Constitutional Reset As the Only Choice

On the Possible Reform of the Hungarian Constitutional Court

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One of the most pressing challenges for the new Hungarian authorities will be the future of the Constitutional Court, perceived as a captured institution. The new authorities may be tempted to use their constitutional majority to adopt amendments aimed at a complete overhaul of the Constitutional Court, although such radical actions risk being seen as a violation of judicial independence, one of the core elements of the European standards of the Rule of Law. However, in this post I will argue that sometimes radical steps in response to captured apex courts can be both justified and necessary, provided that they form part of a broader reform genuinely aimed at strengthening the institution's independence, rather than simply re-capturing it.

European Standards and Protection of Judicial Irremovability

Judicial irremovability, as a key safeguard of judicial independence, is a crucial component of the European Rule of Law standards. In light of the ECtHR case law, removal of a judge without providing them with access to a court usually constitutes a violation of Article 6 of the Convention. Arbitrary dismissal, depending on the context of the case, may also breach other provisions of the Convention, such as Article 8 or 10.

The Venice Commission, too, has been very sceptical of removing judges *ex lege*, even as part of a constitutional reform. In the 2024 Opinion on Poland, it criticised the draft constitutional amendment which envisaged the removal of current judges of the Polish Constitutional Tribunal. It held that there was no pressing need to take such a step, given that the Sejm of the current term could appoint a substantive number of judges, leading to a more pluralistic composition of the Court. Moreover, the Venice Commission assessed that such a radical action could be perceived as an impermissible *ad personam* measure and could constitute a dangerous precedent that could be abused in the future.

The Removal of Judges and Judicial Independence

In my view, absolutisation of judicial irremovability and extending it even to the protection of judges of captured constitutional courts against measures taken as part of formally lawful constitutional reforms does not seem a justified approach.

As the Polish experiences have shown, respecting the terms of a court which is unable to carry out its duties independently and impartially serves neither the protection of the rule of law, nor strengthening the public trust in the system of constitutional review.

The current Constitutional Tribunal in Poland is not an independent protector of the Constitution – it is used by the former ruling party (PiS) as a weapon to block almost every action of the coalition aimed at restoring the rule of law. Its judgments are not based on any convincing legal reasoning but have purely instrumental character – as Wojciech Brzozowski aptly put it, the Tribunal's interpretative approach "is best described as the cherry-picking model, with the only guiding principle being to use whatever works, whatever promises to help achieve the aims pursued". For example, when the coalition amended the law on the National Council of the Judiciary, the Tribunal declared the reform unconstitutional. But when the coalition attempted to elect members of the NCJ under the existing law, the Tribunal issued an interim measure requesting that the Sejm halt the procedure. Similarly, when the coalition adopted a new law on the Constitutional Tribunal, the Tribunal declared it unconstitutional. But when the coalition elected

judges based on the existing law, it ruled that the President is not obliged to swear in judges. Parliamentary committees investigating abuses during PiS rule were likewise declared unconstitutional (here and here), and the Act on the Tribunal of State was declared partly unconstitutional as well (here, here, and here), to block proceedings against officials appointed by PiS.

At the same time, the captured Constitutional Tribunal can no longer function as a check against the Polish government. The latter perceives it as a completely compromised institution and refuses to implement its judgments. But this often results in a situation where there is no organ which could effectively review the legality of the government's actions.

One cannot rule out a similar scenario unfolding in Hungary. The Constitutional Court may seek to block various efforts by a new ruling coalition to restore the system after Fidesz's rule. In response, the Hungarian government could discredit unfavourable judgments by presenting them as the work of Orbán loyalists and *de facto* override them by adopting new constitutional amendments, following in the footsteps of FIDESZ from the first years of their rule. Should this occur, the Constitutional Court would be marginalised and unable to function as an effective check on executive power. As a result, instead of "re-building public confidence" in the Constitutional Court, this trust could be further diminished.

Removal as Part of a Legitimate Constitutional Reform

I certainly agree that the ruling authorities cannot be given a *carte blanche* to purge a constitutional court and fill it with their own loyalists. Such a measure would not restore the Rule of Law but would amount merely to yet another instance of court capturing. However, the literature has recognised (here and here) that there may be exceptional situations in which court-packing could be legitimate. I believe that a complete overhaul of the constitutional court's composition may be warranted if, rather than constituting an end in itself, it forms a part of a broader, objectively justified reform aimed at strengthening the independence and impartiality of the court.

The context of reform and the intentions of authorities are crucial for compliance with Article 6 of the ECHR. For instance, in Turkish cases concerning *ex lege* removal of judges of the top courts, the ECtHR took into account that the scale and character of judicial reforms implemented by the authorities were not such as to justify the dismissal of judges without providing them with access to court. However, in the case of *Gyulumyan and others v. Armenia*, the ECtHR reached a different conclusion.

