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The Constitutional Court in the Classical System of the Branches of Power

(theses of PhD dissertation)

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I. Review of the research objective and research question

Constitutional courts, constitutional justice and the interpretation of the constitution have been the central issues of numerous researches and investigations over the last century; these include works on the development and historical background of constitutional justice, those focusing on the theoretical definition of the activity performed by the constitutional court, as well as texts exploring the organizational models of constitutional justice in a comparative approach. The most recent comprehensive articles on the Hungarian Constitutional Court have been published on the relationship between the Constitutional Court and the supreme judicial body. The concept of "juristocratic paradigm" was introduced recently in the Hungarian scholarly thinking, and the discussion around it is still evolving. I undertook to write my doctoral dissertation entitled "The Constitutional Court in the Classical System of the Branches of Power" in this academic context, and I aimed to answer the question of whether the Constitutional Court could be regarded as an independent branch of power. This question and my attempts to answer it within the context of the separation of powers were inspired by an issue raised almost twenty-five years ago, i.e. whether the theory of the branches of power itself has become superseded should also be the subject of a separate analysis. According to some opinions developed within the scope of classical and modern theories of the branches of power, countless numbers of such branches exist, and the theory of the branches of power applies not only within the framework of the nation-state, but also in the field of international public law. On this basis, I aim to overview the reasons why the Constitutional Court can or cannot be considered an independent branch of power.

II. Presentation of the research topics and analyzes performed

I set the starting point of seeking an answer to the question outlined the previous section by defining the concept of the state as the supreme power over a given area and population. Such interpretation of the term of the state is consistent with the definition of sovereignty, i.e. an independent supreme power. However, the notion of supreme power also requires a definition. Power is usually defined as the ability of a person exercising power to induce other individuals, groups or organizations to perform the

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desired behavior. The holder of sovereignty in a politically organized society can enforce their will over the population living in the given area. Sovereignty is limited by the separation of powers. The separation of state powers is considered to be a means of defense against the arbitrary exercise of power, embodied in democratic constitutions. The rights deriving from popular sovereignty are exercised by the structure of the state as a whole in accordance with the order of jurisdictions set out in the constitution. The ideology of the separation of powers is based on institutional and social control of power.

There is no consensus regarding the period when the ideology of the separation of powers emerged. According to some authors, such ideology already appeared in ancient and medieval thought. In contrast, other authors do not accept the idea of projecting the doctrine of the separation of powers back to antiquity. For my part, I take the view that attempts to limit power were already present in ancient writings, however, the idea of the separation of powers appeared primarily in John Locke's work, and evolved in the political struggles of the seventeenth and eighteenth centuries. In English legal literature, a dualist concept prevails, arguing that the judiciary is not an independent branch of power but only the legislature and the executive can be considered as such. However, the three classical branches of power underlying my doctoral dissertation, namely the legislative, executive and judicial powers, are not associated with Locke but with Montesquieu's name and work.

In the course of the development of Hungarian legal history, the Doctrine of the Holy Crown is considered to be the representation of the constitutional continuity of the state of Hungary as declared in the National Avowal of the Fundamental Law of Hungary, in which doctrine – according to Ferenc Eckhart's definition – the nineteenth-century thinkers reconciled István Werbőczy's tenets with the idea of popular sovereignty. The subject of state power is the state, the Hungarian concept of which can be found in the Doctrine of the Holy Crown. State power is indivisible, which does not preclude the state from acting through its bodies with various functions. The state organization established in 1848 reflected the separation of certain power centers. Legislation was vested in the sovereign and the National Assembly together. The ruler exercised executive power through the appointed ministers. The measures of the ruler entered into force upon the signature of the politically responsible ministers. The judges were appointed by the ruler.

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Since Montesquieu, the separation of public administration and the judiciary has been a major issue in political science. It can be considered as the most significant step in the construction of a dualist rule of law. The conclusions of the ideology of the separation of powers with regard to the Hungarian state can be summarized as follows: until the entry into force of Act XX of 1949 on the Constitution of the Hungarian People's Republic, which was based on the principle of concentration of powers in conflict with the ideology of the separation of powers, the principles laid down in István Werbőczy's Tripartitum and in the Doctrine of the Holy Crown were decisive at the enactment of the April 1848 laws, at the adoption of the laws establishing the Austro-Hungarian Compromise of 1867, as well as at the entry into force of Act I of 1920 on the restoration of constitutionality and the provisional settlement of the exercise of state authority, which act ensured legal continuity following the short period of the Hungarian Soviet Republic.

