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**Judicial Resistance against the ‘New-Type’
Hungarian Autocracy**

Bencze Mátyás

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Judicial Resistance against the ‘New-Type’ Hungarian Autocracy

Bencze, Mátyás

Abstract

The aim of this paper is to present the strongest possible social science evidence on the extent to which the ordinary judiciary in Hungary resisted the new type of autocracy. The paper presents numerical changes in judicial practice in a specific field of adjudication (the initiation of constitutional review by judges) during a certain period of the Fidesz-led Hungarian government, through which judicial independence from the government can be measured. The underlying assumption is that, in an autocratic political climate, a constitutional challenge to laws enacted by the ruling parliamentary majority is a clear sign of judicial resistance. The conclusion is that, although there has been a slight decrease in the number of such initiations, this is far from the total elimination of judicial autonomy.

1. Introduction

According to competent international organizations and renowned scholars, Hungary shifted from a state of democracy to a special kind of autocracy over the past sixteen years.¹ However, there is also consensus that a significant aspect of this political regime involved the pretense of being a constitutional democracy (‘new-type’ autocracy).² It follows that it is very difficult to obtain ‘hard’ empirical evidence of the former’s detrimental effect on the functioning of independent institutions such as the court system. Therefore, it is worth conducting a social science analysis of the impact of this political regime on the autonomy of the courts that produces tangible results. My hypothesis is that governmental pressure had a detectable impact on judicial practice.

In order to test my hypothesis, I conducted a temporal statistical analysis of judicial practice in an area that may be indicator of judicial independence and resistance to government influence: changes over time in the number of constitutional reviews initiated by judges. I assume that challenging the constitutionality of a law created by the ruling parliamentary majority is a clear sign of judicial independence. The scope of the temporal analysis covers the period from 2012 to 2023. The exact methodology for conducting the statistical analysis is described in the following section.

¹ Freedom House (2024); World Justice Project (2023); European Parliament (2022); Pap 2018, pp. 2–3.; Boda et al. 2022.

² Halmai 2021, p. 74.; Tóth 2019, p. 52.; Guriev and Treisman 2019, p. 123.

2. A statistical analysis of judicial practice

As mentioned above, it is a methodological challenge to make reliable statements about the impact of governmental pressure on judicial independence. The legal-doctrinal analysis of court decisions needs serious professional expertise to decide whether a judgment that is in accordance with the government's interest is the result of genuine legal-doctrinal considerations or the consequence of a deferential approach. It is also easy to claim that a researcher has misunderstood the legal background or the facts of a decision.

Besides, even in an openly authoritarian regime, judgments can be made against a government's decisions.³ Consequently, in a hybrid or transitional regime, there may be many judgments that do not favor the government, which can be used as proof that the government does not exert any pressure on the courts.

This is why, in order to ascertain whether Hungarian judges became deferential over time under the Fidesz regime, it is necessary to identify a field of judicial practice where (1) governmental interests are clearly present, (2) the temporal change in judicial practice can be traced, and (3) the change cannot be explained by factors other than the presence or lack of a deferential approach of the courts.

I have identified a field of judicial activity that meet these criteria: the request for constitutional review of a law (hereinafter 'norm control' or 'concrete norm control' in specific cases) initiated by judges.

My assumption was that if a judge initiates a process of concrete norm control, it is a sign that the judge is casting doubt on the constitutionality of the applicable law (made by the parliamentary majority or other law-making body of the government). The Hungarian Constitutional Court (HCC) has confirmed that the initiative of a judge to review the constitutionality of a legislative act in an individual case should be interpreted as part of the independence of the judiciary, i.e., as a manifestation of the genuine existence of such independence.⁴ Hence, these kinds of initiations signify the judge's autonomy and independence from the government.

The starting date is 2012, first, because the new court leaders of the court system entered office that year, completely changing the members of the previous leadership, who started their term before the 2010 general election. The new leaders created a new institutional culture, which, in our assumption, has strongly influenced the behavior of the judges regarding challenging the government's measures. Second, the government pressure on courts became clearly detectable the following year.⁵ Third, concerning requests for constitutional review, before 2012, the relevant laws allowed any citizen to initiate abstract norm control before HCC even without having to show that they had been affected by the challenged law ('*actio popularis*'). From 2012 onwards, *actio popularis* was abolished, and the legislation drastically reduced the scope of persons who could initiate constitutional review. Amongst the few who have been allowed to initiate it are judges; therefore, since 2012, they have borne extra responsibility to defend the rule of law and the constitutional rights of citizens. For these three

³ Graver 2023.

