ELKH Eötvös Loránd Kutatási Hálózat
tkjti

____

MTA Law Working Papers
2022/7

The Hungarian Constitutional Court and the Abusive Constitutionalism

Nóra Chronowski – Ágnes Kovács – Zsolt Körtvélyesi – Gábor Mészáros

ISSN 2064-4515
http://jog.tk.mta.hu/mtalwp
Társadalomtudományi Kutatóközpont – MTA Kiválósági Kutatóhely
Eötvös Loránd Kutatási Hálózat
Centre for Social Sciences – MTA Centre of Excellence
Eötvös Loránd Research Network

The Hungarian Constitutional Court and the Abusive Constitutionalism

Nóra Chronowski – Ágnes Kovács – Zsolt Körtvélyesi – Gábor Mészáros

Abstract

As part of the paper series on the rule of law backsliding in Hungary in the past decade this article focuses on the role of the Constitutional Court, and explains the constitutional developments in Hungary, in the first part, by recalling the establishment and constitutional status of the Constitutional Court under the former Constitution before 2010 (section 1), then by outlining the constitutional and legislative background of the court-capture, and referring to the new attitudes brought by the new justices to the Court (section 2). In the second part, the changes will be illustrated with case studies by reflecting on some formative issues that are landmarks on the one hand from the viewpoint of the basis of the constitutional review, on the other hand they are explaining the forms of abusive practice and help to understand how the Court adopted itself to the expectations of the illiberal regime (section 3).

This paper was commissioned by the Netherlands Helsinki Committee. References to Paper I through Paper VII are to other reports in this series, published consecutively as working papers:

Paper I – The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary

Paper II – Tactics Against Criticism of Autocratization. The Hungarian Government and the EU's Prolonged Toleration

Paper III – Inventing Constitutional Identity in Hungary

Paper IV – The Constitutional Court and the abusive constitutionalism

Paper V – Is the EU toothless? An assessment of the Rule of Law enforcement toolkit

Paper VI – The CJEU and the ECtHR – High Hopes or Wishful Thinking?

Paper VII – The Changes Undermining the Functioning of a Constitutional Democracy

Content

Introduction 2
Part I – Changes undermining effective constitutional review 5
1 Before 2010: The role and significance of the Court in a new democracy 5
2 Developments from 2010: the Court and its members..........8
2.1 Constitutional and institutional changes – composition and competence..........8
2.2 New members, new attitudes – The human resources of dismantling the rule of law 19
Part II The way to and examples of abusive constitutional review 23
3 Trajectory of the jurisprudence – case studies 23
3.1 The unconstitutional constitutional amendments..........24
3.2 Abusive judicial review – examples 28
3.2.1 Weak abusive judicial review 28
3.2.2 Strong abusive judicial review..........34
3.2.3 Abusive form of constitutional reasoning 36
Summary..........40

Introduction

In recent years, **the Hungarian Constitutional Court has avoided to confront directly with the governing majority**, which meant that it did little to stop the dismantling of constitutionalism in Hungary, and at times it has also played its part in advancing the authoritarian backsliding. Accordingly, the Court **has not only been reluctant to invalidate those laws that clearly violated the rule of law or basic human rights standards but has also actively shaped the legal framework of the authoritarian regime**. As it was explained in Paper I, it is important for the regime to uphold a seemingly democratic façade, and the Constitutional Court is a useful actor in this play, all the while refusing to function as a constitutional court, as key player in the constitutional protection against government overreach.

This paper will summarize how the authoritarian transition took place and illustrate the outcome of this transition through the example of the Constitutional Court and its jurisprudence. Judicial inconsistencies and problematic jurisprudence are present in all jurisdictions and concern all courts. What we sought to illustrate here is the tendency behind

the decisions that are hard to justify and reconcile with the constitutionalist idea behind a working constitutional court. The Court consistently denied effective legal remedies even within the framework set by the Fundamental Law, which meant that it refused to exercise its main function. Even where we see (partially) acceptable decisions in politically salient cases, this usually comes with strong concessions and indications of loyalty, creating the image of a court subservient to the political message of the day, expressed by the government. This reinforces the image of a Constitutional Court that is only one in name and whose functioning results in the further entrenchment of the abusive or anti-constitutionalist feature of the regime.

In the course of "replacing the old with new" the development of another constitutional regime and the writing of the Fundamental Law came about in parallel with the devastation of the previous constitutional order with permanent amendments to the former Constitution. **In the background of this policy the unequal fight between the Constitutional Court and the governing majority took place. This struggle ended in the partial incapacitating of the Constitutional Court by significantly weakening it as a counterbalance to the executive and legislative powers.**[1] Capturing the court was of course not a result of a "one and done" political strategy, it took place rather step by step right from 2010 which is also reflected in the gradual transformation of the composition and jurisprudence of the court. Public law scholarship usually locates the turning point in 2013,[2] but the CC had made significant concessions to the government even before 2013. However, until the Fourth Amendment of the Fundamental Law (2013)[3] the Court arguably made some cautious efforts

[1] Zoltán Szente, "The Decline of Constitutional Review in Hungary – Towards a Partisan Constitutional Court?" in Z. Szente and others (Eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development* (L'Harmattan, 2015), 185–210, 192–196.

[2] See for instance Gábor Halmai, "In memoriam magyar alkotmánybíráskodás. A pártos alkotmánybíróság első éve", *Fundamentum* (2014), 36–64.; David Landau and Rosalind Dixon, "Abusive judicial review: courts against democracy", 53 *University of California Davis Law Review* (2019), 1313–1387, at 1344.

[3] The governing majority adopted the Fourth Amendment of the Fundamental Law as a response to the Decision 45/2012 of the Constitutional Court. This amendment incorporated into the FL the majority of the abolished articles of the Transitional Provisions (see later in section 2.1.2) and overrode several former Constitutional Court decisions. On 8 February 2013, members of the governing coalition, having two-thirds of the seats in the Hungarian Parliament, submitted a proposal to amend the constitution. The parliament adopted the amendment on 11 March 2013. It was published in the official journal on 1 April 2013. In March 2013, in the course of the amendment, the Council of Europe, the UN High Commissioner, the President of the European Commission, Hungarian human rights associations and scholars voiced concerns over the changes. For the commentaries, see for example Imre Vörös, "The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law", 55 Acta Juridica Hungarica, 1 (2014), 1–20.; Judit Zeller, "Nichts ist so beständig… Die jüngsten Novellen des Grundgesetzes Ungarns im Kontext der Entscheidungen des Verfassungsgerichts", 59 Osteuropa-Recht, 3 (2013), 307–325., Attila Vincze, "Wrestling with Constitutionalism: the supermajority and the Hungarian Constitutional Court", 7 Vienna Journal on International Constitutional Law, 4 (2013), 86–97.

to strike down the efforts of the supermajority government acting in the parliament. Since then, and especially after the first failure (2016) of the Seventh Amendment[4] – as the institutional and competence changes took effect – the Court has given a helping hand to the constitution maker and is even ready to substitute the constituent will with the intentions of the government.

A recently published article on the role of constitutional courts in illiberal setting argues that if the new regime successfully undermines judicial independence and capture the constitutional court, the latter can turn to an agent of the regime, so it no longer operates as a check on the executive power but can play a key role in legitimizing the new system of government.[5] We think that the capturing of the Constitutional Court fits into a broader phenomenon in post-2010 Hungary, namely that public law instruments are used to undermine constitutionalism. The phenomenon of anti-constitutionalism is also described in the literature as 'abusive constitutionalism',[6] a theory we will rely on to frame the changes we describe. The toolkit of abusive constitutionalism ranges from formal constitutional-level changes and statutory changes supported by misleading comparative legal arguments ('abusive borrowing') to capturing and containing independent institutions, which also covers court capture manifesting itself first in judicial passivism then to sudden shifts from extreme judicial self-restraint to extreme activism in the interpretation of the judicial role.[7] **When constitutional courts fail to declare clearly unconstitutional laws void, they engage in *weak abusive judicial review* which can be also called as judicial passivism**. In case the ruling elite is capable of pack the court with loyal judges, it is more likely that the new judges will engage in a form of *strong abusive judicial review* meaning that judges actively contribute to establishing and maintaining the new regime.

This paper explains these developments in Hungary, in the first part, by recalling the establishment and constitutional status of the Constitutional Court under the former Constitution (section 1), then by outlining the constitutional and legislative background of the

[4] A failed attempt to amend the Fundamental Law occurred in October 2016 with the government intending to set new substantive limits on joint exercise of power with other member states in the framework of the European Union in order to protect the Hungarian constitutional identity and prohibit the resettlement of foreign population in the territory of Hungary. There was an invalid referendum (2 October 2016) on EU refugee relocation quota in the background of the issue. (See also Zoltán Szente, "The Controversial Anti-Migrant Referendum in Hungary is Invalid", Constitutional Change 11 October 2016, available at <constitutional-change.com/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/>) The government's plans with the referendum and the subsequent amendment to the FL failed that time in the absence of two-third majority in the National Assembly, as we explain below in section 4.2.

[5] Landau and Dixon, op.cit. supra note 2.

[6] David Landau, "Abusive Constitutionalism", 47 UCDL Rev, (2013), 189.

[7] Landau and Dixon, op.cit. *supra* note 2.

court-capture, and referring to the new attitudes brought by the new justices to the Court (section 2). In the second part, the changes will be illustrated with case studies by reflecting on some formative issues that are landmarks on the one hand from the viewpoint of the basis of the constitutional review, on the other hand they are explaining the forms of abusive practice and help to understand how the Court adopted itself to the expectations of the illiberal regime (section 3).

Part I – Changes undermining effective constitutional review

1 Before 2010: The role and significance of the Court in a new democracy

The Constitutional Court was a novel institution in the framework of the former Constitution amended in 1989/90, designed after the 'Kelsenian' model of constitutional review.

The Constitutional Court was established as the supreme forum of the protection of the Constitution, and it started to function from 1 January 1990. Soon **it became one of the most important safeguards and enforcement factors of the establishment of the rule of law, the protection of constitutional order and fundamental rights as provided for in the Constitution, the separation of the branches of power and the creation of their mutual balance**.[8]

There were no traditions of constitutional review in Hungary: before 1949, in the lack of a written constitutional charter, the constitutional review was not established or institutionalized. From 1949 to 1984, under the communist rule there was no political will to enforce the constitution. As a special body for the protection of the Constitution, a Constitutional Law Council was functioning from 1984, the powers of which included virtually norm control only (e.g. it had no competence to revise the acts of parliament). However, this body could not perform even this competence since its composition, powers and the initiation of its procedures were governed by rules which corresponded to the features of the political order of the time and of the state-socialist constitutional design, that is, the concentration of power, parliamentary supremacy, the so-called "socialist concept of basic rights" etc. Thus, the Council had only a kind of 'mediatory role' in the interpretation of the

[8] László Sólyom, "Introduction to the Decisions of the Constitutional Court of the Republic of Hungary", in L Sólyom and G Brunner (Eds.), *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court,* (University of Michigan Press, 2000)

provisions of the Constitution, it did not carry out substantive constitutional review, and had no power to annul unconstitutional statutes and legislative acts.[9]

Thus, **the constitutional review and an independent Constitutional Court was new institution in the Republic of Hungary without historical precedence, but its establishment was focal for the democratic opposition during the transition, which insisted on a wide scope constitutional review, with wide access to the Constitutional Court in the course of the national round table negotiations in 1989**.[10]

The basic aim of the Constitutional Court especially in the 1990s was to enforce and vindicate constitutionality. The competence of the Constitutional Court was determined with respect to this task. Important guarantees of the enforcement and the protection of the Constitution were, on the one hand, that decisions of the Constitutional Court were binding to everyone (erga omnes) and, on the other hand, that the members of the Constitutional Court were independent. As a consequence of its erga omnes decisions, the Constitutional Court was a typical precedent court, and the court itself consciously emphasized it as a rule of law requirement. That is, legal principles of the judgments once declared bind everybody, including the Constitutional Court itself until it expressly dismisses it and declares that in the future it shall judge from another basis of principle. But independence did not mean that the Constitutional Court had unlimited powers since – according to the body's own interpretation – it was bound to the Constitution in force: in the 1990s the Court posed as self-limitation that it could not revise and repeal any provisions of the Constitution[11] and its powers did not include the amendment or modification of the rules of the Constitution, either.[12] **The Constitutional Court was not established for deciding individual legal disputes, and it was not part of the judiciary: it was a single and one-instance, sui generis legal institution operating as an independent body**.