The Constitutional Court can be considered as a legal institution closely related to the branches of power. In a doctoral dissertation examining the Constitutional Court and constitutional justice, defining constitutional justice is inevitable. According to the generally accepted definition recently published, constitutional justice can be defined as the judicial evaluation of the constitutionality of laws, other legal norms and the decisions of individual bodies implementing the law. In addition, the Constitutional Court is entitled and obliged to carry out an authentic interpretation of the constitution. The Constitutional Court is the supreme body for the protection of the constitution (in Hungary: the Fundamental Law). Regarding the Constitutional Court, as a thesis statement, it can be argued that the basic precondition of the establishment thereof was to accept the separation of powers and to deem the principles of constitutional justice as binding. The Constitutional Court has (can have) two functions: protecting the fundamental rights of citizens and controlling legislative activity. The Constitutional Court is rooted in ancient Greek and Roman thinking, i.e. in the idea of *ius naturale – ius gentium*. On the other hand, the origin of constitutional justice in its modern sense can be traced back to the United States and the decision delivered in the *Marbury v. Madison* case in 1803, establishing that a law in conflict with the constitution is not applicable.

In my doctoral dissertation, by examining the development of constitutional courts, I came to the conclusion that constitutional justice, both in common law and in

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continental legal systems, is the result of a joint development based on the synthesis of enforcing higher principles, the need for a written record of superior rights and the tools of the judiciary allowing for the enforcement of the constitution. In a democratic state subject to the rule of law, the clear legal separation of political decisions and administrative decisions is a requirement. Constitutional courts and supreme courts determine also the functioning of public administration by their decisions. The original idea of constitutional justice is that it provides a guaranteed, unalterable framework for the formation of society carried out by changing majority governments.

Following the above detailed investigation on the history of ideas, I provided a brief overview of the established models of constitutional courts. In the American model of constitutional justice, the judge omits to apply unconstitutional law in the individual matter to be decided. The judge protects the constitution, in the context of which the separation of powers, on the one hand, defines the subject matter of federal legislation within the federal system interpreted by the Supreme Court (horizontal separation of powers), and, on the other hand, is achieved also in a vertical form (the internal brake of the two chambers of the legislature, the veto of the executive, and the right of the courts to declare the disapplication of the law).

In the European model, the predominance of the parliament initially prevented the spread of constitutional justice. As a result of Hans Kelsen's theory, the Austrian Constitutional Court became operational in 1920. The primary purpose of Hans Kelsen's work entitled *The Pure Theory of Law (Reine Rechtslehre)* was to provide a general description of legal systems. The essence of Kelsen's legal theory is a hierarchical system of legal norms that is free of contradictions and gaps. The Austrian constitutional justice was created as an activity of a special court aimed directly at reviewing parliamentary legislation and annulling laws (as well as resolving disputes over competence). The essence of Kelsen's constitutional justice is that it is embodied in a constitutional court that is separate from the ordinary court system. The European model of the constitutional court comprises a broader range of constitutional protection than the American constitutional court. As a separate institution, the constitutional court has the power to rule on the constitutionality of all types of cases.

In the states adopting the Kelsen model, the constitutional justice is considered to fall outside the three branches of power which should respect the competences of the different bodies. In the continental parliamentary systems, it is the majority power that

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makes constitutional justice necessary. Kelsen argued for the uniformity of the cascading system of sources of law, and thus of the legal system, according to which all legislation must be consistent with the constitution, which is ensured by a separate body: the constitutional court.

