

Dismantling Constitutional Review in Hungary

The Constitutional Court After the 1989 Democratic Transition

In 1989 formally the not democratically elected, illegitimate legislature enacted the comprehensive modifications of the 1949 constitution, but after peaceful negotiations between the representatives of the Communist regime and their democratic opposition. This process is called in the literature ‘post-sovereign’ or ‘pacted constitution-making.’¹ The negotiating parties agreed to set up the Constitutional Court as an extremely powerful institution counterbalancing the executive, like it is prevalent in the consensual democracies of Europe, even for the temporary period prior to the elections. However, instead of a body for preserving the state-party’s power, the opposition insisted on a Court, which radically limited the Parliament and the government and the decisions of which cannot be overturned by the Parliament, and where anyone is entitled to submit a petition to review the constitutionality of a piece of legislation (so-called popular action).

The Court was set up prior to the democratic Parliamentary elections to ensure the constitutionality of legislation during the transition, and had an exceptionally wide jurisdiction even in international comparison. Until 1998 the Constitutional Court had even the power to review the constitutionality of a proposed bill in the Parliament before it was voted on, however, the Court voluntarily renounced this right in 1991, saying that its exercise would mean interference with the legislative process.

The main jurisdiction of the Court has been the retrospective abstract norm control – the review of laws for constitutionality after promulgation. This norm control could be initiated by anyone, even if they were not affected by the regulation in question. So, the unique method of the Hungarian Constitutional Court has made the citizens participants in the process of the transformation of the

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¹ See respectively A. Arato, *Post Sovereign Constitutional Making. Learning and Legitimacy*, Oxford University Press, 2016, and M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*, Routledge, 2009.

old legal system. Anyone could call the attention of the Court to a potentially unconstitutional law and the Court was obliged to examine any such law called to their attention. Such “popular actions” have led to several decisions by the Constitutional Court influencing decisively the organs of the state and the regulation of fundamental human rights. It was also in the wake of such civic motions that the death penalty has been abolished, the first time in legal history by a court.

Persons whose rights have been violated by the application of an unconstitutional legal provision may have lodged a constitutional complaint for the violation of their constitutional rights to the Constitutional Court, having exhausted alternative legal avenues. In this respect however, the power of the Hungarian Constitutional Court was not as wide as that of other European constitutional courts. The Hungarian Constitutional Court could not deal with direct individual complaints against an administrative or judicial decision in a concrete case if those direct complaints did not challenge the constitutionality of the norms on the basis of which the decision has been brought. The Court had also been authorized, on the petition of specified bodies, to interpret constitutional provisions abstractly, without reference to particular cases.

The judicial selection process of the Constitutional Court judges involved a nominating committee consisting of one member of each Parliamentary faction. The fact that the committee is composed of an equal number of representatives from each of the parties in the Parliament reduced the dominance of the stronger parties in the nomination of the judges, thereby promoting the political neutrality of the Constitutional Court. A further safeguard was that judicial nominees are put to a vote of all members of Parliament. Successful nominees required the approval of two thirds of parliamentarians. Accordingly, any constitutional judge must have had both the support of a majority of Parliamentary parties as well as the support of two thirds of the members of the Parliament, ensuring that there was a broad consensus over judicial selection.

The first Constitutional Court led by László Sólyom expressly followed an activist approach in the interpretation of the Constitution, which was laid down in the concept of the “invisible constitution,” elaborated in his concurring opinion to the decision on the death penalty: “The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an ‘invisible Constitution’ provides for a reliable standard of constitutionality beyond the Constitution, which

nowadays is often amended out of current political interest; therefore, this coherent system will probably not conflict with the new Constitution to be adopted or with future Constitutions.”²

Changes After the Constitutional Counter-revolution in 2010

The weakening of the power of constitutional courts has started in Hungary right after the landslide victory of the centre-right FIDESZ party in the 2010 parliamentary elections.

1. REDUCING THE COMPETENCES

In July 2010, the new Hungarian government elected in April adopted a law³ that imposed a so-called „special-tax’ on severance, bonuses and other rewards for state employees who left the public service and received such financial benefits in excess of 2 million forints (~\$9,000). The tax rate was set at 98% and was to be retroactively applied to all money paid out over the preceding year. The government argued that its predecessor had used severance payments as an instrument for rewarding political loyalists in the public service. At the same time, the punitive tax rate applied not only to the presumed target group of high level former civil servants but also to teachers, doctors and other professional groups who had received such benefits after decades of service.

In October the Constitutional Court struck down the special tax in a unanimous decision.⁴ Noting that justice demands the measure, the government at the very day of the decision introduced amendments to the Constitution allowing retroactive legislation in certain cases, and removing the Constitutional Court’s jurisdiction to review laws pertaining – among other things – to budgetary and tax policy, According to the latter amendment the constitutional court judges can only review

² Decision 23/1990. (XII. 31.) AB

³ Act XC on the creation or amendment of certain economic and financial laws (2010. XC. tv. Egyes gazdasági és pénzügyi tárgyú törvények megalkotásáról, illetve módosításáról).