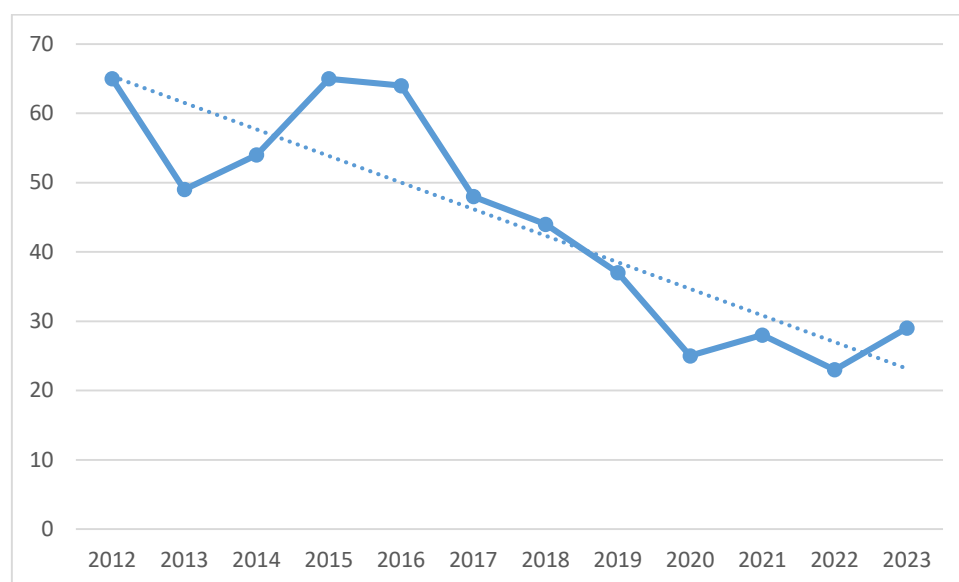
⁴ See 42/2005. (XI. 14.) AB decision, also confirmed by 35/2011. (V. 6.) AB decision.

⁵ Bencze 2024.

reasons, I considered making a comparison of the number of initiations before and after 2012 misleading.

As for all the concrete norm control cases, a clear tendency is reflected in Chart 1, compiled on the basis of official statistical data published by HCC. The number of initiations has dropped drastically since 2017, the year when court leaders became more self-restrained in their reactions to the government's criticism.⁶

Chart 1 Total number of initiated concrete norm control cases by year (author's compilation)⁷



As Chart 1 indicates only the raw numbers reflecting all the norm control cases initiated by judges, it was necessary to clean the original database. First, it had to filter out initiations concerned with the decrees of local governments or with the so-called uniformity decisions of the Curia, because they cannot be considered challenges to the lawmaking activity of the governmental majority. Second, there have been multiple initiations where more than one judge initiated the constitutional review of a certain legal provision (or the same judge initiated it in different cases). As the paper aims to explore the resilience of the whole judiciary and not of its individual members, I counted the multiple initiations as one. Thus, the basic unit in the cleaned database was the 'legal provision (challenged by any member of the judiciary)' and not 'individual initiation.' Accordingly, if constitutional reviews on the same issue were initiated in different years, I counted them as occurring in the earliest year. This choice is supported by the argument that knowing that another judge (a 'hero' in game theory terms) has already initiated a review in a case significantly reduces the 'cost' of the next initiation. After cleaning the data, a database was created that realistically reflects the willingness of the judiciary to challenge the legislature on constitutional issues ('Total number of challenged legal provisions' in Chart 2).

In the next step, I filtered out cases that were not politically sensitive. This is because judges, in many cases, tend to turn to the HCC to 'fix' technical problems with the applicable

⁶ Bencze 2024, p. 173.

⁷ The original database can be found here: <https://1drv.ms/x/s!AoqSX5Z3hnhMhoRRReLZJplDlFcb80g?e=q0FAb3>.

law that can also be defined as constitutional issues (for example, a lack of clarity of norms). Also, judges sometimes initiated norm control against laws made before the Fidesz era. Neither of these cases is politically sensitive, so they cannot be considered manifestations of judicial resistance.