The said case concerned the removal of Constitutional Court judges on the basis of a constitutional amendment adopted in the context of deep political changes following the so-called Armenian Revolution of 2018. The amendment changed the procedure for appointing judges of the Constitutional Court and introduced fixed terms for them. Since the new terms applied even to judges appointed before the reform took effect, several judges were removed from office. The removed judges filed applications to the ECtHR, but the Court declared them inadmissible.

There are certainly differences between the Armenian and the Polish or Hungarian context. The replacement of life tenure with fixed terms would be objectively very difficult to implement without shortening the terms of incumbent judges, and so it was easier to prove that the form was justified. In Poland and Hungary, judges already have fixed terms (though, in Hungary's case, unusually long), so one can always argue that, rather than removing them, authorities could wait for their terms to expire.

However, the ECtHR's reasoning in *Gyulumyan and Others* contains certain passages which could be interpreted more broadly, as a recognition that legitimate constitutional reforms may justify extraordinary measures, such as the removal of judges *ex lege*. The ECtHR paid attention to the specific role and function of constitutional courts, which make them different from ordinary courts. It also underlined that "the power of a government to undertake reforms of the judiciary cannot be called into question, on condition that any reform of the judicial system should not result in undermining the independence of the judiciary and its governing bodies". In the ECtHR's opin-

ion, the legislation at stake was not targeted against this group of judges – their removal was not arbitrary but part of a broader reform aimed at strengthening, not weakening, the independence of the Armenian Constitutional Court. Moreover, given the unique nature of constitutional amendments, ensuring the right of dismissed judges to judicial review would have been difficult.

On that basis, I argue that the removal of judges of the constitutional court via constitutional amendment would not violate Article 6 ECHR if it were part of a structural reform genuinely aimed at strengthening the court's independence and impartiality. The European institutions, including the Venice Commission, should acknowledge that domestic authorities may have a legitimate interest in reforming constitutional courts whose composition lacks necessary pluralism. As Gertrude Lübbe-Wolff convincingly argued, constitutional courts that are one-sidedly staffed lack systemic impartiality, which is key for the proper exercise of their functions.

The reform of such courts would be justified, especially if it is necessary to address the constitutional shortcomings that led to the rule of law backsliding. According to the Venice Commission, one of the goals of the rule of law restoration process should be addressing "the very flaws that allowed the regression to occur, in order to build better safeguards for the future."

Constitutional Reset

In Poland, the idea of adopting a constitutional amendment to reform the appointment procedure for Constitutional Tribunal judges and remove the current bench is referred to as a "constitutional reset". Recently, an increasing number of commentators have voiced their support for this approach. An interesting proposal in this regard was presented by Senator Kazimierz Michał Ujazdowski. His draft law envisages terminating the terms of the current judges of the Constitutional Tribunal and dispersing the competence to elect their successors among three organs: the Sejm, the Senate, and the President. Such a law would address one of the most serious flaws of the current Polish Constitution: that all judges of the Constitutional Tribunal are elected by the Sejm with just an absolute majority.

Unfortunately, in Poland, the chances for adopting such a reform are slim, and attempts to "zero" the Constitutional Tribunal through an ordinary parliamentary resolution would be unlawful and, instead of solving the crisis, could lead to further problems. However, in Hungary, the idea of "constitutional reset" could be effectively implemented. Similarly to Poland, the current procedure for appointing judges to the Constitutional Court is flawed, as it allows the ruling majority to unilaterally elect all the judges. In addition, during the initial phase of FIDESZ rule, the parliament changed the law, increasing the number of the Constitutional Court's judges and limiting the opposition's influence on the process of their election. This resulted in a situation in which the Constitutional Court lacks the necessary pluralism.

Therefore, the goal of the new authorities should be to construe the procedure so as to make the Court more resilient to political capture. This could involve, for example, increasing the transparency of the process and ensuring the involvement of non-political bodies and civil society. It is also crucial to cooperate with the parliamentary opposition to ensure the reform's broader legitimacy. From an international perspective, consultations with the Venice Commission may be important. To lower the risk of losing a case at the ECtHR, the reform could include mechanisms to protect the rights of incumbent judges, such as a proper transitional period or a guarantee of an adequate retirement salary upon removal.

The creation of a truly independent and effective Constitutional Court, trusted and respected by society and all political actors in Hungary, would undoubtedly be a very difficult task. The scenario considered here would require TISZA to reject the possibility of capturing or marginalising the Constitutional Court and to accept limitations on its virtually unlimited power, guaranteed by a two-thirds majority. It may turn out that, politically, the most convenient solution would be simply to do nothing with the Constitutional Court. After all, as already mentioned, any problematic ruling

could easily be overridden, and the risk of condemnation by European institutions for adopting the radical measures considered here would be averted. But would this really be a triumph of the rule of law?

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