⁴ Constitutional Court decision 184/2010. (X. 28.)

these financial laws from the perspective of those rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship), that they typically cannot breach. This withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been restricted based on the object of the legal norms to be reviewed. Therefore, in the case of laws that are not reviewable by the court, the requirement that the constitution be a fundamental law, and that it be binding on everyone, is not fulfilled.

Together with the constitutional amendment the government also reintroduced the nullified law with unchanged provisions, even expanding its retroactive application to the preceding five years.⁵ In response to various petitions seeking to invalidate both of the government's constitutional amendments, the Court soon came to face with the question of whether these measures were unconstitutional and if it had the authority to review it. It issued a decision in July 2011⁶, a year after the retroactive special tax was first adopted. The majority of the Court by rejecting the competence to review constitutional amendments created a very bad precedent when the majority of Constitutional Court judges voluntarily signed the death sentence of judicial review. Taking the allegory further, one might of course object that even a decision that would have declared the constitutional amendments unconstitutional, and which would have consequently nullified them, could not have averted the passing of judicial review, neither in the short-term in the context of the Constitution in force, nor in the long-run in the context of the Fundamental Law passed on 18 April 2011 and entering into force on 1 January 2012.

⁵ Ultimately, the Court found a 'loophole' in the constitutional amendment limiting its jurisdiction and nullifying the act again in May 2011, citing a violation of human dignity. At the same time, in the context of many other laws its diminished jurisdiction did stop the Court from intervening. Ultimately, the retroactive effect of the law was greatly reduced, as it only applied to the beginning of 2010 rather than to 2005, as the government's second proposal on the issue intended (Constitutional Court decision 37/2011. (V. 10.)). One of the civil servants also file a petition with the European Court of Human Rights, complaining in particular that the imposition of a 98 per cent tax on part of her severance pay under a legislation entered into force ten weeks before her dismissal had amounted to an unjustified deprivation of property. In its Chamber judgment of May 14, 2013 in the case of *N.K.M. v. Hungary* (application no. 66529/11), the European Court of Human Rights held, unanimously, that the 98 per cent tax on part of the severance pay of a Hungarian civil servant violated her right to peaceful enjoyment of property, and therefore there had been a violation of Article 1 of Protocol No. 1 (protection of property) of the European Convention on Human Rights.

⁶ Constitutional Court decision 61/2011. (VII. 13.) AB

A committed German critic of the constitutional amendments and the Fundamental Law claims in his excellent blog that it would not have served the interests of constitutionalism if the judges of the Court had chosen the occasion of their own powers being at stake to change their previous jurisprudence on this question.⁷ Yet, does not the question of the restriction of their jurisdiction point to a larger issue whose significance points beyond protecting the Court's interests narrowly understood, and does this issue not concern Hungarian constitutionalism in its entirety? And did not Chief Justice Marshall's opinion in *Marbury v. Madison*, which instituted the previously unknown practice of judicial review in the Court's constitutional jurisprudence thereby revolutionizing constitutionalism across the globe, pertain directly to the Court's powers? The greatest problem of the majority of judges on the Hungarian Constitutional Court is precisely that they gave up on the ideal of constitutionalism.

As the events in 2012 and 2013 have shown, the question of restricting constitutional jurisdiction point to a larger issue whose significance points beyond protecting the Court's interests narrowly understood, and concern Hungarian constitutionalism in its entirety. In the last days of 2011, the Parliament has enacted the so-called Act on the Transitional Provisions to the Fundamental Law with a claimed constitutional status, which partly supplemented the new constitution even before it went into effect. In the very end of 2012, in the Decision 45/2012. (XII. 29.) the Constitutional Court ruled that those parts of the Transitional Provisions of the Fundamental Law, which are not transitory in nature cannot be deemed as part of the constitution, and are therefore invalid. Although this decision did not go into the substance of the constitutionality of the Transitional Provisions, since the petition of the ombudsman asked exclusively a formal review, but the majority of the judges this time emphasized in the reasoning that in order to keep the unity of the constitution they may consider to look at the substance of a constitutional amendment.

Before 1 January 2012, when the new constitution became law, the Hungarian Parliament had been preparing a blizzard of so-called 'cardinal' – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure.⁸ These laws affect the laws on freedom of information, prosecutions, nationalities, family

⁷ <http://verfassungsblog.de/ungarn-orbn-verdoppelt-seinen-einsatz>.

