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The Case of Hungary: beyond the Rule of Law*

Developments in Hungarian constitutional law after 2010 suggest that the era in Hungarian constitutionalism characterized by a commitment to the rule of law has been replaced by an era where the law is regarded as an instrument available to government to rule. Under the new Fundamental Law, which places alike the 1989 Constitution the rule of law at the centre of the constitutional order,[1] the constraints which follow from the rule of law have been habitually overridden or ignored by the government acting in parliament.[2]

The Constitutional Court's attempts to continue the legacy of pre-2010 constitutionalism were reproached by the government delimiting the powers of the Court or overruling its decisions in formal amendments of the constitutional text.

The independence of judiciary was also challenged by the two-third majority government through administrative and legislative means. Although European fora pointed out the deficiencies, the respect for the rule of law has significantly declined and the government got rid of the substantive bounds of this principle.

Several significant systemic developments indicate that in the new constitutional order the ability of the government to rule by law enjoys priority over the idea that for a government to be constitutional it must be constrained by law.[3]

On the following I focus on these developments by

- giving a short introduction into the style of constitution-making and amending practice of the governing majority from 2010-2018, with special regard to explaining the changes related to constitutional jurisdiction and the competences of the Constitutional Court;
- outlining the challenges on judicial independence and the on-going establishment of separate administrative courts.

These points characterise well the Hungarian rule of law crisis, first, because for legal certainty the stability of the constitution and its judicial protection is focal, and second, from the perspective of the European Union rule of law principle the independence of judiciary is essential to guarantee the application and supremacy of EU law.

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[1] Article B) para. (1) of the Hungarian Fundamental Law (as in force in November 2018): "Hungary shall be an independent, democratic rule-of-law State."

[2] Nóra *Chronowski*: Human Rights in a Multilevel Constitutional Area. Global, European and Hungarian Challenges, L'Harmattan, Paris, 2018, 11.

[3] Nóra *Chronowski* and Márton *Varju*: The Hungarian rule of law crisis and its European context, in Rule of Law in Europe – Current Challenges (eds. Andreas *Kellerhals* and Tobias *Baumgartner*), Schulthess, Zurich, 2017, 149-168.

1. The Constitution and the Constitutional Court

In Hungary a new constitution, the Fundamental Law (hereinafter FL) was promulgated on 25 April 2011 and came into force on 1 January 2012.[4] Its drafting rose to prominence in Europe and was severely criticized both by domestic experts[5] and Venice Commission. After the 2010 parliamentary elections, political forces forming a parliamentary majority – possessing two-thirds of the seats – have expressed their intention to create a new constitution. In the course of "replacing the old with new" the development of another constitutional regime and the writing of the FL came about in parallel with the devastation of the previous constitutional order with permanent amendments to the former Constitution (Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989-90, in force until 31 December 2011; hereinafter former Constitution). In the background of this policy the unequal fight of the Constitutional Court and the governing majority took place which might be summarised in the question of 'who the final arbiter in constitutional matters is' and ended in the partial incapacitating of the Constitutional Court by weakening it as a counterbalance of the executive and legislative powers.[6] Until the Fourth Amendment the Court made cautious efforts to strike down the strivings of the supermajority government acting in the parliament. Since then and especially after the – at first failed Seventh Amendment in 2016 – as the institutional and competence changes had their effect, the Court gives even a helping hand to the constitution maker, and it is even ready to substitute the constituent will along the intents of the government.[7]

The rule of law backsliding started after the 2010 parliamentary elections, parallel with the declaration of creating a brand-new constitution, the permanent amendments of the old

[4] For the official English translation of the Fundamental Law (consolidated version with seven amendments), see https://hunconcourt.hu/uploads/sites/3/2018/11/thefundamentallawofhungary_20181015_fin.pdf

[5] See e.g. Attila *Vincze* and Márton *Varju*: Hungary: the New Fundamental Law, European Public Law Vol. 18, № 3, 2012, 437-453., Attila *Vincze*: The New Hungarian Basic Law: Redrafting, Rebranding or Revolution, Vienna Journal on International Constitutional Law 2012, 88-109., Zoltán *Szente*: Breaking and making constitutional rules. The constitutional effects of the world economic and financial crisis in Hungary, in Constitutions in the Global Financial Crisis: A Comparative Analysis (ed. Xenophon *Contiades*), Farnham, 2013, 245-262., Gábor *Halmai*: Perspectives on Global Constitutionalism. The Use of Foreign and International Law, Eleven, The Hague, 2014, 121-155.

