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Fazekas, János*

Political question doctrine in Hungary and Europe. An overview

This paper is a brief summary of my habilitation lecture, which was held on 3 November 2022 at ELTE's Faculty of Law. The title of lecture and the thesis was "Judicial review of governmental acts and the political question doctrine". The thesis will be published in book form in 2024. At the end of this paper, I will briefly introduce my three-year-long (2022–2025) research project funded by the MTA Bolyai Scholarship, which is a sequel to my habilitation research.

The main question of my habilitation research is whether governmental actions can be subject to judicial review. Although holding the government to account is an important element of democracy, it is not obvious that every action of the executive branch can be reviewed by the judiciary. Government is a complex activity that has an essentially political nature but regulated by law. It involves setting strategic goals for a political community and monitoring their implementation, and ideological choices between alternatives that express values.[1] As a result, governance largely means taking discretionary decisions with political content. That's why governing politicians must be accountable to the people.[2] On the other hand, implementing political decisions is not the government's but the public administration's task, which is, as a bureaucratic administrative apparatus, the "engine room" of the state.[3]

Distinguishing between government and public administration is not easy because of the organizational and personal overlaps.[4] However, differentiation is crucial because it must be decided which decisions can be challenged before a court and which cannot (justiciable and non-justiciable acts). Political decisions cannot be reviewed by courts, only by politicians or the people itself. On the other hand, public administration,

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1 I. Marosi and L. Csink, Political Questions in the United States and in France, (2009) 4 (1) *Studia Iuridica Caroliensia,* 113–124, http://www.kre.hu/portal/doc/sic/2009/sic4_10_marosi-csink.pdf (Last accessed: 29.12.2023.) DOI: https://doi.org/10.14232/jtgf.2009.1.107-113

2 R. Hague and M. Harrop, *Comparative Government and Politics. An Introduction,* (Palgrave Macmillan, Basingstoke, 2004) 268.

3 Hague and Harrop, *Comparative Government and Politics.* 290; M. Weber, *The Theory of Social and Economic Organization,* (Free Press, New York, 1947) 329–341.

4 Körösényi A., Demokrácia és patronázs. Politikusok és köztisztviselők viszonya, (1996) 5 (4) *Politikatudományi Szemle,* 35–62.

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which is far more thoroughly regulated by law, can be controlled by public administrative bodies and courts, too.[5]

The theoretical framework that helps in making this decision and, as a result, setting the boundaries of judicial review, is called political question doctrine. It describes the connection between governmental acts and law and ascertains whether an act of government may be challenged before the court. This is a very important question, because courts are nowadays often pressed to make rulings on politically sensitive cases, such as regarding climate change[6] or the conditionality mechanism in the European Union.[7] Moreover, modern legal systems provide governmental bodies with broad deliberation, even discretionary powers, as the absence of detailed decision-making criteria and constraints laid down in legislation can enable administrations to respond quickly and effectively to continuously changing challenges.[8] On the other hand, to maintain effectiveness, governments also need constant feedback on the quality of their work, both in legal and political terms, and to be subject to external scrutiny in the system of democratic checks and balances. As a result, political question doctrine helps to resolve the conflict between broad political discretion and accountability (and, within this, legality).

In sum, governmental acts cannot be challenged in court since judges may only adjudicate legal but not political disputes. They cannot assume governmental responsibility because they have not been empowered by the people to govern. On the other hand, governmental actions may certainly not violate the principle of the rule of law and separation of powers.[9] From another point of view, the final decision on justiciability is always in the hand of the court: it can use political question doctrine as a tool to prevent itself from deciding on the merits of issues where it would be imprudent to do so.[10]

Political question doctrine has been elaborated in the jurisprudence of the United States Supreme Court, which laid down the criteria for political issues and thus

[5] Ereky I., *Közigazgatás és önkormányzat,* (Magyar Tudományos Akadémia, Budapest, 1939) 120–123, 180.