⁸ See a detailed discussion of the laws M. Bánkuti, G. Halmai and K.L. Scheppele, 'From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions (together with Miklós Bánkuti and Kim Lane Scheppele), In: Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law, CEU Press, 2012.

protections, the independence of the judiciary, the status of churches, elections to Parliament, and most importantly the functioning of the Constitutional Court.

The Fundamental Law of 2011 has changed the review power of the Constitutional Court, making it far less capable than before of performing its tasks related to the protection of fundamental rights. Added to this is the change in the composition of the Constitutional Court, taking place prior to the entry into force of the Fundamental Law, which will further impede it in fulfilling its function as protector of fundamental rights.

The considerable restriction on ex-post control has caused great controversy in Hungary and abroad. The withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been restricted based on the object of the legal norms to be reviewed. The constitutional court judges can only review these laws from the perspective of those rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship) that financial laws typically cannot breach. The restriction remains in effect for as long as state debt exceeds half of what is referred to in the Hungarian text as “entire domestic product”, the content of which is uncertain. Therefore, in the case of laws that are not reviewable by the court the requirement that the constitution be a fundamental law, and that it be binding on everyone, is not fulfilled. This also clearly represents a breach of the guarantees, set out in Article 2 of the TFEU, relating to respect for human dignity, freedom, equality and the respect of human rights – including the rights of persons belonging to a minority.

With regard to the Constitutional Court’s powers of ex-post control, the effectiveness of the protection of fundamental rights is reduced not only by the limitation of their objective scope, but also by a radical restriction of the range of persons that may initiate a Constitutional Court review. This is due to the abolition of one of the peculiarities of the Hungarian regime change: the institution of the *actio popularis*, according to which a petition claiming ex post norm control may be submitted by anybody, regardless of their personal involvement or injury. Over the past two

decades or more this unique instrument has provided, not only private individuals, but also non-governmental organizations and advocacy groups with the opportunity to contest in the Constitutional Court, for the public good, those legal provisions that they regard as unconstitutional. It could of course be argued that this toolkit has never existed in any other democratic state, but it has nevertheless undoubtedly contributed substantially to ensuring the level of protection of fundamental rights that has been achieved and which now diminishing.

Abstract ex-post norm control, under point e) paragraph (2) of Section 24 of the Fundamental Law, may in future only be initiated by the government, a quarter of the votes of members of parliament, or the Commissioner for Fundamental Rights. Given the balance of power in the current parliament. This makes any such petitions much more difficult, since the government is hardly about to make use of this opportunity against their own bills, while a quarter of MPs' votes would assume a coalition between the two democratic opposition parties and the extremist right-wing party, which supports the government.⁹

The cardinal Act on the Constitutional Court, passed in October 2011 decided on the fate of the several hundred petitions that are already lying in the court's in-tray, submitted in the form of an *actio popularis* by private individuals entitled to do so prior to the entry into force of the Fundamental Law, but who will be subsequently divested of this right. It applies the *in malam partem* retroactive effect, so willingly applied by the present government in other cases, also came into play here with the result that the Constitutional Court does not pass judgement on previously submitted petitions.

Private individuals or organisations may only turn to the Constitutional Court in future if they themselves are the victims of a concrete breach of law and this has already been established in a civil-administration or a final court decision. In this case, the legal remedy offered by the

⁹ Indeed, in 2012 it was only the ombudsman, who filed such petitions in 35 cases (12 petition files were still pending earlier, and there were 23 new ones). The Constitutional Court decided on 11 of these cases, 6 cases in favour of the petitions, and 5 rejections. There are still 24 petitions pending. See: Ombudsmani indítványok az Alkotmánybíróság előtt. (Petitions of the ombudsman before the Constitutional Court) <http://www.jogiforum.hu/hirek/28922>

Constitutional Court will naturally only affect them. In other words, the extension of opportunities to submit constitutional complaints is no substitute whatsoever for the widely available right of private individuals and organisations to file petitions.

2. PACKING THE CONSTITUTIONAL COURT

Among the first statutory amendments to the constitutional system it adopted, the governing majority in Hungary, which entered into office with a two-thirds majority following the parliamentary election of 2010, changed the system for nominating the judges of the Constitutional Court. As a result of the changes, the governing majority provided itself with the opportunity to nominate and then elect judges without consulting the opposition. Consequently, the governing majority immediately filled two positions on the Court that had previously gone unfilled for two years because of Parliament's inability to reach a consensus. The new judges were nominated and elected without a consultation involving the other parties in Parliament. April 2011 saw the adoption of the Fundamental Law, which increased the number of judges on the Court from 11 to 15. This change allowed for the election of five new associate judges on the court, since another judge's term of office had expired in October 2010. Moreover, the newly elected judges' term is 12 years rather than the previous nine (which remained the rule for the 'old' justices), thus spanning three parliamentary cycles. The president of the Court was previously elected by the associate judges for a three-year term, but pursuant to the new rules he/she is selected by Parliament for the duration of his/her entire term on the Court. As a result, at the point when the new constitution entered into effect, there were seven judges on the Court who had been selected without any effort at reaching a consensus. February 2013 saw the election to the Court of a governing party Member of Parliament who had chaired the Constitutional Affairs Committee, but since he replaced another Fidesz nominee, the judges selected exclusively by the governing party still did not constitute a majority on the Court. Finally, April 2013 saw the realization of a majority that had been exclusively selected by the governing party when another Fidesz-KDNP nominee was elected over the protests of the democratic opposition in Parliament, though the candidate did enjoy the support of the extreme right Jobbik party.