From a methodological point of view, the fundamental question was how to decide whether a case was politically sensitive. Relying on my knowledge as legal researchers with a quarter of a century of experience, and being politically well-informed, educated citizen, I considered myself competent to decide on the political sensitivity of the examined cases. I considered a case politically sensitive if the challenge to the law represented a symbolic step by the government (for example, laws against refugees) or if it was an instrument directly intended to strengthen the political and economic power of Fidesz. In cases when the degree of political sensitivity was not entirely clear, I searched for reflections about the HCC's decision in the print and online press, and sometimes also consulted experienced constitutional lawyers to check if I had decided correctly.

Chart 2 Number of concrete norm control cases by legal provision and by year (author's compilation)

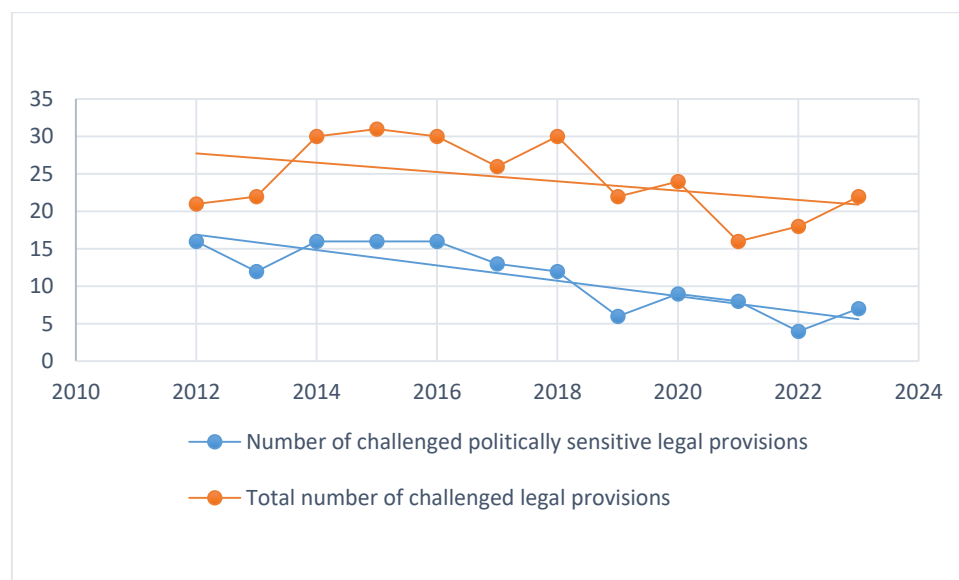


Chart 2 is similar to the previous one, but the drop in both the total number of cases and politically sensitive ones is less spectacular than indicated by the raw data. Nonetheless, it is clearly detectable that the tendency is declining, and, what is more important, the number of initiations in politically sensitive cases decreases slightly more than the total number of initiations.

3. Discussion of the results of the empirical analysis

The gradual drop in the number of politically sensitive initiations can be explained by many factors. The most implausible one is that, over time, the parliamentary majority has made less and less legislation whose constitutionality has been questionable. In the beginning of this paper, I presented references of the constantly deteriorating condition of the rule of law and

democracy in Hungary between 2010 and 2026. Therefore, the chance that the legislation has become constitutional over the examined period is almost negligible.

The diminishing number of constitutional review initiations might be a sign of ‘disillusionment’ on the part of the Hungarian judges. From 2010 onwards, Fidesz gradually occupied the HCC, and by 2015, they had fully packed the Court with Fidesz-loyalist justices, who proved to be very self-restrained in annulling laws that were important for the politics of the government party.⁸ If the chance of success is small, this may deter judges from initiating concrete norm control.⁹

Therefore, the more plausible explanation is that Hungarian judges, lacking support from their superiors, have become more self-restrained in terms of initiations, as they cannot count on protection if they are accused of ‘making politics.’¹⁰ In a system where judges are part of a bureaucratic organization and where their career prospects significantly depend on the opinion of their superiors, ‘self-censorship’ in politically sensitive cases may be a viable option for judges who seek promotion. This assumption is supported by research that examined the strategies of Hungarian judges in the very controversial case of the criminalization of homelessness in 2018, which was an organic part of the populist politics of the government.¹¹ The result of the research was that judges who had to deal with these cases turned to the HCC (referring to the violation of human dignity) only if their career prospects were not affected because of their tenured position or if they felt the strong support of their peers or/and immediate superiors to act this way.¹² Another study supports the ‘gradual discouragement’ explanation. This study found that Hungarian judges’ sentencing practices have become increasingly severe since 2010. This change cannot be explained by changes in criminal law, but only by the fact that judges adjusted their practice to the government’s ‘tough on crime’ policy, which has been widely and constantly advertised in the media.¹³