[6] Nóra *Chronowski* and Márton *Varju*: Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law, Hague J Rule Law Vol. 8, № 2, 2016, 281-282. See also Zoltán *Szente*: The Decline of Constitutional Review in Hungary – Towards a Partisan Constitutional Court? in Challenges and Pitfalls in the Recent Hungarian Constitutional Development (eds. Zoltán *Szente*, Fanni *Mandák* and Zsuzsanna *Fejes*), L'Harmattan, Paris, 2015, 192-196.

[7] 22/2016. (XII. 5) Constitutional Court Decision. In October 2016 the Orban-government initiated a referendum on refugee relocation, but it was invalid. After that the government lodged a bill on the amendment to the Fundamental Law with the intention to exclude the 'settlement of foreign inhabitants' and to create a constitutional basis for the protection of constitutional identity. But this amendment also failed in the Parliament.
Right after that, the war on migration was fuelled by a new Decision of the Hungarian Constitutional Court from 5th December 2016. The Hungarian Constitutional Court, by formally copying some recent decisions of the German Constitutional Court, established that upon a relevant motion and in the course of exercising its competences it may review whether the joint exercise of powers with other EU member states or by way of the institutions EU violates human dignity, or an another fundamental right, the sovereignty of Hungary or its constitutional identity based on the country's historical constitution. It is still an open question how the new judge-made competence will be used in the conflicts of EU law and domestic constitutional law. The judgment was greatly influenced by the landmark cases of the German Constitutional Court, but it is very doubtful whether the transplanted German paradigm would be operable under Hungarian circumstances.
See to this Ágoston *Mohay* and Norbert *Tóth*: Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law, American Journal of International Law № 2, 2017, 468-475.

Constitution also commenced. These amendments can be grouped into two types, one of them are 'normal' modifications and the others are 'demolishing' amendments.[8] The 'normal' modifications are justified, because any new government is authorised to constitutional reforms on the basis of its electoral program and experiences of the constitutional practise. However, only the minority of the 2010-11 amendments belonged to this group.

The subject matters of the 'demolishing' amendments were as follows:

(1) nomination of *Constitutional Court* judges by the governing majority without the consent of the opposition,
(2) freedom of press – creating constitutional basis for a new media legislation and enabling the state capture of the public media,
(3) *judiciary:* allowing court clerks to act as judge in certain cases,
(4) special tax on severance pay against *bona fides (morals)* in public service,
(5) limitations on right to be elected for officials of armed forces,
(6) limitation of the *Constitutional Court's competence* regarding the review of acts concerning public finances,
(7) special tax on severance pay – retroactive legislation back to five years,
(8) basis for changing pension system in order to get rid of early retirement benefits,
(9) nationalisation of local governments' property,
(10) *judiciary:* president of the *Kúria* (Supreme Court) shall be elected until 31. December 2011,[9]
(11) *president of the Constitutional Court* shall be elected by the parliament instead of the court itself, and *15 instead of 11 judges* shall be elected.[10]

A clear line of threatening (constitutional) judiciary and undermining rule of law can be observed in this group of amendments, while the supermajority strived to eliminate the constitutional impediments of economic governance and policy-making as well.[11]

As to the new constitution, in early March of 2011 two bills were lodged to the parliament, one of them by the governing party alliance and the other by an independent MP. They were parallel discussed from 21 March, and after 9 effective days of parliamentary debate on 18 April 2011 the bill of the governing parties was endorsed with the two-third majority of votes of the MPs. No opposition MPs voted for the bill. This short summary clearly shows that the actual and effective constitution-making was rapid and non-transparent. The Venice Commission issued two opinions during the narrow sense Hungarian constitution making, first upon the request of

[8] András László *Pap*: Democratic Decline in Hungary: Law and Society in an Illiberal Democracy, Routledge, 2018, 15-28.
[9] The six-year-mandate of the acting president of the Supreme Court, András Baka was terminated after three years; later the European Court of Human Rights stated the violation of the Convention, see Baka v. Hungary, Judgement of 27 May 2014, no. 20261/12.) See about the case Attila *Vincze*: Dismissal of the President of the Hungarian Supreme Court: ECtHR Judgment Baka v. Hungary, European Public Law Vol. 21, № 3, 2015, 445-456.
[10] The following acts of Parliament amended the former Constitution: Act of 5 July 2010, Act/2 of 6 July 2010, Act/1 of 11 August 2010, Act/2 of 11 August 2010, Act CXIX of 2010 (published on 19 November), Act LXI of 2011 (published on 14 June 2011), Act CXLVI of 2011 (published on 14 November 2011), Act CLIX of 2011 (published on 1 December 2011).
[11] Márton *Varju* and Nóra *Chronowski*: Constitutional backsliding in Hungary, TvCR № 4, 2015, 298.