It can be proved that the Constitutional Court's majority, which was unilaterally nominated and elected by the current governing majority in Parliament, renders decisions meant to further the

interests of the party that nominated them, thereby placing the Court in the service of the ruling party and the government, even though the Fundamental Law provides that it should be independent of those.

The issue of political independence can be separated from the question of the judges' ideological sympathies, since the latter finds its imprint on courts' case-law even in the case of constitutional bodies that are selected by the most democratic methods. A conservative or liberal judge will think differently about the issues of abortion, euthanasia or same-sex marriage, for example, just as a socially sensitive judge will take different stances from his fellow judges when it comes to issues involving the social safety net. Not to mention the fact that in certain countries various ideological outlooks can yield very different applications in practice, depending on the approaches adopted by individual judges. Thus, conservative Hungarian judges are not necessarily favorably disposed to the idea of an active state, while those who profess to be liberals may have rather statist ideas. Parties with opposing ideologies try to balance such divergences through all sorts of refined nomination procedures, such as for example the ones used in selecting the members of the German Federal Constitutional Court, but the impact of the judges' individual ideological approaches cannot be wholly avoided. Moreover, as the case of several justices of the US Supreme Court shows, in some cases even the President who nominated a given justice may end up surprised by the ideological stances that he ends up taking.¹⁰

What is nevertheless undesirable, and in fact uncommon in the case of constitutional courts that operate within a rule of law framework, is that a court's decisions are meant to outright serve the interest of political parties. There are of course exceptions among those courts that command great respect internationally, such as for example the above mentioned highest American judicial forum¹¹. In a situation, however, when a body that has the final say on constitutional matters

¹⁰ Some of the defining liberal justices of the US Supreme Court in the second half of the 20th century and the first decade of the 21st century were nominated by Republican presidents: Chief Justice Earl Warren and William J. Brennan were Dwight Eisenhower's nominees, Harry Blackmun was nominated by Richard Nixon, John Paul Stevens was selected by Gerald Ford, and David H. Souter by G. H.W. Bush. Byron White, in contrast, who became a conservative judge, was proposed by the Democrat J.F. Kennedy. See Adam LIPTAK: The polarized Court, *The New York Times*, May 10, 2014.

¹¹ In his vitriolic dissent on the *Bush v. Gore* decision that ended up deciding the 2000 presidential election, Justice Stevens - who as I pointed out had been nominated by the same party that emerged victorious from this case - wrote the following: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."

relegates the issue of constitutionality to the background and instead repeatedly decides the matters before it in favor of a political party or the government that this party supports, then we can no longer speak of independent constitutional review. Even in the life of the relatively young Hungarian Constitutional Court a year is not a long time. But if in the decisions rendered during this time there is no discernible constitutional standard in the Court's jurisprudence to which it could be held, in other words when apart from partisan loyalty there is no ideologically more or less coherent standard in the Court's case-law that might be used as a basis for evaluating its decisions, then the current constitutional body fails its constitutional mission.

I am of course aware that there is no such thing as a politically and ideologically fully independent constitutional review, judges will inevitably have political and ideological affiliations. They are left- or right-wing, conservative or liberal. What they nevertheless must be able to put aside once they don the judicial robe is their party political affiliation. In order for the Constitutional Court to properly discharge its functions, it must be able to act as a check on the legislative, the executive and the judicial powers, and it must fundamentally be guided by the principles of constitutionalism rather than party political considerations. There are no party political interests that may override the main principles of constitutionality; the principles that the exercise of state power must be subject to certain limitations in order to safeguard equal human dignity and other rights of individuals enshrined in the constitution. For the court to be able to act as the main guardian of constitutionalism, its judges must be independent from the (party) political forces that nominated them, both in terms of their organization and in the persons of the individual judges on the court. In order to perform such functions, they must also be sovereign personalities who meet the highest professional and ethical standards and are capable of consistently and reliably standing up for constitutional principles even against - occasionally inevitably short-term - governmental considerations, no matter how justifiable those may sometimes be from a party political or economic perspective. An independent constitutional court judge must be able to distinguish