[6] K. Sulyok, The quality of law requirement as a climate litigation tool, (2022) 2 *ELTE Law Working Papers,* 1–7. DOI: https://doi.org/10.58360/20221129-Sulyok

[7] J. Fazekas, The European Court of Justice as political actor in intergovernmental coordination, (2024) 17 (1) *Journal of Comparative Politics,* 5–18. DOI: https://doi.org/10.21862/PoliticalActors.2023.35-37

[8] K. F. Warren, Administrative Discretion, in J. Rabin (ed.), *Encyclopedia of Public Administration and Public Policy,* (CRC Press, Boca Raton, 2003) 35–38.

[9] J. Fazekas, Local Governments and Political Question Doctrine in Hungary, (2019) 17 (3) *Lex Localis – Journal of Local Self-Government,* 811. DOI: https://doi.org/10.4335/17.3.809-819(2019)

[10] M. Tushnet, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, (2002) 80 *North Carolina Law Review,* 1204. DOI: https://doi.org/10.2139/ssrn.283464

non-justiciable governmental actions in the famous *Baker v. Carr* landmark decision,[11] in which the Court ruled on a case about the composition of legislative districts. In its decision, the Supreme Court set out the criteria for a case to be considered a political question, which cannot be decided by the court; for example, a "lack of judicially discoverable and manageable standards for resolving it" or the "impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion". Courts are often reluctant to take part in deciding other political questions, too, such as when the President and the Congress clash over the exercise of wartime authority.[12]

In European legal systems, political question doctrine cannot be found, neither in theory nor in judicial practice in the form in which it surfaced in the United States. Constitutional courts in Europe are generally not part of the ordinary court system and are much more likely to be regarded as political bodies than the US Supreme Court. In Europe, the separation between law and politics is less strict. Consequently, while the US Supreme Court only rules on the specific issue of law that it is presented with (see the case or controversy clause in the US Constitution), a European constitutional court examines the legal issue in a broader context, when, for example, it reviews a statutory law instrument abstractly in the light of the constitution.[13]

Nevertheless, political question doctrine has its own European antecedents and versions. The first theoretical doctrine to associate it with is the reason of state *(raison d'état),* with the pivotal thought that the interest of the state is more important than the legality of a state act.[14] In the German and Austrian jurisprudence, governmental acts *(Regierunksakt)* can be examined,[15] while in French jurisprudence the so called acte de gouvernements emerged in the practice *Conseil d´État*.[16] In the common law of the United Kingdom, we find another historical precedent, the concept of the royal prerogative.[17]

[11] *Baker v. Carr,* 369 U.S. 186 (1962).

[12] T. Porčnik, Detainee rights: the judicial vs. congressional check on the president in wartime, (2019) 12 (2) *Journal of Comparative Politics,* 72.

[13] Paczolay P., Alkotmánybíráskodás a politika és a jog határán, in Paczolay P. (ed.), *Alkotmánybíráskodás, alkotmányértelmezés,* (Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar, Budapest, 1995) 22.

[14] A. S. Miller, Reason of State and the Emergent Constitution of Control, (1980) 64 *Minnesota Law Review,* 587.

[15] E. Schmidt-Aßmann, Grundgesetz Art. 19 Abs. 4. in T. Maunz and G. Dürig (eds), *Grundgesetz. Kommentar,* (C. H. Beck, München, 2019) 81–83.

[16] Marosi and Csink, Political Questions in the United States and in France, 118–123; Barabás G., Kormányzati tevékenység: a "political question doctrine" a magyar közigazgatási perjogban, in Barabás G., Rozsnyai K. F. and Kovács A., *Kommentár a közigazgatási perrendtartáshoz,* (Wolters Kluwer Hungary, Budapest, 2018) 86.

[17] A. Bradley and K. Ewing, *Constitutional and Administrative Law,* (Pearson Longman, Harlow, 2011) 250–251.