---

[9] See to this Zoltán Szente, *Hungary – International Encyclopaedia of Laws: Constitutional Law* (Wolters Kluwer, 2021), 186-188.

[10] Already in January 1989, the Parliament had decided on the establishment of a constitutional court, however, its structure and competences were agreed later in the framework of round table negotiations between the democratic opposition and the ruling party. Accordingly, the Parliament amended the Constitution in October 1989 by inserting Article 32/A that regulated a new institution of Hungarian public law: the Constitutional Court. The Act XXXII. of 1989 on the Constitutional Court was adopted on 19 October 1989 and it entered into force on 30 October. On 23 November 1989 the Parliament elected the first five judges of the Court, which commenced its operation on 1 January 1990. Five additional members were elected by the new, freely elected Parliament. Originally the Court were composed of 15 members, but later the number of judges was reduced to 11.

[11] "Should a provision be incorporated into the Constitution with two-thirds of the votes cast by Members of Parliament, it is impossible to state its being contrary to the Constitution for conceptual reasons, too." CC Decision 23/1994. (IV. 29.)

[12] The revision of constitutional amendments did not belong to the competence of the Constitutional Court, either. CC Decision 1260/B/1997.

The Constitutional Court had eleven members, including the Chairperson and the Vice-Chairperson. **The Constitutional Court judges were elected by the Parliament with a two-third majority vote. The nomination was the task of a parliamentary committee, in which the political party factions represented in the parliament had equal voting rights**. The result of this regulation was that the parliamentary majority and the opposition had to reach a consensus in the course of nomination, that is, the two sides had to agree in persons who are acceptable to all parties, and of course fulfil the requirements (age, expertise). The disadvantage of this kind of nomination procedure was that the opposition was able to block the election of new judges even in the early stage of the process and this way jeopardize the functioning of the Court.

The most important competence of the Constitutional Court was the ex post constitutional review, which followed from the Constitution itself, while other competences were laid down by the Act on Constitutional Court. It was a 'full competence' since Art 32/A (3) of the Constitution ensured a procedure of abstract review of legislation of the Constitutional Court with regard to all legal acts."[13] **There were two types of this** subsequent norm control regarding its initiation,

- **An abstract assessment of the constitutionality of legal acts, which might be initiated by anyone as an *actio popularis* motion. It was a unique form of access to the Constitutional Court** in international comparison, and **it made possible for the wide public to turn to the Court.**
- **A concrete, that is, actual assessment of the constitutionality of legal acts, which procedure was initiated by the judges of ordinary courts**. The judges of ordinary courts had an obligation of initiative, together with suspending the legal proceedings, if they had to apply such a legal act or another legal instrument of state administration in the case pending before them regarding which they perceived unconstitutionality. In such cases, the assessment of already repealed legal acts by the Constitutional Court was possible, too.[14]

Constitutional complaint based on personal, actual and direct concern and alleged violation of fundamental rights also belonged to the competence of the Court, but this procedure was relegated to the background as the actio popularis motion was much easier to submit. In the

[13] CC Decision 66/1997. (XII. 29.)

[14] "The assessment of the constitutionality of already repealed legal acts is possible only if the assessment of such a legal act is initiated in an individual (concrete) case, according to Art. 38 of the Abtv. [former Act XXXII of 1989 on the Constitutional Court] by a judge with regard to applicability in a case pending before him [CC Decision 34/1991. (VI. 15.)] or if the issue of the applicability of an already repealed legal act is raised with regard to a constitutional complaint." ABH [Decisions of the Constitutional Court] 1992. 72 (76)

constitutional complaint procedure, the Court carried out only norm control, the review of ordinary court judgments was not possible.

Altogether, under the former Constitution, the Constitutional Court was strong as judge of the legislator, with a general annulment power, wide accessibility (by the way of actio popularis initiation), and human rights activism,[15] but it had no full competence to give effective remedy in concrete cases of human rights violation.

2 Developments from 2010: the Court and its members

2.1 Constitutional and institutional changes – composition and competence

After the 2010 parliamentary elections, parallel with the declaration of the creation of a brand-new constitution, the **permanent amendments to the old Constitution** also commenced. These amendments partly **targeted the Constitutional Court**, namely:

1) nomination of *Constitutional Court* judges,[16]
2) the limitation of the *Constitutional Court's competence* regarding the review of acts concerning public finances,[17]
3) *the election of the president of the Constitutional Court* which now shall be elected by the parliament instead of the court itself, and the expansion of the seats on the court entailing that *15 instead of 11 judges* shall be elected.[18]

There was a clear line of threatening constitutional judiciary and undermining the rule of law in the course of amendments in 2010-11 whilst **the supermajority also strived to eliminate the constitutional impediments of economic governance and policy-making as well**.[19]

At this point we must again emphasize that the court capture was a step-by-step process, it did not take place immediately. The mandate of the acting constitutional justices remained continuous after the FL – contrary to that of the President and Vice-President of Supreme

[15] Kelemen, Katalin, "Van még pálya. A magyar Alkotmánybíróság hatásköreiben bekövetkező változásokról" Fundamentum 4 (2011).
[16] Act of 5 July 2010.
[17] Act CXIX of 2010 (published on 19 November 2010, which was announced as a temporary limitation, but which has been maintained by the FL).
[18] Act LXI of 2011 (published on 14 June 2011).
[19] Márton Varju and Nóra Chronowski, "Constitutional backsliding in Hungary", 6 Tijdschrift voor Constitutioneel Recht, 4 (2015), 296-310, 298.

Court[20] – and for some years the government-loyal justices were in minority. In the Fundamental Law, the governing majority did not change the Kelsenian model of constitutional review – e.g. by transferring and integrating this power to the Supreme Court (later Kúria) –, instead, the separate **Constitutional Court turned out to be a useful institution for hypocritic façade-constitutionalism – a constitutional court in name only, in fact playing its part in the practice of abusive constitutionalism**.

The table below summarizes the main changes and explains their direction.

Table 1: The most important changes in the rules regulating the functioning of the Constitutional Court (compilation of the authors)

	Pre-2010	Post-2010	Direction of the changes
Membership	11 judges elected by wide political consensus to a nine-year renewable mandate	15 judges elected by government-only votes (with few exceptions) to a twelve-year non-renewable mandate	Court packing and move from consensual to unilateral elections
Nomination	Parity-based parliamentary committee allowing nominations from the opposition	Procedure that allows the governing majority routinely to block nomination by opposition MPs, government appointees at times lacking the expertise required by law	Opposition rights taken away
Justices	Selected mostly among qualified lawyers or legal scholars	Many newly-elected justices failing to meet the eligibility criteria or lacking professional qualifications or being obvious allies of the current government	Politically motivated selection of a large number of new justices
President	Elected by the judges on the Court	Elected by the Parliament	Court autonomy curtailed
Competences	Wide competences to review and invalidate all kinds of legislation	limited competences to review legislation, new competence to review the constitutionality of judicial decisions Court generally prevented	Reshuffling the powers of the court, Politically motivated restriction of competences to

[20] See Paper V, and the Baka v. Hungary, Judgment of 27 May 2014, no. 20261/12, § 79, 100, 103.; Grand Chamber Judgment of 23 June 2016, and Erményi v. Hungary, Application No. 22254/14, Judgment of 22 November 2016.

		from invalidating laws related to public finances (itself established to sanction the Court for invalidating retroactive taxation introduced by the incoming government in 2010) only extension in the power to review court judgments (from the 'ordinary' court system)	review legislation
Applications/access to the court	*Actio popularis* (everyone without special requirements of standing)	Selected few: political actors and some state officials, victims of human rights violations	Venues to challenge laws considerably restricted
Interpretation	Developed internally by the Court	Special rule introduced on interpretation in the Fundamental Law and the pre-2012 decisions of the Court invalidated by force of law	External constraints on judicial autonomy
Implementation	High ratio of compliance with court judgments	Recurring practice of amending the Fundamental Law instead of amending unconstitutional laws	Constant threat of non-compliance

2.1.1 Composition

One of the most important elements of eliminating critical views relates to the packing of the Constitutional Court after 2010. **In June 2010, soon after the election and the inauguration of the new Government, the constituent power (i.e. the National Assembly) amended the constitutional rule on the nomination procedure for Constitutional Court judges** and stipulated that the nomination is made by a parliamentary committee consisting of the members of parliamentary factions, upon majority rule. This amendment authorized the governing majority in the parliament to nominate judges unilaterally.

Before the new rules introduced in 2010, members of the Constitutional Court were elected by a two-thirds majority vote in the Parliament. They were, however, as it was explained above, nominated by a committee consisting of one member of each parliamentary group (parity). It meant that the opposition and the governing majority always had to agree on whom to appoint

as a judge. **Under the new rules, judges are nominated by a nominating committee consisting of members of parliamentary groups represented in the Parliament (on proportional basis, i.e. the representation of the parties is in line with the composition of the plenary session). Thus, there is no longer any need to reach a consensus on the nominations in the committee, and the governing majority can both nominate and elect judges to the Constitutional Court without the support or consent of any of the opposition parties if there is two-third majority in the National Assembly**. In 2010-11, 6 new justices were elected upon the new regulation, between 2012 and 2014 further 5. In 2016 the ruling party in the absence of the two-third majority in the Parliament elected the next 4 judges with some cooperation of a small opposition party. In 2019 the former President of the National Office for Judiciary was elected as Constitutional Court judge, in 2020 the former President of the Office of Economic Competition became the member of the Constitutional Court, again upon the unilateral decision of the governing two-third majority.

A further setback regarding the Constitutional Court**'s autonomy was that the President of the Court (who from the origins was elected by the members of the** Constitutional Court **themselves) upon a constitutional amendment even before the FL is now elected by the National Assembly**.

The FL from 2012 introduced a longer, 12 year-mandate for the Constitutional Court **judges (their term was 9-year-long earlier), and got rid of the renewal of the position**.

With these changes, the ruling majority can easily keep under control the constitutional judiciary regarding its human resources, far beyond the 4-year parliamentary cycle.

Later, a crucial stage of the judicial reform series was the adoption of the special rules on the interoperability between Constitutional Court judge and ordinary judge position in 2019.[21] According to the standard procedure, judges have to participate in an application procedure in order to be appointed as ordinary court judges. **The new law made it possible for judges of the Constitutional Court to request an appointment as a judge of the ordinary court, without going through the standard application procedure.** In 2020, 8 out of 15 justices of the Constitutional Court requested the President of the Republic to be appointed as ordinary court judges, but only 2 had previous judicial experience. These judges can be assigned directly to the Kúria, the top court of Hungary anytime when their mandate in the Constitutional Court will be terminated.