In his last dissenting opinion before his retirement in 2010, in the *Citizens United* case (531 U.S. 98) - where the majority decided obviously for political reasons to discard all limitations on the campaign contributions of corporations - Stevens wrote that "[t]he Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution" (558 U.S. 310). Similarly, partisan prejudice is proven by a study (Lee Epstein, Christopher M. Parker & Jeffrey A Siegel: 'Do Justices Defend the Speech They Hate?') assessing 4,519 opinions of Justices' in 516 decisions on freedom of expression between 1953 and 2011. The research has found that most of the Justices, conservatives and the a lesser extend liberals as well, defended peoples' speeches, who ideologically were close to them. See Adam Liptak, 'For Justices, Free Speech Often Means 'Speech I Agree With'', *The New York Times*, May 6, 2014.

"everyday" politics from constitutional politics. Whatever the constitution would forbid party politics to do, the constitutional court must also interdict. Here is an example of an independent constitutional court decision: despite substantial political pressure, in the early 1990s the Hungarian Constitutional Court refused to allow the government to implement the so-called unitary personal identification number scheme, which had cost huge sums to develop, because the Court assessed that the government should not be allowed to combine and store various types of personal data concerning citizens. A counterexample from the practice of the current Court: every constitutional court judge who is committed to the principles of constitutionalism must be aware that the constitutionality of a constitutional amendment can only be assessed on the basis of the constitution that was in effect at the time when the amendment was adopted. Nevertheless, the majority of the recently reconstituted Constitutional Court decided upon the constitutionality of the impugned Fourth Amendment to the Fundamental Law precisely on the basis of said Amendment's relevant new provisions. When a constitutional body disregards the most basic constitutional considerations in the interest of reasons motivated by party politics, then it inevitably turns into an institution that advances partisan political interests. I believe the latter example is a good illustration of the fundamental problem facing constitutional review in Hungary today, namely that through their party politically biased jurisprudence, the judges discard the accepted standards of constitutional review without establishing through their decisions a new constitutional standard in their stead.

3. ANNULLING THE PREVIOUS CASE LAW

On 11 March, 2013 the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The most alarming change concerning the Constitutional Court annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution = old decisions; new constitution = new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions were substantially the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and

new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary. These moves renewed serious doubts about the state of liberal constitutionalism in Hungary and Hungary’s compliance with its international commitments under the Treaties of the European Union and the European Convention on Human Rights.

The government has said that this fifteen-page comprehensive amendment to the still-new constitution was necessary because of previous decisions by the Hungarian Constitutional Court, in particular a ruling issued at the very end of 2012. This decision held that those parts of the Transitional Provisions of the Fundamental Law that are not transitional in nature could not be deemed part of the constitution, and were therefore invalid.¹² (Some elements of the Transitional Provisions were previously reviewed and criticized by the Venice Commission.¹³) In his letter to Mr. Thorbjørn Jagland, Secretary General of the Council of Europe, dated 7 March 2013, Mr. Tibor Navracsis, the Hungarian Minister of Public Administration and Justice argued that the main aim of the Fourth Amendment was to formally incorporate into the text of the Fundamental Law itself the provisions that were annulled for formal procedural reasons. He argued that the amendment is therefore, “to a great extent, merely a technical amendment to the Fundamental Law, and most of its provisions do not differ from the former text of the Transitional Provisions or they are directly linked thereto. Accordingly, the significance and novelty of this Proposal should not be overestimated.” Mr. József Szájer, the Fidesz member of the European Parliament who served as the official representative of the Hungarian government at the hearing before the Commission on Security and Cooperation in Europe (U.S. Helsinki Commission) on 19 March 2013 went even further, claiming that the amendment was “basically a copy-paste exercise of a purely technical nature” done at the request of the Court itself.¹⁴

¹² Decision 45/2012. (XII. 29.) AB

¹³ See Opinion 664/2012 on the Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and legal Status of Churches, Denominations and Religious Communities

¹⁴ Mr. Szájer’s testimony can be found at http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord_id=539&ContentType=H.B&ContentRecordType=H&CFID=22872555&CFTOKEN=58422914 .

These statements are misleading. In its decision of 28 December 2012, the Constitutional Court did not review the substance of the Transitional Provisions, since the petition of the ombudsman had not requested such a review. Instead of requesting that the nullified provisions be reinserted into the constitution as an amendment, the Court only said that, if the Parliament wanted a provision to be part of the constitution, it was not enough to declare that the Transitional Provisions had constitutional status. Instead, the Parliament had to use the formal procedure laid out in the constitution to make a constitutional amendment. The Court did not tell the government to put the annulled provisions back into the constitution.