Although the thesis does not delve deeply into the UK common law system, a special chapter is devoted to the court cases relating to the UK's exit from the European Union (Brexit). The reason for this is that Brexit has recently been (and to some extent still is) one of the most significant, news-generating, and emblematic political events on the international political stage, which fundamentally determines the fate of Europe and Hungary. This story has also given rise to some very exciting court cases. In them, the courts decided issues of real political significance and, accordingly, these judgments caused very serious political upheavals. Therefore, through these cases, the judicial review of government acts and the practical implementation of the political question doctrine can be observed at first hand, in today's context. The chapter, inter alia, analyses the *Miller/Cherry* case,[18] in which the UK Supreme Court had to rule on the constitutionality of the prorogation of the House of Commons. The court ruled the governmental decision on prorogation unconstitutional because it would have made parliamentary monitoring of government impossible during a very crucial period of Brexit.

The longest part of the thesis covers the functioning of political question doctrine in Hungary, namely in the jurisprudence of the Constitutional Court (hereinafter: CC) and the administrative courts (including the Supreme Court/Curia). The main controversy of the Hungarian situation is that, like European jurisprudences, Hungarian judicial practice has never explicitly mentioned political question doctrine; nevertheless, courts and the CC have regularly used political question doctrine-like justifications in their decisions. After the regime change (1989/1990). the CC played an important role in building the Hungarian constitutional system, for example, regarding the interpretation of the powers of the President of the Republic and therefore deciding on a conflict between the President and the Government,[19] so it had to rule on politically sensitive cases. On the other hand, such as in cases regarding the criminal justice system, the CC refrained from deciding on the merits of the problems, citing very much political question doctrine-like reasons.[20] Nevertheless, the new Code on the CC[21] has largely depoliticised constitutional adjudication by abolishing *actio popularis* and putting emphasis on constitutional complaints as a means of finding whether an action was unconstitutional. As a result, the CC has refrained from deciding politically sensitive cases after 2011, even when it had the opportunity to do so.[22] Furthermore, due to successive amendments to the Fundamental Law overruling

[18] *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland,* ([2019] UKSC 41).
[19] CC decision 48/1991. (IX. 26.).
[20] Firstly in CC decision 1214/B/1990.
[21] Act CLI of 2011 on the Constitutional Court.
[22] Z. Pozsár-Szentmiklósy, The Hungarian Constitutional Court as a lawmaker, in M. Florczak-Wator (ed.), *Judicial Law-Making in European Constitutional Courts,* (Routledge, London and New York, 2020, 128–144) 144. DOI: https://doi.org/10.4324/9781003022442-7

certain decisions of the CC, it has had less and less power to interfere in the decision of cases that the legislature and the constitutional branches want to keep to themselves.[23]

In the field of judicial review of administrative acts by ordinary courts, the adoption of Act I of 2017 on the Code of Administrative Court Procedure (hereinafter: Kp.) can be considered as a significant milestone, because the concept of non-justiciable governmental actions appeared for the first time in Hungarian administrative statutory law in the Kp.[24] It has given political question doctrine a clear formulation in legislation. Prior to the Kp., the doctrine appeared indirectly, mostly in the practice of the Constitutional Court. Furthermore, since administrative adjudication before the adoption of the Kp. was primarily focused on decisions of administrative authorities, there was less chance of politically relevant cases being brought to administrative courts. The thesis therefore examines two politically heated cases under the regime of the Kp. that are relevant regarding political question doctrine: case Kvk. III.38.043/2019/2 (Curia) from 2019 was related to a municipal election campaign and case Kpkf. 40.129/2021/2 (Curia) from 2021 was about the maintenance of the University of Theatre and Film Arts (SZFE).

The man conclusions of the thesis are that political question doctrine is a vital challenge to the principle of rule of law because it excludes some decisions of the Executive from judicial review. Contrary to this, it is a democratic requirement to provide judicial remedy against decisions of the government and the court must be able to judge the legality of such decisions. The principle of separation of powers supports judicial review in all cases, even of a governmental action with political content, as it ensures that each branch operates lawfully in its own domain. In a democracy, no one can justify their own decisions if found contrary to the constitution and substantive law.[25] Consequently, courts should follow a prudential theory of political questions:[26] they must carefully consider whether a politically sensitive case is justiciable, must draw as narrowly as possible the boundaries of the political question doctrine and has to seek to ensure that as many acts of the Executive as possible are subject to judicial review. It is highly desirable, especially in view of the recent trends on limiting judicial power throughout Europe and the whole world, including Hungary (see the above-mentioned changes regarding the