[21] Act CXXVII of 2019 on the amendment of certain Acts in relation to the single-instance administrative procedures of district offices.

The President of the Kúria is an elected position that has always been available only for (already appointed) judges (that have already practiced law as judges at least for five years). A previous position held as a judge, however, has never been a legal prerequisite for becoming a judge of the Constitutional Court. The members of the current Constitutional Court, as it is well-known, were both selected and elected almost exclusively by the current government's two-thirds majority. Thus, those who are loyal to the governing party could quickly become Constitutional Court judges and, later, members of the Kúria, as it happened in 2020. Zsolt András Varga, a member of the Constitutional Court and the former Deputy of the Prosecutor General, who has never attained a position as an ordinary judge, and was elected to the Constitutional Court by the votes of the governing majority, is now the President of the Kúria.

2.1.2 Competence

As it took years to elect new judges, the governing majority also utilized the instrument of partial but immediate restriction of competences of the Constitutional Court, and of the moderate change of competences and the room for interpretative maneuver.
The first step in this field was **the limitation of the constitutional review competence of the Court**. In October 2010 the Constitutional Court annulled the rules of an economic and financial act on 98 % special tax applied to certain severance pays against *bona fides (good morals)* in public service.[22] The Constitutional Court did not find it unconstitutional to impose a special tax on income earned in a way inconsistent with good morals, but it was unconstitutional that the regulation also affected those who obviously received severance pay not in a manner inconsistent with good morals, instead, they received it on a lawful basis on which they had no influence. On the same day, when the Constitutional Court decision was announced, a bill was tabled in the National Assembly on the amendment of the constitution, with the intention of the limitation on the constitutional review of laws on public finances.
According to the adopted amendment, the Constitutional Court may assess the constitutionality of Acts related to the state budget, central taxes, duties and contributions, custom duties and central conditions for local taxes only on limited constitutional grounds, exclusively on the basis of the right to life and human dignity, the protection of personal data, freedom of thought, conscience and religion or the right related to Hungarian citizenship.

[22] CC Decision 184/2010. (X. 28.)

Also, the Court may only annul these Acts in cases of violations of the above-mentioned rights. The restriction of the Constitutional Court's competences was the response of the alliance of the governing parties to a Court decision which annulled a law on a certain tax imposed with retroactive effect.

The amendment to the Hungarian Constitution of November 2010 on the restriction of the powers of the Constitutional Court had a sanctioning character[23] and opened the debate on unconstitutional constitutional amendments. Several actio popularis motions were filed to the Constitutional Court against this amendment that raised the question of whether amendments to the constitution may be revised by the Constitutional Court. Earlier such practice was explicitly excluded by the Hungarian Constitutional Court as it is bound by the constitution. The Court decided the case in July 2011,[24] and it confirmed that the Court had no power to review the substance of constitutional amendments as they became the part of the Constitution. This definitely was a missed opportunity, and the Court at this point lost the chance to remain a counterbalance of the overwhelming two-third parliamentary majority. The Constitutional Court provided however *obiter dictum* two important and forward thoughts – or signals for the governing majority – on the potential limits on constitutional amendments (see later in this paper).

The new Fundamental Law (FL) and a new Act on the Constitutional Court (ACC)[25] entered into force in 2012 brought further changes in the scope of constitutional review, and the protection of the constitution.

The *actio popularis* (without personal interest)[26] initiation of subsequent norm control was eliminated, which significantly limited the possibility to challenge laws before the CC.

[23] Although the limitation of the review powers of the Constitutional Court was a political reaction by the government to a preceding decision by the Court annulling an act which imposed as intended by government retroactive tax obligations (Decision 184/2010 of the Constitutional Court), but it also had a forward intention. The quasi nationalisation of the entire private limb of the compulsory pension system followed the introduction of this limitation very shortly, the challenges against which were all declared as inadmissible by the Court on the basis of its new jurisdictional rules in Decisions 3291/2012, 3292/2012, 3293/2012, 3294/2012, 3295/2012, 3296/2012 and 3243/2012.

[24] CC Decision 61/2011. (VII. 4)

[25] Act CLI of 2011 on the Constitutional Court

[26] As we referred to it in section 1, before the FL anyone could apply to the Court with norm-control initiatives but the FL abolished this action popularis and at the same time reformed the constitutional complaint. This change was intended to reduce the workload of the Court, however this led to a balance that made the Constitutional Court more a counterweight to the ordinary courts instead of the legislative and executive bodies. András Jakab and Eszter Bodnár, "The Rule of Law, democracy, and human rights in Hungary – Tendencies from 1989 until 2019", in Tímea Drinóczi and Agnieszka Bien-Kacala (Eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism – Poland and Hungary within the European Union* (Routledge 2021), 105-118. at 109.

In return, the constitutional complaint procedures were reformed: not only legislative acts (ACC §26) but also judicial decisions (ACC §27) can be challenged if they violate rights guaranteed by the FL and the petitioner is personally, directly and effectively concerned. Soon, **the constitutional complaint procedures came to the forefront of the Constitutional Court's proceedings**, and the Constitutional Court's control activity shifted from the legislator to the ordinary courts. As a result, in the last decade, reference to the principle of rule of law seems to have been increasingly relegated to the background in the Constitutional Court's decisions in constitutional complaint procedures, and in other constitutional judicial review cases, as well. **The Court focuses on the rights ensured by the FL and protects the principle of the rule of law only to a narrow extent in constitutional complaint procedures, i.e. as far as the lack of required preparation time and the prohibition of adverse retroactive effects are concerned, but a general reference by the applicant to the violation of the rule of law as formulated in Art. B) (1) of the FL is not enough in constitutional complaint procedures.**[27] The protection of acquired rights and the protection of legitimate expectations (*Vertrauensschutz*) are completely disappearing.[28]

In respect of the principle of rule of law, it is very harmful that **the FL upholds for an indefinite time the restriction of the supervision and annulment rights of the Constitutional Court** which was introduced in November 2010. More specifically, Article 37(4) of the Chapter on Public Finances of the FL lays down that with regard to *ex post* norm control and constitutional complaint procedures, the Constitutional Court is prevented from reviewing the content of, or annulling, acts on public finances, with the exception of four "protected fundamental rights", as long as state debt exceeds half of the Gross Domestic Product.[29] Thus, the power of annulment is curtailed by Article 37(4) of the FL, because it excludes the constitutional review and annulment of Acts relating to public finances from the

[27] In 2012 the CC referred back to its former case law before the FL to justify the narrowing of the scope: HCC Order 1140/D/2006 AB, but at the time the 1989 Constitution was in force, this did not represent a problem due to the actio popularis type expost constitutional review.
[28] See, early retirement – HCC Decision 23/2013. (IX. 25.); gambling monopoly – HCC Decision 26/2013. (X. 4.).
[29] 'As long as state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence set out in Article 24(2)b-e), only review the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding Acts due to a violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship. The Constitutional Court shall have the unrestricted right to annul the related Acts for non-compliance with the Fundamental Law's procedural requirements for the drafting and publication of such legislation.'

content side, apart from four exceptions. This is not rectified even by the fact that Acts relating to this subject-matter may be annulled in cases in which the requirements of the legislative process have not been met (for formal reasons). Paradoxically, in this way the FL also excludes the protection by the Constitutional Court of its provisions relating to public finances, because the violation of rules relating to public finances contained in the FL is most likely to occur by way of Acts relating to the state budget, taxes, customs duties etc., which are subjects to ex post review by the Constitutional Court only from the perspective of the four protected fields of fundamental rights. The **Transitional Provisions to the FL (hereinafter: TPFL)** upheld and extended the effect of the disputed limitation on constitutional review,[30] and the Fourth Amendment incorporated it into the FL.[31]

The TPFL's purpose was to support the coming into force of the FL, and it was adopted in December 2011. However, the TPFL **overruled several important findings made by the Constitutional Court, e.g. on the right to be heard by a lawful and impartial judge[32], and undermined some rules of the FL itself**.[33] According to the Commissioner for Fundamental Rights of Hungary, the TPFL 'severely harms the principle of the rule of law, which may cause problems of interpretation and may endanger the unity and operation of the legal system. The Ombudsman was concerned because the Transitional Provisions contained many rules which obviously did not have a transitional character.'[34] Thus the Ombudsman requested the Constitutional Court to examine whether the Transitional Provisions comply with the requirements of the rule of law laid down in the FL. Following the Ombudsman's initiative, the Parliament adopted the First Amendment to the FL, clarifying that the Transitional Provisions are part of the FL. By this amendment the governing majority intended to avoid

---

[30] Article 27 of the TPFL: 'Article 37(4) of the Fundamental Law shall remain in force for Acts that were promulgated when the state debt to the Gross Domestic Product ratio exceeded 50% even if the ratio no longer exceeds 50%.' This Article was also annulled by the Constitutional Court in its HCC Decision 45/2012. (XII. 29.) AB.

[31] See Art. 17 of the Fourth Amendment.

[32] CC Decision 166/2011 (XII. 20.)

[33] On the TPFL and other cardinal acts read more in Gábor Halmai and Kim Lane Scheppele (Eds.), Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws, February 2012, available at <https://sites.google.com/site/amicusbriefhungary/>

[34] For the petition of the Ombudsman lodged in March, 2012 to the Constitutional Court concerning the TPFL, see Press release on the petition of the Ombudsman lodged in March, 2012 to the Constitutional Court concerning the TPFL, available at <http://www.ajbh.hu/en/web/ajbh-en/press-releases/-/content/ujPUErMfB9lw/petition-of-the-ombudsman-to-the-constitutional-court-concerning-the-transitional-provisions-of-the-fundamental-law>

the constitutional review of the TPFL, confirming its constitutional rank.[35] Despite this, the Constitutional Court ruled on the Ombudsman's petition, declaring that all the provisions of the TPFL which lacked a transitory character were invalid.[36] **The Constitutional Court declared that the Hungarian Parliament had exceeded its legislative authority when it enacted regulations into the "Transitional Provisions of the Fundamental Law" that did not have a transitional character. The Hungarian Parliament should also comply with the procedural requirements when acting as constitution-maker, because any regulations that violate these requirements are invalid. Therefore, the Constitutional Court annulled the regulations concerned due to formal deficiencies**. The Constitutional Court, regarding its consistent practice, did not examine the constitutionality of the content of the Fundamental Law and the Transitional Provisions.

As a response, the governing majority adopted the Fourth Amendment of the FL (April 2013), which incorporated into the Constitution most of the abolished articles and overrode several previous Constitutional Court decisions, therefore reversed nearly all politically sensitive decisions of the Constitutional Court had handed down after the 2010 elections. It was achieved by incorporating the substance of the previously repealed laws into the very body of the constitution itself.[37] **This amendment also repealed the decisions of the Constitutional Court adopted before the Fundamental Law, with the aim of disrupting the continuity with the former jurisdiction of the court and the entire constitutional system**. It should be mentioned that the Constitutional Court had previously worked out a sensible new rule for the constitutional transition by deciding that in cases where the texts of the old and new constitutions were substantially similar, the former decisions and the opinions of the previous Court could still be applied, however, where the new constitution

[35] In April 2012 the Government of Hungary presented a bill to the Parliament as the First Amendment of the FL of Hungary so as to clarify that the Transitional Provisions are a part of the FL. The First Amendment was adopted in June 2012. It added a new 5th point to the Closing Provisions of the FL: '5. The transitional provisions related to this Fundamental Law adopted according to point 3 (31 December 2011) are part of the Fundamental Law.' Other relevant points of the Closing Provisions: '2. Parliament shall adopt this Fundamental Law according to point a) of subsection (3) of Section 19 and subsection (3) of Section 24 of Act XX of 1949. 3. The transitional provisions related to this Fundamental Act shall be adopted separately by Parliament according to the procedure referred to in point 2 above.' (The FL was not yet in force when the Parliament adopted the Transitional Provisions – this is the reason for the reference to the former Constitution).