In fact, the ruling on the Transitional Provisions made it possible for the Constitutional Court to review the substance of some of the cardinal laws that said the same thing as the corresponding parts of the Transitional Provisions. Most of the provisions struck down by the Constitutional Court when it reviewed the Transitional Provisions were also embedded in cardinal laws that the Parliament had passed earlier, and with these provisions now “demoted” from constitutional status by the Court’s ruling, the Court then undertook to review the almost identical provisions in the cardinal laws. Among these reviewed and annulled laws was one on voter registration, which the Court found unconstitutional on substantive grounds because it constituted an unnecessary barrier to voting.¹⁵

At the time that the Fourth Amendment was submitted to the Parliament, a decision on the constitutionality of the cardinal law on the status of churches was expected and the Court did in fact issue its ruling on 26 February 2013¹⁶ declaring unconstitutional parts of the law regulating the parliamentary registration of churches. These provisions had been first enacted as a law in 12 July 2011, were struck down by the Constitutional Court on procedural grounds in December 2011¹⁷, and then reinserted into the Transitional Provisions one week after the Constitutional Court struck down the law. This section of the Transitional Provisions was then struck by the Court again in December 2012 because the provision failed to guarantee procedural fairness in the parliamentary process through which churches were certified. Within a week, the annulled provisions were again added to

¹⁵ Decision 1/2013. (I. 5.) AB

¹⁶ Decision 6/2013. (III. 1.) AB

¹⁷ Decision 164/2011. (XII. 20.) AB

a constitutional amendment, the Fourth Amendment, and this time it was insulated from Constitutional Court review by the section of the Fourth Amendment that prohibits the Court from substantively evaluating constitutional amendments. While, as discussed earlier, the Court had in the past said it did not have the power to review amendments to the constitution on substantive grounds, the Court in its decision 45/2012 has indeed changed its opinion, taking the power to review future constitutional amendments for their substantive conflict with basic constitutional principles. Therefore, the Fourth Amendment's ban on substantive review of constitutional amendments is a direct reaction to this decision of the Constitutional Court from December 2012. The real reason for this ban is to prevent the Court from evaluating on substantive grounds the Fourth Amendment or any subsequent amendment. The ban on substantive review of constitutional amendments in the Fourth Amendment has therefore allowed the government to escape review by inserting any previously declared unconstitutional provision directly into the constitution. This move abolished the difference between ordinary and constitutional politics, between statutory legislation and constitution making. Now the government's two-thirds majority is above any power that might constrain it. It can, constitutionally speaking, now do anything it wants.

This situation has been demonstrated by a decision of the Constitutional Court ruled on 21 May 2013 on the constitutionality of the Fourth Amendment. In its petition the ombudsman argued that on the one hand by failing to discuss parts of the suggested modification to the amendment at the plenary session, the Parliament have violated the formal requirements of the amendment procedure, and on the other some provisions of the amendment, which are in contradiction with provisions of the Basic Law, endanger the unity of the constitution, which is in his view also a formal requirement of the amendment procedure. The majority of the judges haven't find any formal mistake in the amendment procedure, therefore rejected the first part of the petition, and arguing with the lack of their competence haven't reviewed the contradictions among constitutional provisions on the basis of the ombudsman's unity of the constitution argument. This majority of the judges argued that there is no substantial limit to the amendment power, and consequently the Constitutional Court has no jurisdiction for such a review.

The fact that the government was defeated in the case of the voter registration and church registration cases shows that, even though the Fidesz government by that time had elected seven of the 15 judges with the votes of their own parliamentary bloc, these judges were still not in a reliable

majority within the Court.¹⁸ That may have provided a reason for the government to want to limit the Court's influence even further.

In response to these decisions, the Fourth Amendment elevated the annulled permanent provisions of the Transitional Provisions into the main text of the Fundamental Law, with the intention of excluding further constitutional review, while the amendment also prohibited the Constitutional Court from reviewing the substantive constitutionality of constitutional amendments. The Fourth Amendment therefore contained all of the annulled sections of the Transitional Provisions except the section on voter registration. Even though the Constitutional Court argued that the registration of churches by the Parliament does not provide a fair procedure for the applicants, this procedure will be constitutional in the future as the Fourth Amendment puts this procedure, previously declared unconstitutional, directly into the constitution itself and beyond the reach of the Constitutional Court. That effectively means a very serious restriction on the freedom to establish new churches in Hungary.

The Fourth Amendment also put into the constitution and beyond the reach of the Constitutional Court the power of the President of the National Judicial Office (NJO) to move cases from the court to which a case is assigned by law to a different court anywhere in the country that is less crowded. While the Constitutional Court did not have the opportunity to review the substance of this provision for constitutionality, the Court had previously struck down a similar provision giving that power to the Prosecutor General.¹⁹ The Venice Commission had criticized the power of the president of the NJO to move cases²⁰ and the Hungarian government had added some restrictions on this power through amendments to the relevant cardinal law in summer 2012.