The separation of state powers is, thus, considered to be a means of defense against the arbitrary exercise of power, embodied in democratic constitutions. The idea of the separation of powers is a conceptual feature of the modern state. At this point, as the term of democratic constitution was mentioned, the need to define the concept of democracy arises. A system of governance in which decisions are made by the community is called democracy. Constitutional democracy is realized if the exercise of power is enshrined in the constitution. Modern democracies operate within the framework of the rule of law enforced by the idea of constitutionality. Primarily, the courts are responsible for enforcing the provisions of the constitution. However, in order to abolish legal norms of lower status in the legislative hierarchy that are deemed contrary to legal norms of a higher status in such hierarchy, a need to set up a higher-level judicial body arises, justified by the law-interpreting function of the courts isolated from politics. Constitutional interpretation is a special, abstract case of the interpretation of law (legal norms), which fills in the gaps in the provisions of the constitution, or resolves its contradictions. In modern legal systems, the constitution is lifted above all pieces of law. The legislative power must be limited in order to exclude arbitrary exercise of power, and constitutional constraints, necessarily, should be implemented by the courts. In modern constitutional democracy, there must be a body that controls the outcome of the democratic process. This body is the constitutional court.

Following the exploration of the relationship between constitutional justice and democracy, in my dissertation I reviewed the origins, formation and functioning of the Hungarian Constitutional Court by mapping the relevant legislative provisions before and after the entry into force of the Fundamental Law. In my opinion, the origins of the Hungarian constitutional justice can be traced back to the nineteenth century. In his work entitled *A XIX. század uralkodó eszméinek befolyása az álladalomra* [The influence of the dominant ideas of the nineteenth century on the state], Baron József Eötvös attributes also competences related to constitutional justice to the “supreme tribunal”. The Supreme Tribunal can neutralize and impersonalize the other two

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branches of power; thus, it can examine the future law to assess whether it conflicts with the constitution. The establishment of this Supreme Tribunal, known as the state court, was initiated by Ferenc Deák during the debate of Act IV of 1869. In his proposal, he gave the state court competence to decide on political crimes, disputes between the authority and the court, as well as on "other matters".

Between the two world wars, as a result of the research conducted at Móric Tomcsányi's Seminar of Public and Administrative Law, the information on constitutional justice was collected and summarized. If the law is not adopted in accordance with the prescribed constitutional way and forms, a formal unconstitutionality exists. Lower-level pieces of law should not conflict with higher-level pieces of law. In 1948, an attempt was made in Hungary to establish an institution similar to the Constitutional Court, which did not prove to be durable. The socialist economic and social system did not favor the development of constitutional justice. The socialist system declared unity of power and unity of parliamentary sovereignty, defining the state as the body of the ruling class exercising indivisible class power. Socialist states rejected the idea of any version of constitutional courts.

The idea of constitutional review was introduced in 1970 in a publication entitled *Javaslatok az Országgyűlés, az Elnöki Tanács és a Minisztertanács munkájának továbbfejlesztéséről* [Recommendations for the further development of the work of the National Assembly, the Presidium and the Council of Ministers]. Act I of 1972 on the amendment of Act XX of 1949 and on the consolidated text of the Constitution of the Hungarian People's Republic (hereinafter: the Constitution) established the most important bodies of constitutional protection and the competences thereof. The National Assembly, with the assistance of the standing committees of the National Assembly, ensured the constitutional order of society. The National Assembly could also set up a temporary committee to investigate a constitutional problem. In addition, National Assembly committees could raise constitutional issues, present constitutional proposals, as well as examine and comment, from a constitutional point of view, the submitted legislative proposals and drafts even by using the assistance of experts. In such scope, the National Assembly had the power to annul the unconstitutional provisions of state bodies.

Paragraph (3) of article 21 of the Constitution was amended by Act II of 1983 on the amendment of the Constitution, by setting out that the Constitutional Law Council elected by the National Assembly was entitled to review the constitutionality of laws

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and legal guidelines. The bylaw of the Constitutional Law Council became a chapter of the bylaw of the National Assembly. Although, during the preparation of the Constitutional Law Council, the idea of creating a body similar to the constitutional court also emerged, the Constitutional Council eventually became part of the system of the supreme representative body, thus, became a body subordinate to the National Assembly, reflected also in the fact that its members were elected by and responsible to the National Assembly. The provision set out in article 1 of Act I of 1984 on the Constitutional Law Council, delegated the tasks of contributing to ensuring the constitutionality of laws and legal guidelines, the monitoring thereof, as well as the interpretation of the provisions of the Constitution, to the Constitutional Law Council, i.e. a body consisting of eleven to seventeen recallable members elected by the National Assembly, based on the proposal of the National Council of the Patriotic People's Front, from among members of the National Assembly and other public figures. The law did not allow the body to declare unconstitutionality, the decision in this regard was made by the National Assembly.