[36] The Constitutional Court annulled approximately half of the articles of the TPFL in its decision of 28 December 2012 [HCC Decision 45/2012. (XII. 29.) AB]. The decision is available at link 3. It is worth mentioning the governing party's response, in which the faction leader immediately declared that the annulled provisions would be inserted into the FL.

[37] Jakab and Bodnár, op.cit. supra note 26, 109.

was substantially differed from the old, the previous decisions would no longer be used.[38] Furthermore, the Fourth Amendment included that the Constitutional Court could review the constitutional amendments only on formal grounds. This means that the chance of future so-called activist efforts of the Court to review amendments made to the FL on substantive grounds eliminated.

The Venice Commission expressed its serious concerns about the systematic shielding of ordinary law from constitutional review. The reduction (budgetary matters) and in some cases complete removal (constitutionalized matters) of the competence of the Court to review ordinary legislation on the one hand undermines the rule of law – as the constitutional protection of the standards of the FL have become limited; while on the other hand it infringes the democratic system of checks and balances – as the Constitutional Court has lost its influence and is not able to provide effective control.[39]

The Fourth Amendment introduced *lex specialis* rules in comparison to the fundamental principles of the rule of law,[40] democracy and the protection of fundamental rights; regulations evading or bypassing Constitutional Court rulings were enacted, substantially reducing the space for constitutional protection (e.g. in cases of student contracts, recognition of churches, concept of family), the specific review – and new interpretation – limit was raised, blocking the way to constitutional judicature (the exclusion of a substantial review of the amendments to the constitution, the repeal of Constitutional Court decisions adopted before the FL), and even the open infringement of EU law (limitation of election campaigns, the possibility of special taxation as an indirect result of court rulings) was risked.[41] The Fifth Amendment (October 2013) was adopted by the governing majority under the pressure of

[38] Gábor Halmai, "A Coup Against Constitutional Democracy – The Case of Hungary" in Mark A. Graber, Sanford Levinson and Mark Tushnet (Eds.), *Constitutional Democracy in Crisis?* (OUP 2018), 243-256., 247.

[39] See Opinion 720/2013 of the Venice Commission point 87.

[40] Especially Article U), introduced by this amendment, drew attention as a lex specialis or even an exception to the rule of law principle, as it makes possible the retroactive prosecution of politically motivated crimes committed and not prosecuted during the communist regime.
However, Article U) is not present in the case law of the Constitutional Court, and its relation to Article B)(1) was not clarified: there has only been one decision – CC Decision 16/2014. (V. 22.) – so far which obiter dictum explained that the paragraphs of this article result in a contextual difference between the Fundamental Law and the former Constitution regarding their regulation on the rule of law and the nullum crimen et nulla poena sine lege principle, but the Court did not reach any interpretative conclusion because in the concrete case Article U) was not applicable, being completely irrelevant. See, on this, Miklós Hollán, "Büntetőbírói döntések az Alkotmánybíróság ítélőszéke előtt a nullum crimen et nulla poena sine lege elv tükrében" (Criminal Court Judgments Before the Constitutional Court in the Light of Nullum Crimen et Nulla Poena Sine Lege Principle) in *Az Alaptörvény érvényesülése a bírói gyakorlatban* (The Fundamental Law in Judicial Practice) (HVG-ORAC, 2019), 64–97. at 76.

[41] See to this Vincze, op.cit. supra note 3, 86–97.

European institutions with the intention of 'closing international debates'; however, not all of the challenged articles were modified, just those with the potential of infringing EU-law.

After the Fourth Amendment, in some years **the Constitutional Court itself took the initiating role in forming its own competence**, and the National Assembly followed these intentions.

The Seventh Amendment of the FL – which originally failed in 2016 but was reloaded, updated and adopted by the governing majority after the parliamentary elections in 2018 – **prescribed, among others, the protection of constitutional identity based on the historic Hungarian Constitution**. Into the text of the National Avowal (preamble of the constitution) a new sentence was inserted: "We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State." In line with this, Article R) was also completed: "The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State." The joint exercise of power within the EU under Article E(2) "shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure." All these – partly codifying the 22/2016. (XII. 5.) Constitutional Court decision, which was adopted right after the failed amendment – give a wide margin of appreciation for constitutional court justices on the primacy of the EU-law.

The latest amendment related to the competence of the Constitutional Court took place in 2019. **The Constitutional Court concluded in its 2018 ruling[42] that public authorities might initiate constitutional complaints if their fundamental rights are supposed to be violated. This novelty influenced the legislation as well**, since in December 2019 the Hungarian Parliament by Act CXXVII of 2019 amended the Act on Constitutional Court – beyond several other acts as it was a legislative package to substitute for the repealed Administrative Court reform. **The new regulation opens the possibility for public authorities to submit complaints, not only for the protection of their fundamental rights, but also in case of an alleged violations of their constitutional competences.** This idea

[42] CC Decision 23/2018. (XII. 28.) - annulling the judgement No. Kfv.I.35.676/2017/10 of the Kúria on supervisory fine applied by Hungarian National Bank, see later in section 3.2.3.

invigorated the discussion on constitutional complaint in Hungary. The Government and the supporters of the amendment explicates, that constitutional complaint shall be a safeguard of the rights of all legal entities, therefore, public authorities should be also included. **According to the opposing views, constitutional complaint targets inherently the protection of individuals against the state, therefore, public authorities shall be excluded from this opportunity**.

As we have seen the FL and its amendments crucially narrowed the competences of the Constitutional Court which steps aimed at weakening the separation of powers and at the same time strengthening the political power of the government. However, this process had already started even before the adoption of the FL with the raising of the members of the Constitutional Court from 11 to 15, which enabled the government to elect 5 new judges itself at once already in 2011. With the new members, gradually new attitudes arrived at the Court.

2.2 New members, new attitudes – The human resources of dismantling the rule of law

It has been a longstanding truth of constitutional law: **constitutionalism requires actual people committed to constitutionalism and act accordingly, and the best institutional setup can be rendered meaningless if filled with people committed to loyalty to power regardless of constitutionalist commitments.** Of course, it also helps if acting upon constitutionalist commitments does not take too much courage and such actions do not trigger threats, firings and the like.

In the Hungarian case, a story parallel to the elimination of constitutional checks is the story of people from the legal professions who actively helped and served the building of the regime and its walk away from the rule of law. Measures formally strengthening constitutional guarantees, like long mandates shielded from outside interference and the inability to remove them even after their mandate expires, safe for a qualified majority, can be turned into anti-constitutionalist moves when the people entrenched by these moves are stable loyalists of the nominating force.[43] People formally nominated to serve constitutionalism but vetted against meaningful commitment and selected based on reliable loyalty can not only refuse to uphold the rule of law but can use their position to help its demise. (See, e.g., for the

[43] See, using Hungary as an example, Landau, op.cit. supra note 6, 189.

case of public prosecution, the overview in Paper V.) This is in brief the story of legal professionals serving the post-2010 Hungarian regime.

One obvious way to address the role of legal professionals is to track their voting record, if sitting on a court where this is transparent; the Constitutional Court of Hungary is such an institution. Several studies concluded that the shift can be easily demonstrated by associating votes with the nominating party.[44] That is why the break with the earlier, consensual nomination process led to lasting change in whether the Constitutional Court fulfilled the primary roles of constitutional courts: checking power. Under the earlier nomination procedure, opposition parties could not only nominate but also elect judges, on a parity basis. Under the post-2010 rules, the opposition could not even get to the nomination phase and lost all effective participation in the process. The packing of the Court (increasing the number of judges from 11 to 15 judges) completed the process. One direct result of this was the nomination of a series of judges who did not fulfill the statutory requirements[45] of becoming a constitutional judge: having twenty years of practice in the legal profession or being an outstanding legal academic.[46]

It is in great part the personal setup rather than normative changes that allowed a practice of the Constitutional Court boosting instead of controlling government power. See, most importantly the context and text of the resolution on constitutional identity (Paper III, and this paper section 3.2.3 below).

Another level of inquiry can assess **the credo of people elected to positions** meant to check power.

- András Zs. Varga is a former judge of the Constitutional Court who is now heading the entire judicial structure despite the fact that he never worked in the judiciary that he now presides over (see Paper V for more). In his academic work, he followed a typical strategy of blackmailing constitutional values to defend the illiberal regime. He went all the way to comparing the rule of law to Nazism and labelling the rule of law as an arbitrary tool in the hands of European institutions, a ‘direct road to tyranny’,

[44] Halmai, op. cit. supra note 2, 29.; Szente Zoltán, “Az alkotmánybírák politikai orientációi Magyarországon 2010 és 2014 között”, 24 Politikatudományi Szemle 1 (2010), 31–57; EKINT, Hungarian Civil Liberties Union, and Hungarian Helsinki Committee, “Analysis of the Performance of Hungary’s ‘One-Party Elected’ Constitutional Court Judges Between 2011 and 2014,” 2015, https://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf.

[45] See the current rule in Art. 6-1c, Act CLI of 2011 on the Constitutional Court.

[46] Halmai, op. cit. supra note 2., 36 and 60, n. 1.

instead of a tool against arbitrariness, with courts presented as the main threat.[47] (Earlier, he served as deputy to prosecutor general Péter Polt, leading an organization that has long been criticized for a practice favoring government interests in politically salient cases. See Paper V for more.)

- Judicial nomination often appears as a reward for loyalty, sending the message that serving government interests pays off. Mária Szívós, unlike earlier constitutional judges who arrived from the judiciary, was a judge at the lower level of the judiciary and was responsible for pre-trial decisions. She also lacked meaningful academic publications evidencing outstanding academic work.[48] On the other hand, she rendered decisions favorable to criminal procedures related to demonstrations in 2006 that played an important role in the political campaigns of FIDESZ. Tünde Handó, discussed in Paper VII for her role in supporting and implementing steps to undermine judicial independence, was also elected to the Constitutional Court in late 2019 before her mandate as administrative head of the judiciary expired. Her transfer to the Constitutional Court took place with the aim of ending a two-year long constitutional crisis in court administration developed over Handó's activity.
- Loyalty-vetting at times went as far as electing judges who transferred directly from being parliamentarians. István Balsai transferred directly from parliamentarian and Fidesz politician to the Constitutional Court, without fulfilling the statutory requirements mentioned earlier. His former role as a prominent government politician put him in a position that did little to strengthen the image of a Court that can do an independent and effective assessment of legislative acts. For instance, he himself presented, with another Fidesz MP, the very law that packed the Court that led to his own nomination. This might seem as an error of style, but this becomes a direct question of conflict of interests when it comes to the series of laws where he participated in the adoption as a party representative and that he had to assess for constitutionality, refusing to recuse himself from consideration.
- Péter Paczolay, the current Hungarian judge at the European Court of Human Rights was the single most important figure in the struggle to defend constitutionalism after

[47] For a summary sensitive to the issue raised here, see Hungarian Helsinki Committee, "Most lehet elkezdeni aggódni. Egy illiberális legfőbb bíró," January 7, 2021, https://helsinki.hu/wp-content/uploads/Most_lehet_elkezdeni_aggodni_20210107.pdf.