¹⁸ When it came to power in 2010, the Fidesz government changed the rules for nominating judges to the Court so that all of the recently elected judges were elected by the Fidesz two-thirds majority in the parliament without needing (and generally without getting) the support of any opposition parties. The government expanded the number of judges on the Court from 11 to 15 to give themselves even more seats to fill. When the Transitional Provisions and the Law on the Status of Churches were struck down by the Court in December 2012 and February 2013 respectively, seven of the 15 judges had been named by Fidesz since 2010. In February 2013, an eighth judge was added and in April 2013 a ninth Fidesz judge joined the bench.

¹⁹ Decision 166/2011 (XII. 20.) *AB*

²⁰ See Opinion 663/2012 on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts.

A number of statutory provisions that were previously annulled by the Constitutional Court have also become part of the Fourth Amendment. One of them authorizes the legislature to set conditions for state support in higher education, such as requiring graduates of state universities to remain in the country for a certain period of time after graduation if the state has paid for their education. The Constitutional Court had declared this unconstitutional in December 2012 because it violates both the right to free movement and the free exercise of occupation. The European Commission has expressed its concern over this restriction on the movement of Hungarian students in an “EU Pilot” letter to the government of Hungary in November 2012.²¹

Another reversal of a declaration of unconstitutionality is the authorization for both the national legislature and local governments to declare homelessness unlawful in order to protect “public order, public security, public health and cultural values.”²² The Constitutional Court had declared the prohibition of homelessness as a status unconstitutional because it violated the human dignity of people who could not afford a place to live.²³ But the power to make homelessness unlawful has now been placed into the constitution and beyond the reach of the Constitutional Court so it cannot be reviewed again.

At the end of 2012, the Court had annulled the definition of the family in the law on the protection of families because it was too narrow, excluding all families other than very traditional ones consisting of opposite sex married parents with children.²⁴ Now the Fundamental Law will define marriage as taking place only between men and women. It will also establish the parent-child relationship as the basis of the family, excluding not only same-sex marriage, but also all non-marital partnerships. The Fourth Amendment therefore overruled yet another Constitutional Court decision.

²¹ <http://www.freehungary.hu/component/content/article/1-friss-hirek/1510-another-infringement-procedure-against-hungary.html>

²² Fourth Amendment, Article 8.

²³ Decision 38/2012. (XI. 14.) *AB*

²⁴ Decision 43/2012. (XII. 20.) *AB*

Under the old Constitutional Court jurisprudence, group libel laws were found to be an unconstitutional restriction on free speech.²⁵ The Fourth Amendment entrenched in the constitution those parts of the new Civil Code that permit private actions to remedy group libel, not only in the case of the protection of racial, religious and other minorities, but also where there are offenses “against the dignity of the Hungarian nation.” Since the Fourth Amendment annulled all of the case law of the Constitutional Court from 1990-2011, the addition of this provision to the constitution is not a direct contradiction of a recent case, but it is a jarring reversal of something that had been taken for granted in Hungarian constitutional law.

The Impact of the Hungarian Decline of Constitutional Review

After the 2015 parliamentary election in Poland, the Law and Justice Party (PiS) also followed the playbook of Viktor Orbán, and started to capture first the Constitutional Tribunal. What happened in Hungary resonates with some less successful, similar attempts to weaken constitutional review in other East-Central European countries that took place roughly around the same time. In the Summer of 2012 there was a constitutional crisis also in Romania, where the ruling socialists tried to dismantle both the constitutional court and the president, but the EU was able to exert a stronger influence over events there.²⁶ From 2014 there was also been a constitutional crisis in progress in Slovakia, where the Constitutional Court was working two—and from February 2016 three—judges short, because the President of the Republic refuses to fill the vacancies.²⁷

But the most successful follower of the Hungarian playbook, how to dismantle constitutional

²⁵ Decision 96/2008. (VII. 3.) AB

²⁶ About the Romanian crisis see V. Perju, ‘The Romanian double executive and the 2012 constitutional crisis’, *I•CON* (2015), Vol. 13 No. 1, 246–278.; B. Iancu, ‘Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts’, in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area*, C. H. Beck – Hart – Nomos, 2015. 153-169.

²⁷ T. Lálík, ‘Constitutional Crisis in Slovakia: Still Far from Resolution’, *ICONnect*, August 5, 2016. <http://www.icconnectblog.com/2016/08/constitutional-court-crisis-in-slovakia-still-far-away-from-resolution/>

review: Jaroslav Kaczynski's governing party (PiS) and its government in Poland. The first victim of PiS' capture of the constitutional system was the Constitutional Tribunal, which already in 2007 had struck down important elements of PiS' legislative agenda, including limits on the privacy of public officials to be lustrated and freedom of speech and assembly²⁸.