In theory, the Constitutional Court would have been created in Hungary by a provision set out in article 6 of Act I of 1989 on the amendment of the Constitution. Such provision would not have allowed the Constitutional Court to annul unconstitutional laws. The body would have been entitled also to suspend the implementation of unconstitutional laws. The judges of the Constitutional Court would have been recallable. The provisions of Act I of 1989 pertaining to the Constitutional Court qualified as valid but never entered into force.

Finally, the legal institution of the Constitutional Court was regulated by article 6 of Act XXXI of 1989 on the amendment of the Constitution, complementing chapter 4 of the Constitution by article 32/A. The establishment of the Constitutional Court was an integral part of the public law process of the change of regime. Some authors criticized the Hungarian constitutional justice by highlighting that the Hungarian Constitutional Court had a very broad competence even in a global context. At the commencement of the Hungarian constitutional justice, it was explicitly declared that the "invisible constitution" that emerges in the decisions of the constitutional court is above the written constitution.

Paragraph (1) of article 24 of the Fundamental Law, published in no. 43/2011 (IV. 25.) of the Hungarian Official Gazette (Magyar Közlöny), defines the Constitutional Court as the supreme body for the protection of the Fundamental Law.

Similarly to the previous legal provisions, the Constitutional Court examines the laws adopted but not yet published from the perspective of consistency with the Fundamental Law, reviews, on the basis of judicial initiative, the compliance of the law applicable in an individual case with the Fundamental Law, and, as a result, it annuls the laws in conflict with the Fundamental Law, which will cease to have effect on the day following the publication of the decision and will no longer be applicable. The newly introduced competence of the Constitutional Court is the so-called genuine constitutional complaint; accordingly, the Constitutional Court, on the basis of a constitutional complaint, reviews the conformity of a judicial decision with the Fundamental Law, and annuls the judicial decision contrary to the Fundamental Law, including any other judicial or official decisions in conflict with the Fundamental Law, that were reviewed by the decision.

Contrary to the previous regulation, the body may overrule specific, individual judicial decisions contrary to the Fundamental Law, while ex post normative controls can no longer be initiated by anyone; the Constitutional Court reviews the compliance of the legislation with the Fundamental Law based only on the initiative of the Government, a quarter of the Members of the National Assembly, the Commissioner for Fundamental Rights, the President of the Curia or the Prosecutor General.

After outlining the origins of the Constitutional Court and the legal provisions applicable to the body, I reviewed the operation of the Constitutional Court and its exercise of competence in the light of the Constitutional Court's case law, on the basis of which I tried to match the competence of the constitutional court with the classical branches of power, summarizing it based on the aspects detailed in the next section.

III. Summary of the scientific results of the dissertation

After reviewing the concept of constitutional justice, as well as the formation, operation and exercise of competence of the Hungarian Constitutional Court, answering the central question addressed in my doctoral dissertation cannot be avoided. After summarizing the procedures falling within the scope of responsibility and competence of the Constitutional Court, it can be concluded that the Constitutional Court is a legal

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institution closely associated with the legislative, executive and judicial branches of power, i.e. the three classical branches of power.

The Constitutional Court is linked to the legislative branch of power by the abstract norm control procedure: the body implements a negative legislative activity through the fact that, in the case of a law adopted, but not yet promulgated that was found to be in conflict with the Fundamental Law by the Constitutional Court, the law cannot be promulgated by the President of the Republic. Pursuant to Act CLI of 2011 on the Constitutional Court, after the renegotiation of the relevant law (after its conflict with the Fundamental Law has been established), the National Assembly is obliged to carry out positive legislative activity (unless the National Assembly waives the regulatory need of the subject matter in question). The ex ante norm control procedure also includes a preliminary examination of the compliance between the Rules of Procedure of the National Assembly, as well as an international treaty or any of its provisions and the Fundamental Law. However, as I pointed out in my doctoral dissertation, according to the its practice, the Constitutional Court have expressly refrained from taking a position on legislative issues.