[48] Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) and Eötvös Károly Közpolitikai Intézet, "Nyilvános jelentés a FIDESZ–KDNP által javasolt öt alkotmánybíró-jelöltről: Szívós Mária," 2011, 1, http://ekint.org/lib/documents/1479662503-sz%C3%ADv%C3%B3s_m%C3%A1ria.pdf.

2010, serving as the president of the Constitutional Court. While the attacks on the independent and effective functioning of the institutions were under way and as the Court was in the process of considering key pieces of legislation, he was offered and accepted a position to serve, after his mandate expires, as a government representative (ambassador in Rome). When asked about whether this raises serious questions regarding the impartiality of the institution he leads, he referred to the agreement with the minister of foreign affairs that the deal will not be discussed in public and to his opinions issued at the Court as proof that he was not influenced by the promise of the government position.[49]

- At times we find cases where there is full formal compliance with the rules, but the nomination still works to undermine constitutionalism because of views incompatible with this idea. Béla Pokol,[50] a legal theorist elected to the Constitutional Court as part of the court packing reform, has been known as the most prolific critic of the very functioning of the Constitutional Court. (He also served as a government MP under the first Orbán government.) Lately, he has been expressing views on 'juristocracy', the global network, with domestic presence, that conspire to undermine democracies – a narrative in perfect fit with the government line.
- It can also hamper the functioning of meaningful constitutional review if the cases are filtered: the role of the ombudsperson increased significantly under the new regime with the abolition of actio popularis as the ombudsperson was given the power to initiate abstract review of legislation after 2012. The ombudsperson who served from 2013 to 2019, László Székely reduced significantly the applications of its Office to the Constitutional Court. His predecessor had a higher annual submission rate under the new regime than the number of submissions under his mandate.[51] This includes his petition that allowed the Court to effectively read into the Fundamental Law a provision on constitutional identity that the governing majority at the time had no power to adopt. (See Paper III, and this paper section 3.2.3 below.)

---

[49] MTA Társadalomtudományi Kutatóközpont, Paczolay Péter előadása az Alkotmánybíróság működéséről, 2015, https://www.youtube.com/watch?v=y2IHjg3YgTk, 1:11:33.

[50] See, e.g., his kickoff paper and the exchanges in Jogelméleti Szemle 4 (2015), http://jesz.ajk.elte.hu/2015_4.pdf.

[51] Hungarian Helsinki Committee, "Assessment of the Activities and Independence of the Commissioner for Fundamental Rights of Hungary – In Light of the Requirements Set for National Human Rights Institutions," September 2019, 6, https://helsinki.hu/wp-content/uploads/Assessment_NHRI_Hungary_2014-2019_HHC.pdf.

Part II The way to and examples of abusive constitutional review

3 Trajectory of the jurisprudence – case studies

As democratic decline has become a growing trend globally,[52] judicial politics and the role of courts in non-democratic settings have received increasing scholarly attention in the fields of political science and comparative constitutional law. In 2008, Tamir Moustafa and Tom Ginsburg provided a comprehensive overview of the possible functions of courts in authoritarian regimes and argued that these political regimes can benefit from judicial institutions which can justify not only the containment of courts but also the empowerment of the judiciary with a certain degree of independence and autonomy.[53] Andreas Schedler, when describing the main features of electoral autocracies, stresses that in order to maintain the democratic façade, newly emerging authoritarian regimes do not abolish the political institutions of consolidated democracies rather take control over them and use them for their own purposes.[54] Relying on the work of Moustafa and Ginsburg, he gives a "menu of judicial manipulation" and concludes that even if autocrats seek to subvert the judiciary, they provide them limited autonomy and power which can turn courts not only into institutions of control, but also into institutions of struggle and resistance. Therefore, these scholars agree that courts in non-democratic settings can function as double-edged swords: on the one hand, they can play an important regime-supporting and legitimating role, but on the other hand, they can become an arena of political contestation and threaten the survival of the authoritarian regime.

In a recent article, David Landau and Rosalind Dixon have joined the debate on the political functions of courts in authoritarian settings arguing that in case the government can successfully control the judiciary, judges can act as agents of the regime and can engage in abusive forms of judicial review.[55] According to their approach, courts carry out abusive judicial review when they "intentionally undermines the minimum core of electoral

[52] The *2021 Freedom in the World* report found that 2020 marked the 15th consecutive year when we could be witnessing a general decline in global freedom meaning that since 2006 the number of countries experiencing democratic decline has exceeded those countries where the human rights situation has improved. See Freedom House, *Freedom in the World 2021: Democracy under Siege*, pp. 1-2., available at: https://freedomhouse.org/sites/default/files/2021-02/FIW2021_World_02252021_FINAL-web-upload.pdf

[53] Tamir Moustafa and Tom Ginsburg, "Introduction: The Functions of Courts in Authoritarian Politics", in Tom Ginsburg and Tamir Moustafa (Eds.), *Rule by Law: The Politics of Courts in Authoritarian Regime* (2008), 1–22.

[54] Andreas Schedler, *The politics of uncertainty: Sustaining and subverting electoral authoritarianism* (OUP, 2013), 59–76.

[55] See Landau and Dixon, op. cit. *supra* note 2, 1334

democracy".[56] This means that we must distinguish abusive judicial practices from those instances when antidemocratic results can be explained by judicial errors or prudential reasons.[57]

Above, we presented the major steps of the Hungarian government aiming to curb the competences and autonomy of the Constitutional Court and to remake the composition of it by packing with justices working as allies of the governing majority.

In this part selected cases will be presented which are characteristic and formative from the point of the regime. They are indicative as well as they demonstrate how constitutional concepts are used and misused or dismantled under an illiberal domain. We will use the term of abusive judicial review in a broader sense compared to what is suggested by Landau and Dixon as our narrative covers not only cases that resulted in the erosion of the minimum core of democracy but also those which are clear instances of how the Constitutional Court misused its power and abdicated its constitutional duty to protect the rule of law and fundamental rights. Our broader perspective might illustrate how the different tools and series of decisions delivered by the Constitutional Court contributed to the establishment of an authoritarian governance. In discussing the selected judgments of the Constitutional Court's jurisprudence, we will nevertheless follow Landau and Dixon categorization of weak and strong form of abusive judicial review and try to make a difference between those cases that reflect judicial inertia (*weak abusive judicial review*) and those that can be seen as the Constitutional Court's active contribution to the authoritarian turn (*strong abusive judicial review*). The list of judgments below is definitely not exhaustive, but we hope that they can illustrate the systematic and abusive nature of constitutional judicial review in Hungary.

3.1 The unconstitutional constitutional amendments

The challenge of constitutional review of the amendments to constitution is very well discussed in legal literature.[58] It is often related with the problem of eternity-clause, the unamendable constitutional provision. For a long time, in Hungary it was mostly a theoretical problem. There was no eternity clause in the former Constitution, and neither is in the present FL. However, there are examples, when constitutional courts find inherent values and

[56] Landau and Dixon, op. cit. *supra* note 2, 1322.
[57] Landau and Dixon, op. cit. *supra* note 2, 1326–1334.
[58] Yaniv Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (OUP, 2017); Rory O'Connell, "Guardians of the Constitution: Unconstitutional Constitutional Norms", 48 Journal of Civil Liberties, 4, (1999).

principles to protect the constitution even against an overwhelming constitution-amending power.[59] If it occurs in a constitutional system, it is always about constitutional cores and fundamentals, and the outcome is determinative, because it answers the question on 'who is the final arbiter in constitutional matters' and indicates the strength of constitutional resilience.

As it was mentioned above, **in November 2010 a constitutional amendment restricted the constitutional review of laws on public finances**, and several petitions were filed to the Constitutional Court alleging that this amendment violates the principle of rule of law and division of powers. **The Constitutional Court had to deal with the problem of unconstitutional constitutional amendment** in very **desperate political situation,** under the pressure of a two-third governing majority. Despite this, the Court did not refuse the motions based on actio popularis, but carried out an abstract subsequent norm control procedure and **confirmed that it has no competence to review the substance of any constitutional amendments**.

In Decision 61/2011. (VII. 13.) the Constitutional Court provided however *obiter dictum* two important and forward thoughts, still (or already) before the entry into force of the FL. One of them suggested a potential standard for review, the other one promised a level of protection of fundamental rights. The first one had an overall negative career and brought harmful consequences for the Constitutional Court and is actually a floating one without having concretized itself in practice. The second one has however expanded itself, and played a role in specific cases as well.

The first quotation: "The standards, fundamental principles and fundamental values of *ius cogens* provide altogether a standard that must be met by every subsequent constitutional amendments and Constitutions. A larger part of these principles and values has been incorporated into the Constitution and into the case-law of the Constitutional Court or has become part of laws of the branches of law (e.g. formulation of the prohibition of retroactive effect in terms of criminal law, the *nullum crimen sine lege* principle, the *nulla poena sine lege* principle or the principle of exercise of rights of good faith, the principle of fair trial, etc. in other branches of law). The principles, guarantees of *ius cogens* appear in the form of values in the laws of the branches of law and in other legislation as well."[60] This part seems to

---

[59] O'Connell, op. cit. *supra* note 58, Michael Freitas Mohallem, "Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority", The International Journal of Human Rights, 5 (2011).

[60] CC Decision 61/2011. (II. 13.) AB, ABH [Decisions of the Constitutional Court] 2011, 696, 711.

suggest that the Constitutional Court would in general, but not in specific cases, attribute in principle a certain level of "supraconstitutionality" to the international *ius cogens* standards, i.e. would consider them as holding an interpretative priority in the course of constitutional judicature.[61] The quoted thought is however not so convincing: the only positive and in terms of law interpretable argument of the body as regards the (potential) call for the *ius cogens* may be its incorporation into domestic law, i. e. its transformation from supra-constitutional into intra-constitutional.

The above-mentioned standards appear again, although in a much more wrapped and an even more blurred form, in the Decision on the TPFL, as adopted about a year after the entry into force of the new constitution. The Constitutional Court established in its Decision 45/2012. (XII. 29.) that it has the power to review the TPFL, whereas it had become a regulation substituting the constitution and disrupting the unity and structure thereof and taking away the scope of competence of the Constitutional Court. The body provided an extremely faint reference in this decision to the possibility of eventual substantial review of future amendments to the FL in comparison with international standards. „Constitutional legality has not only procedural, formal and public law validity requirements, but also substantial ones. The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *ius cogens,* which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic States under the rule of law."[62] International standards are transformed here into a requirement to a democratic state governed by rule of law, and are internalized – without precise reference to their source, origin or scope.

Parliament exercising the power to amend the constitution found this indirect reference however more than enough – the fourth amendment closed the ways to substantial review of future amendments. Upon the motion of the Commissioner of Fundamental Rights, the Constitutional Court undertook to review this amendment, but no invalidity was found by Decision 12/2013. (V. 24.). Getting out of the embarrassing situation, or in order that the

[61] László Blutman, "Az Alkotmánybíróság és az alkotmány feletti normák: könnyű liaison elkötelezettség nélkül?" [Constitutional Court and Supraconstitutional Norms: An Airy Liaison Without Commitments?], Közjogi Szemle 4 (2011), 1–11.