the Hungarian government (March 2011),[12] and second upon the request of the Monitoring Committee of the Parliamentary Assembly CE (June 2011).[13]

It must be noted that the draft of the new constitution was not sent to the Venice Commission on time, thus the first opinion of 28 March 2011 contained general comments and not evaluated any particular provisions of the draft constitutional text.

The Venice Commission in its second opinion, which was published on 20 June 2011, examining the final text revealed several criticalities that should be eliminated by utilising the common European values during the interpretation. Although the commission welcomed the youngest European constitution, it also formulated important concerns and critics regarding the (i) procedure of drafting, deliberating and adopting without the opposition and the wider public, (ii) the high number of cardinal (organic) laws, especially in the fields of family legislation, social and taxation policy, which are typically simple majority decisions of any government, (iii) the concept of 'historical constitution' as rule of interpretation, (iv) the wording of preamble, (v) the provisions related to Hungarians living beyond the borders, (vi) the constitutional obligations with uncertain content, (vii) the lack of explicit reference to abolition of death penalty, (viii) the limitation of the Constitutional Court's competence.

However, the Hungarian constituent power circumvented the recommended way of interpretation, saying the Venice Commission's opinion is just a recommendation without any legal binding force, and insisted on the criticized solutions.

The National Assembly has modified the FL seven times since its entry into force (2012), and has, *inter alia*, cemented the model of limited constitutional judicature, broke constitutional continuity, and perpetuated the practice of overruling the decisions of the Constitutional Court.[14] All amendments have shaped and shaded the new constitutional architecture; all have influenced the present landscape though, of course, not with equal significance. It is worth noting that most of amendments were adopted during 2012-14, in the context of a practically unlimited constitution-amending power – a two-thirds majority in the parliament.[15] Here I discuss shortly the most formative amendments that influenced the scope of constitutional review and the interpretation of FL.

The sharpest criticism was induced by the Fourth Amendment (April 2013) to the FL,[16] in which amendment *lex specialis* rules were introduced in comparison to the fundamental principles of the rule of law, democracy and the protection of fundamental rights; regulations evading or

[12] European Commission for Democracy Through Law (Venice Commission) Opinion № 614/2011, Strasbourg 28 March 2011, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, Available at tasz.hu/files/tasz/imce/2011/opinion_on_hungarian_constitutional_questions_enhu_0.pdf.

[13] Venice Commission, Opinion № 621/2011, Strasbourg 20 June 2011, Opinion on the New Constitution of Hungary, www.venice.coe.int/webforms/documents/CDL-AD%282011%29016-E.aspx.

[14] See also Pál *Sonnevend*, András *Jakab* and Lóránt *Csink*: The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary, in Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania (eds. Armin von *Bogdandy* and Pál *Sonnevend*), C.H. Beck, Hart, Nomos, Oxford, Portland, Oregon, 2015, 52-63.

[15] The two-third majority of the parliamentary mandates belonged to Fidesz-KDNP party alliance (Young Democrats and Christian Democrats alliance) between 2010-14, 2014-15, and also after the 2018 elections.

[16] The amendment was firmly criticised by the Venice Commission, see Opinion № 720/2013 of the Venice Commission on the Fourth Amendment of the Fundamental Law of Hungary, Strasbourg 17 June 2013, www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e.

bypassing Constitutional Court rulings were enacted substantially reducing the space for constitutional protection (e.g. student contracts, acknowledgement of churches, concept of family), a specific review- and a new interpretation-limit was raised in the way of constitutional judicature (excluding substantial review of the amendments to the constitution, repealing of Constitutional Court decisions adopted before the FL), and even open infringement of EU law (limitation of election campaigns, possibility of special taxation as an indirect result of court rulings) was risked.[17] The Fifth Amendment (October 2013) was adopted by the governing majority under the pressure of European institutions with the intention of 'closing international debates', however not all of the challenged articles were modified, just the ones with the potential of infringing EU-law. The Sixth Amendment (July 2016) did not affect the Constitutional Court and its review powers, it concerned the constitutional regulation of the special legal order.[18] The most recent Seventh Amendment – that 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 historic Hungarian Constitution, prohibited the settlement of foreign inhabitants and created a basis for sanctioning homelessness.