In the ex post norm control procedure, which can be classified as an abstract norm control, on the initiative of the Government, a quarter of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights, the Constitutional Court reviews the compliance of the legislation with the Fundamental Law, that may also include an examination of compliance with the procedural law provisions set out in the Fundamental law concerning the drafting and promulgation of the Fundamental Law or an amendment of the Fundamental Law. In the event of a violation of the Fundamental Law, the Constitutional Court shall render a decision which is, in principle, a negative legislation regarding the unlawfully adopted law or regulation violating the Fundamental Law or the amendment of the Fundamental Law in substance or in form: this also constitutes a restriction of the legislative power and, thus, a (negative) interference with legislation.

The laws on central taxes, fees and contributions, customs and central conditions of local taxes are currently exempted from the latter procedure in Hungary. Laws on the said subjects may only be examined by the Constitutional Court (in ex post norm control and in its other typical competencies) in in the event of a content conflict with the right to life and human dignity, the right to protection of personal data, the right to

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freedom of thought, conscience and religion, or laws related to Hungarian citizenship, and may only be annulled on the ground of such conflict.

The judicial initiative and the constitutional complaint procedure are Constitutional Court proceedings falling within the scope of individual norm control. The Constitutional Court procedure, called "judicial initiative for specific norm control procedure" seeks the annulment of a legislation or legal provision applicable in a court case, by which procedure the said negative legislative competence becomes applicable also within the judicial branch. Another type of individual norm control procedure is the Constitutional Court procedure called constitutional complaint, which has two types (the direct and the old type), seeking to remedy a violation of law caused by the application of a statutory provision in conflict with the Fundamental Law, resulting also in a negative legislative competence (since, in the latter cases, the constitutional problem is not related to the judicial decision but to the underlying legal norm, i.e. the legislative provision or the legislation as a whole). The latter constitutional complaint procedure may be invoked after the exhaustion of judicial remedies, while the former constitutional complaint procedure may be invoked exceptionally, in the event of the direct application or entry into force of a legislative provision in the absence of a judicial decision. By such decisions, annulling the said two types of law or legal provisions, the Constitutional Court limits the legislative activity of the legislative or executive branch of power.

By submitting a (so-called "genuine") constitutional complaint against a judicial decision, the Constitutional Court limits the interpretation and application of the law within the judicial branch, thus interfering with the operation of the judicial power. In the event of the annulment of a judicial decision, the courts shall proceed as laid down in the provisions of procedural law. In the light of recent research, the conventional relationship between the Constitutional Court and the Curia providing the uniform interpretation and application of the law can be understood in the following way: the Constitutional Court refrains from deciding on issues relating to the interpretation of law, which, on the side of the Curia, is compensated by the adoption and application of the resolutions rendered by the Constitutional Court, as well as and the reasoning provided thereto.

Conflicts of legal norms with international treaties may be examined in any type of Constitutional Court procedure, either ex officio or at the request of the petitioners. Pursuant to the effective provisions on Constitutional Court proceedings, in the event of

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a conflict of a legal provision applicable in a court procedure with an international treaty, the court is obliged initiate the procedure of the Constitutional Court, in addition to the suspension of the court procedure. The procedure can be initiated also by a quarter of the Members of the National Assembly, the Government, the President of the Curia, the Prosecutor General and the Commissioner for Fundamental Rights. This provision also qualifies as a negative legislative act restricting the activities of the legislative or executive branch.

The Constitutional Court is also involved in the exercise of public authority within the sphere of direct democracy, in the form of constitutional court proceedings initiated as regards any resolution of the National Assembly on ordering a referendum or rejecting the ordering of a mandatory referendum – in terms of compliance with the Fundamental Law and legality –, which procedure can be initiated by anyone. In such procedure, the Constitutional Court, exceptionally, examines the requests related to concerns regarding the content and authentication of the referendum question. The Constitutional Court – which, according to some representatives of the modern theories on the branches of power, can be considered an independent branch of power – has a significant influence on local governments as well, by expressing an opinion in case the operation of a local council or a national minority council is in conflict with the Fundamental Law.