It is, therefore, not a surprise that the Hungarian judiciary shows signs of ‘fatigue’ in the fight for the rule of law and constitutionality. The drop in the number of concrete norm control cases, however, is not as spectacular as one might think, considering the strength of the government’s attacks on the judiciary and the general political climate in Hungary. One explanation may be that the bureaucratic model of court organization has certain features that can make judges more resistant to political pressure. In the construction of a modern court system from 1867, Hungary followed the so-called Prussian model. According to this, a judge is a well-educated, competent and disciplined bureaucrat, a legal specialist whose primary duty is the unbiased and impersonal application of the law.¹⁴ They are politically neutral and gain legitimacy from their high level of professional competence. This model can also be characterized as a ‘Weberian’ one.¹⁵ During the socialist era, especially in its ‘soft’ period, the bureaucratic character of judicial work became stronger. From the mid-1960s onwards direct

⁸ Szente 2026.

⁹ Somssich and Szalai 2022, p. 4

¹⁰ In 2014, in one of his concurring opinions, a constitutional judge elected by the Fidesz parliamentary majority openly accused some judges who had initiated the concrete norm control of a certain law of playing anti-government politics. It is true that this law was very important for Fidesz, but the justice did not provide any evidence of political bias on the part of the initiating judges. Bencze and Kovács 2014.

¹¹ Homelessness is not actually qualified as a crime but a misdemeanor. Nevertheless, the sanction can include imprisonment, and the parliamentary majority amended the Fundamental Law (!) with a ban on ‘living on the street.’

¹² Molnár 2024.

¹³ Győry 2024.

¹⁴ Máthé 1982, pp. 17–26.

¹⁵ Weber 1978, pp. 809 and 853.

political influence on courts gradually disappeared; and the bureaucratic mentality of judges was further strengthened. Judges were generally conceived of as technocrats and apolitical civil servants.¹⁶

The positive side of the bureaucratic ('Weberian') model is that the judges' self-perception is that they are competent, unbiased, effective, and independent civil servants, not subordinates of any government. This is why one currently can find judges in Hungary who have remained loyal to judicial values such as neutrality, impartiality, and autonomy. This follows from the rational-legal legitimacy of the Hungarian judiciary, which is based on the law and formalized procedures. In the eyes of these kinds of judges, politics can only interfere with professional activity and reduce efficiency. The Weberian mentality can also be reconciled with the broad conception of law according to which rights, principles, and values are part of the law.¹⁷

4. Concluding remarks

A common problem in understanding how new types of autocracies work is that they can effectively mimic the institutional set-up of real democracies. The formal existence of institutions makes it difficult to criticize, and criticisms often appear as mere opinions. In this paper, I have sought to identify whether it can be empirically demonstrated that in a particular new type of autocracy (Hungary), the government has sought to influence judicial judgments in illegitimate ways.

Statistical methods were used to examine an area where it might be shown whether judges had bowed to government pressure. The number of constitutional review proceedings initiated by judges has been gradually decreasing since 2012 concerning politically sensitive cases, which may suggest, justifying my initial hypothesis, that government pressure has, to some extent, been effective. The Hungarian government has found a way of influencing the judicial practice of the courts that is more subtle than threatening judges outright or engaging in 'telephone justice.'

At the same time, the relatively slight decrease in the numbers suggests that the Hungarian court system, which is essentially bureaucratic in nature, is more resistant to political pressure than previously assumed due to its respect for professionalism.

¹⁶ Fleck 2001, p. 105.

¹⁷ Bencze 2022, p. 1287.

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Kiadó: ELTE Társadalomtudományi Kutatóközpont (MTA Kiválósági Kutatóhely)

Székhely: 1097 Budapest, Tóth Kálmán utca 4.

Felelős kiadó: Boda Zsolt főigazgató

Felelős szerkesztő: Kecskés Gábor

Szerkesztőség: Hoffmann Tamás, Lux Ágnes, Mezei Kitti

Honlap: <http://jog.tk.mta.hu/mtalwp>

E-mail: mta.law-wp@tk.mta.hu

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