In October 2015, before the end of the term of the old Parliament, five judges had been nominated by the outgoing Civil Platform government, even though the nine-year term of two of them would have expired only after the parliamentary elections. Andrzej Duda, the new President of the Republic nominated by PiS, refused to swear in all the five new judges elected by the old Sejm, despite the fact that the term of office of three of them has already started to run. In early December, in accordance with a new amendment to the Law on the Constitutional Tribunal, the new Sejm elected five new judges, who were sworn into office by President Duda in an overnight ceremony. As a reaction to these appointments, the Constitutional Tribunal ruled that the election of two judges whose term were not yet over by the previous Sejm in October 2015, was unconstitutional. The Tribunal also ruled that the election of the other three judges was constitutional, and obliged the President to swear them in. Since President Duda refused to do so, the chief judge of the Tribunal did not allow the five newly elected judges to hear cases.

The governing majority also passed an amendment to the organization of the Tribunal, increasing the number of judges that have to be present in a ruling from 9 to 13 out of 15. As opposed to the previous simple majority, decisions of the Tribunal will be taken by a 2/3 majority. With the five new judges, as well as the one remaining judge appointed by the PiS when it was last in government from 2005 to 2007, it may no longer be possible for the Tribunal to achieve the necessary 2/3 majority to quash the new laws. The six-member PiS faction, combined with the new quorum and majority rules, will be enough to stymie the court. Furthermore, the Tribunal is bound to handle cases according to the date of receipt, meaning it must hear all the pending cases, most likely regarding laws enacted by previous parliaments, before any new ones adopted by the new Sejm. For the same reason, the amendment also states that no decision about the constitutionality of a law can be made until the law has been in force for six months. Disciplinary proceedings against a judge can also be initiated in the future by the President of the Republic or by the Minister of Justice, which

²⁸ About the battle for the Constitutional Tribunal see T.T. Koncewicz, 'Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense', I•CONnect, December 6, 2015.

gives power to officials loyal to PiS to institute the dismissal of judges. In early March, 2016 the Constitutional Tribunal invalidated all of the pieces of the law restricting its competences. The government immediately announced that it would not publish the ruling because the Court had made its decision in violation of the very law it invalidated. By Polish law, the decision of the Court takes effect as soon as it is published. If the decision is not published, it cannot take effect. As a reaction to the government's (lack of) action, the General Assembly of Poland's Supreme Court judges adopted a resolution stating that the rulings of the Constitutional Tribunal should be respected, in spite of a the government disputing the content of certain judgement. The councils of the cities of Warsaw, Lodz and Poznan have resolved to respect the Constitutional Tribunal's decisions, in spite of the fact that the government is not publishing its rulings.²⁹

In the end of 2016 the Polish parliament adopted three new laws that permitted the President of the Republic to name a temporary Constitutional Tribunal President replacing the outgoing head of the court. The new interim President's first action was to allow the three so-called 'anti-judges', unlawfully elected by the PiS majority in Sejm to assume their judicial duties suspended by the previous Tribunal President, and participate in the meeting to nominate a new President to the head of the state, who two days later appointed the temporary President as the new permanent President of the Tribunal. With this the Constitutional Tribunal has been captured. This is what Wojciech Sadurski calls a constitutional coup d'etat.³⁰ The next step of the coup was to dismantle judicial independence altogether, and its main targets have been the Supreme Court, the ordinary courts and the National Council for the Judiciary.³¹

Conclusion

While after the 1989 'rule of law revolution' in Hungary a very strong judicial review was one of

²⁹ <http://www.thenews.pl/1/9/Artykul/250415,Polands-Supreme-Court-opposes-government-in-constitutional-wrangless>.

³⁰ M. Steinbeis, "What is Going on in Poland is an Attack against Democracy", Interview with Wojciech Sadurski, <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>

³¹ The reasoned proposal of the European Commission in accordance with Article 7(1) TEU regarding the rule of Law in Poland dated on 20 December 2017 proposes to the Council to recommend to Poland to restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution, as well as to guarantee judicial independence. European Commission, Brussels, 20.12.2017 COM(2017) 835, 2017/0360 (APP)

the most decisive elements of the new constitutional system, since 2010 the parliamentary majority decides every single issue without any substantive check by weakened and packed Constitutional Court. Behind the dismantlement of the constitutional review there is no any serious concept of political constitutionalism or weak judicial review, but merely the authoritarian efforts of the governing party to keep their unlimited power as long as possible. Unfortunately, this authoritarian backsliding, which started in one of the forerunners of the democratic transitions in 1989, has a lasting impact to other East-Central European Member States of the European Union, and the Union does not seem to have the proper toolkits and/or the political willingness the enforce such a requirement of the rule of law as the once well-functioning constitutional review.