[23] J. Fazekas, Administrative procedural and litigation aspects of the review of governmental actions, (2022) 2 (2) *Institutiones Administrationis – Journal of Administrative Sciences,* 17–20. DOI: https://doi.org/10.54201/iajas.v2i2.52; P. Sonnevend, The Responsibility of Courts in Maintaining the Rule of Law: Two Tales of Consequential Judicial Self-Restraiyernt, in A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski, and M. Schmidt (eds), *Defending Checks and Balances in EU Member States,* (Springer Verlag, Heidelberg, 2021) 175.

[24] Section 4(4) a).

[25] V. Beširević, Making Sense of the Political Question Doctrine: The Case of Kosovo, (2021) 46 (1) *Review of Central and East European Law,* 95–96. DOI: https://doi.org/10.1163/15730352-bja10041

[26] S. Birkey, Gordon v. Texas and the Prudential Approach to Political Questions, (1999) 87 (5) *California Law Review,* 1265–1281. DOI: https://doi.org/10.2307/3481043

Constitutional Court). In the United Kingdom, several government officials, including then-Prime Minister Boris Johnson said, regarding the *Miller/Cherry* case in connection with Brexit, that the courts became involved in politics, which is for ministers and Parliament, and the boundaries of judicial review should be reconsidered.[27] On the other hand, trends on limiting judicial review do not lack a theoretical basis. The concept of judicialization[28] analyses and often criticizes the process when judges take over the role of elected politicians when deciding on political matters.

As a sequel to my habilitation research, I have started a three-year (2022–2025) research project to examine the role of political question doctrine in the jurisprudence of the European Court of Justice (hereinafter ECJ). The research is in progress, so its final findings cannot be formulated yet. The starting point of the research is that ECJ is not a political actor; nonetheless, it can play a vital role in solving political debates, since it regularly makes rulings on political issues decided by EU bodies. Although ECJ has never elaborated a comprehensive political question doctrine, it has decided, case by case, whether a political problem is justiciable from the 1970's up to now (see. e. g. the Hungarian and Polish cases regarding the conditionality or rule of law mechanism). Despite the ECJ legally reviewing the operation of the Executive on an EU and national level, it usually refrains from cases of directly political substance because, as a court, it cannot take over the role of political actors. The aim of the research is to examine how it has tried to balance between these requirements. The main hypothesis of the research is that the political cohesion within the EU is going to become stronger, because it must take up challenges that need united action, for example, global issues like climate change or migration, or the Ukrainian-Russian war. For this reason, it is vital that ECJ, as the main body of the European judiciary, can rule on politically sensitive cases, since the judiciary can sometimes take the case out of the current political context, which means that the impact of the decision will go beyond the specific case. In this way, the ECJ can decide issues on which it is very difficult or impossible to reach political consensus, or even cool the heat of political conflict.[29] By doing so, the ECJ could help Europe to become a cohesive and organic political community.

This ongoing three-year research project is supported by the MTA János Bolyai Research Scholarship and the ÚNKP-22-5 New National Excellence Program of the Ministry for Culture and Innovation from the source of the National Research Development and Innovation Fund.

[27] BBC News, Judicial review: *Labour query independence of government probe,* 31 July 2020, https://www.bbc.com/news/uk-politics-53612232 (Last accessed: 29.12.2023.).

[28] R. Hirschl, The Judicialization of Politics, in E. R. Goodin (ed.), *The Oxford Handbook of Political Science*, (Oxford University Press, Oxford, 2013) 253–270; B. Pokol, *A jurisztokratikus állam* (Dialóg Campus Kiadó, Budapest, 2017).

[29] Sólyom L., Az alkotmány őrei, in Hitseker M. and Szilágyi Z. (eds), *Mindentudás Egyeteme: Hatodik kötet,* (Kossuth Kiadó, Budapest, 2006) 334.