Parliament also began adopting reports that made the debate even more political than legal. These reports, adopted by parliamentary majorities, lack the depth of legal analysis, and their content is often biased and superficial, even in factual matters. Nonetheless, they are frequently cited as references for further legal analyses, thereby strengthening accusations. The commission also publishes annual rule of law reports for each Member State, whose professional quality is generally higher than that of Parliament's reports. Yet their sources are one-sided, their conclusions hastily drawn, and in the case of Hungary, they display little empathy or understanding.

Only a long-negotiated compromise enabled the introduction of a more legally grounded procedure, the so-called conditionality mechanism. Under the regulation adopted by the European Parliament and the Council¹⁵ at the end of 2020, financial sanctions may be imposed on Member States that fail to uphold the rule of law. However, these financial sanctions must be motivated by a risk of breaching EU's financial interests. Massive corruption or mismanagement of EU funding could, in theory, relate to the rule of law violations but only with concrete evidence. Hungary accepted this compromise, believing that the requirement of proof would prevent purely political accusations. In reality, this expectation proved mistaken: two-thirds of the funds allocated to Hungary have been withheld by the European Commission, and the issues raised are mostly political. The milestones suggested by the Commission often demand that the Hungarian government either yield or fully submit to European authority, conditions politically unacceptable for the government.

Finally, the most significant actor, in our view, is the Court of Justice of the European Union, which pursues a clearly political agenda in protecting the rule of law, especially in the procedures involving Hungary. The Hungarian situation offers a formidable opportunity for the Court to reinforce its jurisprudence on the unity, efficiency, and primacy of EU law in sensitive constitutional matters. These cases provide ideal pretexts for consolidating the federal structure of EU law. This agenda explains why the Court consistently seeks relevant EU legal provisions – even when the case does not directly concern EU law – to sanction Hungary for alleged rule-of-law violations.

It is a constant that the Court of Justice can sanction EU institutions only for violating EU law and has excluded similar mechanisms within Member States, reserving that competence for itself. While defending its integrity from external oversight, the Court simultaneously challenges national sovereignty by arguing that, since EU law operates within national legal and institutional frameworks,

15 Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget.

EU constitutional requirements must also apply domestically. Thus, the Court is increasingly transforming itself into a federal constitutional court even though the treaties do not support such a role. In doing so, it effectively advances its sixty-year-old agenda of federalism.

6. Conclusions

The rule of law, as a legal principle enabling certain legal professionals to serve as strong censors of political action through a substantive approach and supranational judicial application, has become an ideal instrument for the federalization of supranational systems since its politicization and internationalization in the second half of the 20th century. Rooted in values and interests, these systems have gained growing autonomy through the authority of their courts, which now confer an implicit constitutional dimension upon them. As we remember, such a constitutional aspect could not be acquired by democratic decision-making, as the citizens of the Netherlands and France rejected the Draft Constitutional Treaty. Twenty years later, the Court of Justice appears intent on a long-deferred project, and the case of Hungary offers the perfect opportunity to do so.

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