[62] CC Decision 45/2012. (II. 29.) AB, ABH [Decisions of the Constitutional Court] 2012, 347, 403. para [118]

previous searching for international standards does not appear as vain or as a kind of “fleeing ahead” from the expectable international criticism, the following admonishment was given *obiter dicta* in the closing remarks:
“The Constitutional Court emphasizes that the limitations implied by the interrelated system of fundamental rights, and implied in Articles E and Q of the Fundamental Law and applicable to the prevailing legislative and constitution making powers as well, which limitations result from the obligations of Member State of the EU and from ensuring the harmony between the international law and Hungarian law in order to fulfil the obligations of Hungary under international law and from acceptance of the rules generally acknowledged by international law may not be ignored either in these acts [i. e. the ones specifying the Fourth Amendment to the Fundamental Law] or in other ones. (...) [Besides the coherence of the Fundamental Law, the Constitutional Court], in the course of assessing the given constitutional issue, acting according to the governing rules, shall also consider the obligations undertaken by Hungary in international treaties and those accompanying its EU membership, and the rules generally acknowledged by international law and the fundamental principles and values therein. All these rules, having special regard to their values being enshrined in the Fundamental Law as well, form such a single system (system of values) which may not be ignored either in the constitutional or the legislative process or in the course of constitutionality review by the Constitutional Court.”[63] The encoded message is more specific than the previous one: **inherent constraints are implied by the European Union membership and international obligations, i.e. from Articles E and Q, for the constitution making and legislative power. In light of the foregoing it is however highly improbable that the Constitutional Court would confront the constitution making power with these constraints**.
In Decision 61/2011. (VII. 13.), as direct continuation of the thoughts firstly quoted, the body adjusts the level domestic constitutional protection of fundamental rights to the international level, not on hierarchic basis but as a conclusion from the *pacta sunt servanda* principle: “In case of certain fundamental rights, the Constitution defines the substance of the fundamental right in the same way as it is in some international treaty (for example the Covenant of Civil and Political Rights and the European Convention of Human Rights). In these cases, the level of protection of fundamental rights provided by the Constitutional Court may in no case be

[63] CC Decision 12/2013. (II. 24.) AB, ABH [Decisions of the Constitutional Court] 2013, 542, 547. paras [46] and [48]

lower than the level of international protection of rights (typically elaborated by the Strasbourg Court of Human Rights). As resulting from the *pacta sur servanda* principle [Section 7(1) of the Constitution, Article Q(2)-(3) of the FL], the Constitutional Court is required to follow the Strasbourg jurisprudence and the level of protection of fundamental rights defined therein, even if it did not necessarily arise from its own previous case-law decisions."[64]

Later it extends the international determination of the level of protection of fundamental rights with the stipulations of EU law, moreover, it considers the above quoted conclusion as being "even more true" for the law of the European Union, having regard to Article E(2)-(3) of the FL (compared to the rules of the Constitution however it did not elaborate in detail the meaning of the new Article E(3)).[65] Therefore, without any particular dogmatic argument or foundation, Decision 32/2012. (VII. 4.) on student contracts did indeed refer to the jurisprudence of the CJEU and mentioned the necessity to consider fundamental freedoms of the EU, but did not profoundly investigate the connections between "binding down" and EU citizenship. With these decisions, **the Constitutional Court basically defined the requirement for the equivalence of internal protection of fundamental rights with the international and EU standards, as a letter of intent**, but as its practice shows, not able and willing to enforce them substantively. Whit the cautious position in the review of constitutional amendments has a far-reaching effect, or as justice László Kiss formulated in its dissenting opinion to 61/2011 CC decision: "Following this precedent, in all such cases the Constitutional Court will stand with its arms unloaded, put down to its feet, and at most express its disapproval."

3.2 Abusive judicial review – examples

3.2.1 Weak abusive judicial review

According to Landau and Dixon, constitutional adjudication can take an abusive form when courts entrusted with the power of judicial review intentionally fail to intervene into government policies that seriously undermine the core values of democracy. This type of practice is called weak form of abusive judicial review as courts give the green light for the

[64] CC Decision 61/2011. (VII. 13.) AB, AB ABH [Decisions of the Constitutional Court] 2011, 696, 711.
[65] CC Decision 32/2012. (VII. 4.) AB, ABH [Decisions of the Constitutional Court] 2012, 228, 233.

government to dismantle democracy by dismissing those challenges that are raised against autocratic moves. Below, we present a mix a tools used by the Constitutional Court that can fall into the category of weak abusive judicial review.

3.2.1.1. Evading or deferring the decision

A general tool deployed by the politically captured CC to avoid direct confrontation with the government and exercising meaningful control over the political branches is to evade or defer the decision on politically sensitive cases. In 2011, a large number of applicants turned to the Constitutional Court to seek redress against the 2010 laws on the Hungarian pension scheme which transferred all pension contributions paid within a 14-month period into the state-run pension system in order to reduce budget deficit, and provided that those who decided to remain members of private pension funds would have no longer acquired service time and entitlement for state pension, irrespective of their future contributions. The Constitutional Court did not deliver a judgment on these applications in 2011, and in 2012, after major changes in the relevant legislation and also in the competences and composition of the Constitutional Court, it found all complaints inadmissible.[66] In the meantime, however, 97 per cent of the members of the private pension funds returned to the state pension system by fearing from losing their entitlement to state pension, and most of their contributions were confiscated by the state. The then president of the Constitutional Court, Péter Paczolay admitted in an interview that in summer 2011, there was a draft on the unconstitutionality of the law, but they failed to gain majority support for this decision.[67]

This approach prevailed on several further occasions in relation to topics being of symbolic importance for the government. The Fidesz-KDNP government entrenched in the 2011 Fundamental Law the whole life sentence, and in 2015, after several failed attempts to draft a final decision on the unconstitutionality of life imprisonment,[68] the Constitutional Court

---

[66] See for instance CC Decision 3021/2012. (VI. 21.) AB; CC Decision 3101/2012. (VII. 26.) AB, CC Decision 3218/2012. (IX. 17.) AB.

[67] M. László, Ferenc, "Kudarcként élem meg" – az Ab elnöke a nyugdíjügyről és a kétharmados törvényekről" *hvg. hu*, 2 January 2012, (interview with Péter Paczolay, former president of the CC) available at: https://hvg.hu/itthon/20120102

[68] Miklós Lévay, a justice of the CC between 2007 and 2016 admitted in an interview with Fundamentum, a Hungarian human rights quarterly, that before the Fundamental Law entered into force, the case of life imprisonment without parole had already been discussed by the CC, and he as a judge rapporteur drafted seven judgments on the unconstitutionality of the whole life tariff which finally did not receive the support of the majority of justices. See Viktor Kazai, "... hogy ne kelljen a múltat 'végképp eltörölni'" *Fundamentum* 1 (2016), 61.

terminated the procedure on the ground that the government, as a response to the ECtHR judgment[69] rendered in the case *László Magyar v. Hungary*, introduced the 'mandatory pardon procedure' in order to comply with the human rights standards established by the Strasbourg Court, which resulted in a new legal environment making the original complaint procedure devoid of purpose.[70] In 2018, the Constitutional Court suspended two procedures, one on the so-called Lex CEU[71] and the other on the 2017 NGO law[72], on the ground that cases on the relevant laws were also pending before the CJEU. The Constitutional Court justified the staying of the procedures by referring to the importance of constitutional dialogue. The CJEU delivered its judgments on the respective laws in June[73] and October[74] in 2020 and found both laws in breach of EU law, but after that the Constitutional Court was reluctant to continue with these procedures and say anything on the merit of the applications, as if it were still waiting for something. In May 2021, the Government tabled a bill to amend the Act on Higher Education to enforce the judgment of the CJEU in the CEU-case, the 2017 amendment was partly repealed, partly modified. When the bill was adopted, the Constitutional Court noticed that the regulation has substantively changed and the applicants did not submit any supplemental petition thus the Constitutional Court terminated its proceedings, because the subject matter became obsolete and there is no need to adjudicate it.[75]

In 2020, during the first wave of the coronavirus pandemic, when emergency laws were for the first time introduced, the Constitutional Court were also reluctant to review several important emergency decrees issued by the government.[76] While Hungarian NGOs urged the

---

[69] See the explanatory memorandum attached to Bill T/1707 submitted in 2014 to the Parliament, available at https://www.parlament.hu/irom40/01707/01707.pdf

[70] CC Decision 3013/2015. (I. 27.) AB

[71] CC Decision 3199/2018. (VI. 21.) AB

[72] CC Decision 3198/2018. (VI. 21.) AB

[73] Case C-78/18 Commission v Hungary, Judgment of the Court (Grand Chamber) of 18 June 2020, ECLI:EU:C:2020:476

[74] Case C-66/18 Commission v Hungary, Judgment of the Court (Grand Chamber) of 6 October 2020, ECLI:EU:C:2020:792 - The CJEU in the Central European University case declared the violation of the GATS (General Agreement on Trade in Services of the WTO), Article 49(1) TEU, The Services Directive 2006/123, and two further provisions of the Charter, i.e. Article 14(3) on the freedom to found educational establishments and Article 16 on the freedom to conduct a business.

[75] Constitutional Court Orders 3318/2021 and 3319/2021, both decided on 6 July and published on 23 July 2021. See also Nóra Chronowski and Attila Vincze, "The Hungarian Constitutional Court and the Central European University Case: Justice Delayed Is Justice Denied: Decision of the Hungarian Constitutional Court of 6 July 2021 and the Judgment of the ECJ of 6 October 2020, Case C-66/18" 17 European Constitutional Law Review (2021), 688.

[76] It is also important for the judiciary to review the constitutionality of the existence of emergency and the emergency measures taken by the Government. Although the Fundamental Law has no exact provision that clearly prescribe for the Constitutional Court to attend this task but according to Article 54 the functioning of the

government to establish strict deadlines for constitutional review procedures in order to ensure the effective supervision of emergency legislation,[77] the government failed to react and the Constitutional Court decided on several complaints only when the first state of danger was already terminated which again resulted in a series of inadmissibility decisions. This was the case, for instance, with the decree on new labour law legislation[78] and also with the extended deadline for fulfilling all kinds of freedom of information requests. The latter decree providing a 45 plus 45-day deadline for data managers to issue public interest data were reintroduced to the legal system in November 2020,[79] just days after the Constitutional Court published its inadmissibility decision on the previous decree.[80] In April, 2021, after around a one-year saga, the Constitutional Court did not find the decree unconstitutional.[81]

3.2.1.2. Judicial passivism in constitutional review

In order to evade any clash with the government, the Constitutional Court has developed two further instruments that are extensively used when the justices are ready to discuss the complaints on the merit. The first tool is applied in cases the court apparently engages in a proportionality test to review the constitutionality of the legislation, but it fails to adequately carry out the test, especially the third prong of it (proportionality in the strict sense) which requires the balancing of the gains and the losses of the impugned measure. Under this scenario, the CC does not take into account the harms the measure inflicts on the fundamental rights of the affected groups. This has happened in the case of abolishing the early retirement pension system,[82] banning the operation of slot machines outside casinos in an expedite manner,[83] or in the case of the new licensing system for tobacco retail which significantly limited the possibility of retailers to continue with selling tobacco products.[84] In the latter

court may not be restricted under a special legal order. Therefore, it seems evident that the Constitutional Court can review the constitutionality of the state of danger and the emergency decrees as well.