After reviewing the jurisdiction of the Constitutional Court, it is also necessary to take a position regarding the relationship between the Constitutional Court and the classical branches of power. Under the current legal provisions, the Constitutional Court cannot be considered an independent branch of power, due to the fact that the legal consequences of the decisions rendered by the Constitutional Court must (and may) be remedied by legal institutions belonging to the classical branches of power. The bodies implementing the law are obliged to refrain from applying a legal provision that is annulled with retroactive effect in a particular individual case. In my opinion, the Constitutional Court also carries out positive legislative activity. The legislator implements the decision rendered by the Constitutional Court establishing an instance of conflict with the Fundamental Law manifested in failure by adopting a legislative act. By establishing the conflict with the Fundamental Law manifested in failure, the Constitutional Court, as a matter of content, carries out a legislative act in its decision, which can be criticized for the fact that the provisions laid down in the constitutional

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court decisions depart from the written constitution and written legal provisions, thus, the legislative activity is limited by the provisions set out in the mandatory Constitutional Court decisions. In so doing, the Constitutional Court has a negative impact on the legislative activity of the legislative and executive branches of power.

In the event of the annulment of judgments, the legal consequences of the decisions of the Constitutional Court are determined by the leading legal institution of the judiciary, i.e. the Curia, by applying the provisions of procedural law. In addition to the annulment, Constitutional Court decisions may contain constitutional requirements ensuring the enforcement of the provisions of the Fundamental Law, with which the application of the law applicable to court proceedings must comply, greatly affecting the activities of the court in terms of interpreting and applying the law. In the course of judicial activity, the court is required to take into account the interpretation of law included in the decisions of the Constitutional Court, which restricts the activity of the court as regards the interpretation of law, and, thus, partly takes over the functions of the judiciary.

In summary, it can be stated that the Constitutional Court is linked to the classical branches of power by the Constitutional Court procedures enabling the exercise of jurisdiction related to the classical branches of power, therefore, the Constitutional Court cannot be qualified as an independent branch of power. For the reasons stated above, the answer to the question posed in my dissertation is that *the Constitutional Court is a legal institution exercising "hybrid" competences of the classical branches of power, however, it does not constitute an additional independent branch of power in the modern sense*.

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IV. List of publications on the topic of the thesis

1. A hatalommegosztás eszmerendszerének egyes kérdései [Some aspects of the idea of separation of powers]. *Jog és Állam,* No. 18. VIII. Jogász Doktoranduszok Országos Találkozója, Budapest, KRE-ÁJK, 2013.
2. A hatalommegosztás eszmerendszerének egyes kérdései [Some aspects of the theory of separation of powers]. In Tavaszi Szél 2013/SPRING WIND 2013. Konferenciakötet. Doktoranduszok Országos Szövetsége/Association of Hungarian Phd and DLA Students, Budapest, 2013.
3. A hatalommegosztás terminológiája és a hatalommegosztás tana – eszmetörténeti áttekintés [The terminology of the separation of powers and the tenet of the separation of powers – an overview from the history of ideas perspective]. *Jogelméleti Szemle,* No. 2017/2.
4. Hatalommegosztás a magyar eszmetörténetben [Separation of power in the Hungarian history of ideas]. *Jogelméleti Szemle,* No. 2017/4.
5. Az Alkotmánybíráskodás történeti előzményei [The historical origins of constitutional justice]. *Jog és Állam,* No. 22. XII. Jogász Doktoranduszok Országos Találkozója, Budapest, KRE-ÁJK, 2018.
6. Az alkotmánybíráskodás kialakulása [The development of constitutional justice]. *Jogelméleti Szemle,* No. 2018/1.
7. Az Alkotmánybíróság és a demokrácia kapcsolata [The relationship between the Constitutional Court and democracy]. *Jog és Állam,* No. 23. XIII. Jogász Doktoranduszok Országos Találkozója, Budapest, KRE-ÁJK 2018.
8. Az alkotmánybíráskodás és a demokrácia kapcsolata (bővített és átdolgozott változat) [The relationship between constitutional justice and democracy <extended and revised version>] *Jogelméleti Szemle,* No. 2018/3.
9. Tóth J. Zoltán – Egri-Kovács Krisztián: A hatalommegosztás elmélete a XIX. század második és a XX. század első felének politikai filozófiai gondolkodásában Magyarországon [The idea of the separation of powers in the Hungarian political thinking of the second half of the nineteenth and the first half of the twentieth century]. (Before publication)