[77] Amnesty International Hungary – Eötvös Károly Institute – Hungarian Civil Liberties Union – Hungarian Helsinki Committee, *Unlimited Power is not the Panacea. Assessment of the proposed law to extend the state of emergency and its constitutional preconditions*, 23 March 2020, available at: https://www.helsinki.hu/en/unlimited-power-is-not-the-panacea/; See also Gábor Mészáros, "Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of COVID-19", 46 *Review of Central and East European Law* 1, (2021), 69-90.

[78] CC Decision 3326/2020. (VIII. 5.) AB

[79] Government Decree no. 521/2020. (XI. 25.)

[80] CC Order 3413/2020 (XI. 26.) AB

[81] CC Decision 15/2021. (V. 13.) AB, published on 13 April 2013 on the website of the CC.

[82] CC Decision 23/2013. (IX. 25.) AB

[83] CC Decision 26/2013. (X. 4.) AB

[84] CC Decision 3194/2014. (VII. 15.) AB

case, the Constitutional Court even acknowledge in its reasoning that *"the legislator could have introduced a more differentiated regime, ensuring fairness and the various individual interest of those concerned to a greater extent"*[85], nevertheless it finally remained silent on the adverse effects of the new system on the rights of the retailers concerned.
These examples are all taken from the early period of the post-2010 Constitutional Court which at that time made efforts to pretend that it fulfilled its constitutional duty. It is not a coincidence that in the early 2010s, the concept of political constitutionalism gained popularity among scholars and justices of the Constitutional Court who sought to provide normative justification for the jurisprudence of the court.[86] However, we should stress here that the way the Constitutional Court addressed the respective human rights issues can hardly be explained by judicial deference: deferring to the views of the legislators can only be justified within the framework of well-functioning democracies where collective decisions are shaped in meaningful debates carried out by responsible legislators. But the Hungarian Parliament has failed to meet these requirements from 2010 (see also Paper VII).

A more recent practice of the politically captured Constitutional Court in order not to hamper the execution of government policies is to establish "constitutional requirements" which provide guidance for the application and the enforcement of the challenged legislation. These soft consequences are determined by the Constitutional Court in "easy cases" where the human rights violation is so manifest that annulment would be the only proper result of the constitutional review. Instead of invalidating the impugned law, the Constitutional Court determined constitutional requirements in relation to (1) the crime of "facilitating illegal immigration" , a part of the "Stop Soros legislative package" which threatens with criminal punishment several activities carried out typically by human rights NGOs in order to provide assistance for asylum-seekers,[87] (2) the criminalization of homelessness,[88] (3) the vaguely formulated new form of scaremongering which threatens up to five year imprisonment of the spreading of false information or distorted facts under an emergency legal regime,[89] or (4) in relation to the emergency decree which extends the originally 15-day deadline for fulfilling

[85] CC Decision 3194/2014. (VII. 15.) AB at para [30]
[86] On this debate, see Gábor Halmai, "Illiberal constitutional theories", *Jus politicum* (2021) 146 – 147.
[87] CC Decision 3/2019. (III. 7.) AB.
[88] CC Decision 19/2019. (VI. 18.) AB
[89] CC Decision 15/2020. (VII. 8.) AB.

freedom of information request to 45 day to all data managers which deadline can be further extended to 90 days.[90]

To illustrate this case law line, it is worth having a closer look at the homelessness-judgment and its background.

The Seventh Amendment of the FL in 2018 introduced a rule challenging the principle of dignity – and the social solidarity, humanity in wider sense: it was the issue of criminalizing homelessness. Article XXII(3) of the FL reads as follow: 'Using a public space as a habitual dwelling shall be prohibited.' The amendment overrode a former decision of the Constitutional Court on the Misdemeanour Act of 2012,[91] in which the Court stated that the punishment of unavoidable living in a public area fails to meet the requirement of the protection of human dignity.

Right after the Seventh Amendment the Misdemeanour Act was also modified, and introduced the regulatory offence of habitual dwelling on a public place accompanied with a humiliating procedure: police officers are empowered to order homeless people into shelters and can arrest them if they disobey after being ordered three times in a 90-day period. Punishments include jail, community service and their possessions being destroyed (also pets are taken away).[92] Five judges from different courts of first instance challenged this piece of legislation before the Constitutional Court from October 2018 and in the following months, stating that the new regulation infringes human dignity, legal certainty, right to fair trial and personal liberty etc. The Constitutional Court has published its decision in early June 2019,[93] and declared that the criminalization and imprisonment of homeless people is in line with the FL.[94] As a constitutional requirement, it added "that a sanction under the law applicable to minor offences shall only be applied, if the placement of the homeless person in the support

---

[90] CC Decision 15/2021. (V. 13.) AB

[91] CC Decision 38/2012. (XI. 14.) AB, see the press release here: <https://hunconcourt.hu/announcement/provisions-of-the-act-on-contraventions-criminalizing-people-living-at-public-areas-permanently-are-against-fundamental-law/>

[92] 'New Hungary law bans rough sleepers, rights groups complain' Reuters (15 October 2018) <https://www.reuters.com/article/us-hungary-homeless/new-hungary-law-bans-rough-sleepers-rights-groups-complain-idUSKCN1MP1EB>

[93] CC Decision 19/2019. (VI. 18.) AB, Press release: <https://hunconcourt.hu/announcement/the-prohibition-of-staying-habitually-on-public-ground-is-not-against-the-fundamental-law-however-the-state-should-apply-the-sanction-with-encanced-circumspection/>
Full text of the judgment in English:
<http://public.mkab.hu/dev/dontesek.nsf/0/2ba8668e09472db8c1258337004bc40a/$FILE/19_2019_ENG_Final.pdf>

[94] Streetlawyer Association, 'The Constitutional Court has made an inhumane decision on the confinement of homeless people' <https://utcajogasz.hu/en/resources/misdemeanour-cases/the-constitutional-court-has-made-an-inhumane-decision-on-the-confinement-of-homeless-people/>

system was verifiably granted at the time of committing the conduct. The application of the sanction under the law applicable to minor offences should be in line with the constitutional aim of the prohibition of dwelling habitually on public ground, the inclusion into the support system of vulnerable persons who cannot care for themselves."

However, according to the reasoning of majority decision: "(…) nobody has the right to poverty and homelessness, this condition is not part of the right to human dignity," which means that people living in need or at streets shall not be protected by the right to human dignity, they do not share the value of equal dignity. Nine constitutional court justices think that homeless persons shall be punished if they do not cooperate with the state – by which they were left behind earlier, when the same state missed to fulfil its obligation for social care. These justices state that the enjoyment of fundamental rights is dependent on the fulfilment of constitutional duties of the person, which characterized the state-socialist (i.e. totalitarian) rights regime before 1989. The majority holds that, "according to the Fundamental Law, human dignity is the dignity of an individual living in a society and bearing the responsibility of social co-existence." This attitude establishes the misuse of solidarity, and it means a complete disruption with the dignity-interpretation of 1990's, the core of which was that a person's dignity was inviolable irrespective of development or conditions, or fulfilment of human potential.[95] Based on these most important fundamental rights which formed the foundation of a person's legal status, the Constitution did not permit the revocation or restriction of any part of the legal position already attained by a human being.[96]

3.2.2 Strong abusive judicial review

3.2.2.1 Procedural irregularities

Looking at the jurisprudence of the Constitutional Court, we can find decisions which reflect clear procedural irregularities in which the justices have used the competences of the Constitutional Court in an abusive way. As Landau and Dixon states, procedural irregularities

[95] Five justices attached dissenting opinion, and one of them, Balázs Schanda implicitly recalled the dignity-interpretation of the 1990's.

[96] This position of the Constitutional Court has first been formulated in its decision 23/1990 AB on the death penalty, and again in decision 64/1991 AB on abortion. See for instance the summary of the later decision: <http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1991-s-003?fn=document-frameset.htm$f=templates$3.0>

in constitutional review procedures can be indications for the intentions of the judges to undermine the core values of the rule of law and constitutional democracy. In our case studies, these irregularities gave a hand to the justices also to significantly restrict judicial discretion in individual cases handled by ordinary court judges.[97] In 2018, the Supreme Court invalidated 4360 postal ballots casted in the 2018 parliamentary elections. The issue was particularly delicate as the contested ballots, if counted, would have resulted in one additional seat for the Fidesz in Parliament, strengthening the two-thirds majority of the ruling party. Fidesz challenged the decision before the Constitutional Court. The court found the application inadmissible on the ground that the complaint in fact sought the constitutional review of facts rather than a question of law and the Constitutional Court cannot act as a court of fourth instance. However, the five-judge panel made explicit statements on the merit of the case suggesting that the application was well-founded and the interpretation of the Supreme Court was mistaken and arbitrary. Furthermore, the Constitutional Court implicitly indicated that the top court rendered a politically motivated decision in this case.[98] The reasoning of the Constitutional Court provided grounds for the Prime Minister to harshly criticize the Supreme Court claiming that it took away a mandate from Fidesz-KNDP and was not intellectually up to the task. Perhaps it is not a coincidence that since then the government has taken several steps to capture the Supreme Court.

In May 2020, the Constitutional Court rendered a decision in which it overruled a leading judgment of the Supreme Court which was not even challenged by the ordinary judge who turned to the Constitutional Court.[99] The overruled judgment extended the main findings of the SEGRO judgment to cases that did not concerned EU law on the ground that it otherwise would have constituted reverse discrimination in a purely internal situation. By extending the constitutional review to an individual decision that was not directly related to the legal issue raised by the referring judge, the Constitutional Court could establish the general rule that courts cannot set aside the Hungarian law in force if the case has no EU law dimension. The Constitutional Court stressed that it is the duty of all state organs including courts to protect the constitutional identity of Hungary which entails that courts cannot disregard the Hungarian law by extending the scope of CJEU decisions that was rendered in different cases.

3.2.2.2. Falsifying the constitutional question

[97] Landau and Dixon, op.cit. *supra* note 2, 1331.
[98] CC Decision 3156/2018. (V. 11.) AB
[99] CC Decision 11/2020. (VI. 3.) AB

An additional tool for the Constitutional Court to deliver a judgment favourable to the governing parties is to falsify the relevant constitutional question that needs to be decided. During the 2019 elections to the European Parliaments, "Momentum", a political party standing for the election turned to the electoral authorities claiming that activists of Fidesz-KDNP misinformed voters about the objectives of collecting supporting signatures, and therefore violated fundamental principles of the electoral procedure. The Supreme Court, in a review procedure, found that the conduct of the activists was capable of deceiving voters and therefore was unlawful and in breach of the principle of "acting in good faith" prescribed by Article 2(e) of Act XXXVI of 2013 on Electoral Procedure. Fidesz-KDNP filed a constitutional complaint with the Constitutional Court against the judgment of the Supreme Court. The Constitutional Court, in its decision, however, rephrased the relevant legal question stating that the issue was about whether the law excluded the possibility for nominating organizations to collect signatures during the campaign for purposes other than fielding candidates. The question that was posed by the Constitutional Court was misleading as the Supreme Court clearly set out that "supporting signatures" can be collected even for the sole purpose of expressing sympathy with the nominating party, but voters must be adequately informed about the objective of processing their signatures and personal data. The way the original legal question was reformulated helped the Constitutional Court to annul the decision of the Supreme Court on the ground that the top court established a new form of restriction on the electoral procedure that could not have been derived from the text of the law; therefore, the Supreme Court went beyond the intention of the legislature, and acted in an arbitrary manner.

3.2.3 Abusive form of constitutional reasoning

There are instances when the Constitutional Court did not even attempt to mask its motivation and "bad faith" intent to undermine previous judicial doctrines and contribute to developing the jurisprudence of the new authoritarian regime. This has happened in a series of electoral cases decided in 2018 and 2019 when the Constitutional Court overruled and annulled decisions of the Supreme Court detrimental to the political interest of the government. These cases also prove that "full constitutional complaint" introduced in 2012 by the Fidesz-KDNP government can be used for pure strategic purposes and for curbing the independence of the

judiciary if a politically captured and controlled constitutional court is entitled to review the decisions of ordinary courts. As a result of the jurisprudence of the Constitutional Court established in recent years' electoral cases, (1) "state neutrality" in no longer a principle of the electoral procedure, (2) the government can openly campaign for candidates supported by the governing parties,[100] (3) judicial reasoning must be limited to the text of the law which reflects the political interest of the government and can be changed anytime in favor of the government, (4) ordinary courts are discouraged to rely on principles in order to fill the gaps of the law on the electoral procedure, otherwise their decisions will likely be annulled by the Constitutional Court. As to the latter rule, the Constitutional Court relied several times on the argument that ordinary courts made arbitrary decisions when they extended the principles of the electoral procedure to situations which were not covered explicitly by the text of the law.

The MNB judgment is another sad example of abusive constitutional reasoning. The case[101] and the subsequent legislation was already mentioned above in section 2.1.2. The decision beyond its 'great legislative effect' already originally raised at least two constitutionality problems. The first was that the Constitutional Court accepted and adjudicated on the merits the constitutional complaint of the Magyar Nemzeti Bank (Hungarian National Bank, hereinafter: the MNB) as a public authority, and then annulled the judgment of the Kúria. This drew attention to the question of whether the function of the constitutional complaint is to protect the fundamental rights of the individuals against public authority or can be used by state organs as well.

The second problem was that the decision also linked Article XXVIII of the FL on the right to a fair trial to the teleological and constitution-conform interpretation requirement set out in Article 28 of the FL.

As to the facts of the case, the Hungarian National Bank as the petitioner filed a constitutional complaint against the judgements of the Kúria and the Budapest-Capital Administrative and Labour Court. The subject matter was a supervision carried out by the Hungarian National Bank concerning the operation of an investment company followed by initiating the liquidation of the company and launching an investigation against the member of the

[100] This approach is particularly problematic in light of OSCE/ODIHR final report on the 2018 Parliamentary elections which found a broad overlap between the government information campaign and the political campaign of the Fidesz. See Organization for Security and Co-operation in Europe, *Hungary, Parliamentary Elections, 8 April 2018 ODIHR Limited Election Observation Mission Final Report*, Warsaw, 27 June 2018, p. 13, available at https://www.osce.org/files/f/documents/0/9/385959.pdf

[101] CC Decision 23/2018. (XII. 28.) AB - annulling the judgement No. Kfv.I.35.676/2017/10 of the Kúria on supervisory fine applied by Hungarian National Bank

company's board of directors. As a result of the investigation, the member of the board of directors was obliged in a decision – signed by one of the Bank's vice presidents acting in a so called 'transferred power of issuance' on the basis of the authorisation by the Financial Stability Board – to pay a supervisory fine. The fined member of the board of directors requested the annulment of the decision due to the concerns related to issuing the decision. The court of first instance indeed annulled the decision as it held that the vice-president had made the decision in his own name by distracting the Financial Stability Board's competence. The Kúria maintained the effect of the final judgement of the court of first instance and it delivered a final decision in the merit of the question examined on the basis of the constitutional complaint.

The Constitutional Court examined whether the interpretation of the concept of 'issuance' used in the Kúria's judgment violate the petitioner's, i.e. the Hungarian National Bank's right to fair procedure, and found it unconstitutional. According to the Constitutional Court, the ordinary courts must interpret the laws by taking into account the purpose of the legal regulations, however, the Kúria failed to take into account the purpose of the legal regulation – despite of being bound to do so under the Fundamental Law. The Constitutional Court stated that the adopted judicial decision has become an arbitrary one as it left the framework of legal interpretation set forth by the Fundamental Law for the Kúria.

On the one hand, the Constitutional Court did not substantiate the acceptance of the constitutional complaint of the state body on the merits, while in comparison it strictly investigates the direct, effective, and personal concern in the case of individuals' complaints. If public authorities, even if confined to the right to a fair trial, although the decision itself did not guarantee this, may initiate a constitutional complaint procedure in their public capacity, there may be a tendency for challenging those administrative court decisions before the Constitutional Court, which are originally favourable for the individuals. It is contrary to the subjective legal protection function of a constitutional complaint if it can also be used by a public authority.

On the other hand, the Constitutional Court decision is a paramount example for abusive constitutional reasoning (see below). The Constitutional Court has insisted on that judicial interpretation of the law which completely and expressly precludes an examination of the purpose of the legislation is unconstitutional. In the Seventh Amendment of the FL, to ensure the prevalence of legislative will and enforce originalism in the interpretation of legal acts, it was introduced that if the courts seek for the rationale of a legal act, they shall consider its

preamble and the reasoning of the bill (Article 28 FL). This rule was not in force yet in the time of the Constitutional Court decision, still it is easy to see, how willing the Constitutional Court is to pressure the ordinary courts this way to use in their interpretation the explanatory memorandums of legislative acts, which are mere political declarations usually mirroring the illiberal values of the ruling majority.

Another form of abusive reasoning is the abusive constitutional transplant, the best example for this is 22/2016 (XII. 5.) CC decision, which was already assessed in Paper III. Upon the motion of the Commissioner for Fundamental Rights, the Constitutional Court examined the relationship between EU law and the FL in the context of the planned system of refugee quotas. The Constitutional Court conducted an extensive international comparison to establish its decision, and on this basis, it identified the constitutional limitations of the primacy of EU law, by establishing three main criteria for the joint exercise of certain competences by the EU: fundamental rights, sovereignty, and identity control. As long as Hungary is a sovereign state, the main guardian of sovereignty and constitutional identity is the Constitutional Court.
It is easy to conclude that this judgment was strongly inspired by the German Constitutional Court's case law. The Hungarian Constitutional Court strongly relied on "constitutional dialogue", which has special significance in the EU, and on that basis, the reasoning of the decision enumerates lengthily the point of view of the different national constitutional courts (Czech Republic, Denmark, UK, Estonia, France, Republic of Ireland, Poland, Latvia, Italy, Germany, Spain, Wales). These rulings are such decisions without exceptions, where the constitutional courts outline the limits of the transfer of competences and the EU decision-making. The comparative analysis shall not mean only the collection of case law and arguments in harmony with the already established outcome.[102] The colourful European overview may be convincing and presupposes reading and thorough knowledge,[103] but it shall not be considered as a methodologically well-founded comparison. The decision just copied some paragraphs from the OMT ruling of the German Constitutional Court.[104] Par. 142. of the German reasoning, and par. 34. of the Hungarian ruling is identical literally. The Hungarian

[102] See also Otto Kahn-Freud, "On Use and Misuse of Comparative Law", 37 *Modern Law Review* (1974) 1.; Cheryl Saunders, "The Use and Misuse of Comparative Constitutional Law" 13 *Indiana Journal of Global Legal Studies* (2006) 37.; Ran Hirschl, "The View from the Bench", in: Ran Hirschl, *Comparative Matters*. (OUP, 2016) 20–76.
[103] For the researchers interested to the topic the names and reference numbers of at least supposedly relevant cases provided in par. 34. of the reasoning shall be a valuable orientation, but this is really far from a real comparative interpretation.
[104] Judgment of the German Constitutional Court on 21 June 2016, BVerfG, 21.06.2016 - 2 BvR 2728/13; 2 BvR 2728/13; 2 BvR 2729/13; 2 BvR 2730/13; 2 BvR 2731/13; 2 BvE 13/13].

decision is therefore a borrowed one, but this, like all legal transplants,[105] has unintended consequences.

Another example of abusive reasoning, we mention that in 2020, the Constitutional Court had to rule on the constitutionality of a government decree that declared the merger of 476 pro-government media outlets as of national strategic importance. As a result of the decree, the newly created Central European Press and Media Foundation (KESMA) dominating the media market was exempted from any kind of scrutiny by the Media Council and the Competition Authority (see also Paper VII). Opposition MPs filed a constitutional complaint against the decree on the ground that the government failed to substantiate the public interest behind the merger which could have provided legal grounds for this move, and the merger undermined media pluralism and the conditions for free access to information. The Constitutional Court dismissed these challenges by declaring the merger itself as public interest, and by stating that the merger did not raise any constitutional concern in terms of media freedom and media pluralism.[106]

Summary

Beginning in 2010 the procedure, structure, the delegation of the judges and the powers of the Constitutional Court were changed. The most relevant constitutional changes were: the Court's competence regarding the bills on budgetary, financial and tax issues was restricted already in 2010, even before the FL entered into force; the number of the judges was raised from 11 to 15 which meant that by 2011 the judges appointed by solely the government became a relevant block in the body, although we had to wait until 2013 to ensure that the Fidesz-KDNP elected judges have the majority in the Constitutional Court[107]; and the German style of constitutional complaint (which soon became the dominant competence of the Court) system introduced instead of *actio popularis*.[108] Meanwhile, the FL formally maintained the

[105] Attila Vincze, "Ist die Rechtsübernahme gefährlich? Zur Rechtswirklichkeit und Tragfähigkeit des Konzepts eines Verfassungsgerichtsverbundes anhand des Beispiels der Verfassungsidentität", Zeitschrift für öffentliches Recht, (2020) 193-214.
[106] CC Decision 16/2020. (VII. 8.) AB
[107] Halmai, op. cit. *supra* note 2, 36.
[108] András Jakab – Johanna Fröhlich, "The Constitutional Court of Hungary" in András Jakab, Arthur Dyevre and Giulo Itzcovich (Eds.), *Comparative Constitutional Reasoning* (Campridge University Press 2017) 394-437., 431.

most relevant institutions of the Hungarian constitutional system it has definitely took huge steps to weaken the possibility of effective control on the government. The Constitutional Court was seemingly the first target because the government knew that this body had played a crucial role in ensuring checks and balances after the first decades of the regime change. The Hungarian case is an example that the authoritarian rulers see courts, especially constitutional courts and legal, constitutional processes as threats to their powers and therefore insist on subservient judges.[109] After a short transitory period (2010-13), the Constitutional Court adopted to the rule, and plays an important role in legitimating the regime.

[109] John Ferejohn, "Judicial Power – Getting it and Keeping it", in Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan (Eds.), *Consequential Courts – Judicial Roles in Global Perspective* (Cambridge University Press, 2013) 349-362., 349.

© Chronowski, Nóra – Kovács, Ágnes – Körtvélyesi, Zsolt – Mészáros, Gábor

MTA Law Working Papers

Kiadó: Társadalomtudományi Kutatóközpont (MTA Kiválósági Kutatóhely

Székhely: 1097 Budapest, Tóth Kálmán utca 4.

Felelős kiadó: Boda Zsolt főigazgató

Felelős szerkesztő: Kecskés Gábor

Szerkesztőség: Hoffmann Tamás, Mezei Kitti, Szilágyi Emese

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

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