During the past six years, the composition of Constitutional Court changed to much extent. The acting justices are modest in controlling the legislator, and sometimes postpone or bypass the decision in sensitive questions (e.g. in the case of Central European University or the refugee quota).

2. Judiciary

After the adaption of the new constitution, the two-third majority also challenged the judicial branch of power in many ways.

First, the legislator lowered the retirement age of judges from 70 to 62 years. Since 1869, Hungarian judges could remain in office beyond the retirement age, thus they could freely choose their day of retirement between the age of 62 and 70.[19] However, the FL and Act 162 of 2011 on the legal status of judges unexpectedly obliged them to retire at the general retirement age from the beginning of 2012.[20] It has led to a mass removal of over 270 judges in the first half of 2012.

[17] See for example Imre *Vörös*: The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law, 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, Osteuropa Recht № 3, 2013, 307-325., Attila *Vincze*: Wrestling with Constitutionalism: the supermajority and the Hungarian Constitutional Court, International Constitutional Law № 4, 2013, 86-97.

[18] It introduced a new state of emergency in case of threat or act of terrorism, beyond the existing five special legal order situations: national crisis, emergency, preventive defence, unforeseen intrusion and danger. There is no room for a thorough analysis, but a short comment seems to be necessary. This regulation still provides wide discretional power to the government, because the constitution allows the introduction of the special legal order even in case of terror threat – about which the intelligence agency may have exact information, thus the democratic control on the necessity of the introduction is rather limited.

[19] See also Balázs *Fekete*: How to Become a Judge in Hungary? From the Professionalism of the Judiciary to the Political Ties of the Constitutional Court, in Fair Reflection of the Society in Judicial Systems: a Comparative Analysis (ed. Sophie *Turenne*), Springer, Heidelberg, London, New York, 2015, 169-186.

[20] Tamás *Gyulavári* and Nikolett *Hős*: Retirement of Hungarian Judges. Age Discrimination and Judicial Independence: A Tale of Two Courts, Industrial Law Journal Vol. 42, № 3, 2013, 289.

Second, in the course of the constitutional and judicial reform, the Supreme Court was renamed to Curia (in Hungarian Kúria, it is the historical name of the highest judicial body), without any significant changes regarding its competences, however, the TPFL terminated the mandate of the President of the Supreme Court, who was elected by the Parliament in 2009 for a 6 year term.[21] The President of the Supreme Court earlier criticized the premature retirement of judges and other supermajority actions concerning the independence of judiciary.

Third, before the FL, the administration of justice based on autonomy and judicial independence. In 2011 the reforms aiming to improve the efficacy placed the administrative powers held by the National Council of Justice and its president (the President of the Supreme Court) into the hands of two new bodies – the National Judicial Office and the National Judicial Council. While the Council serves mostly control and consultative functions, the latter exercises the effective administrative competences over the judiciary. The President of the NJO had originally a vast array of competences relating to judicial appointments, case allocation, administration, management and supervision, and thus this extensive power over the judiciary belonged to a politically-appointed individual. However, following the widespread alarm of the national and international community regarding these powers and their impact on the independence of the judiciary, in 2012 the parliament restricted certain of the competences of the President of the NJO and increased those of the NJC.

Fourth, the so-called Nullity act, Act XVI of 2011 on the redress of the court judgments in connection with the crowd controls in the autumn of 2006, nullified certain judgments relating to the civil unrest of autumn 2006,[22] on the basis that the law interfered with the right of judges (rather than the legislature) to assess evidence and decide on individual cases. The act suggested that the police gave false evidence in each case when exclusively their evidence confirmed the commitment of the act, in these cases the prosecutors brought charges wrongly, and that the judgments of the first and second instance were wrong.

Fifth, by the Seventh Amendment to the FL (2018) the governing majority decided to re-establish the separate system of Administrative Courts. The present mixed system consists of "Administrative and Labour Courts", which do not form a special branch of courts but function as a sort of decentralised units of the second lowest layer of the ordinary courts, while the highest level in administrative matters is the Kúria, the ordinary Supreme Court. The minister of justice lodged the bills on the new system on 6 November 2018. The present administrative judges can opt in the new system, and new judges may be appointed as well with significant administrative though short judicial practice. The President of the Supreme Administrative Court is elected by the Parliament by the end of March 2019. The new system – with a Supreme Administrative Court and 8 regional administrative courts – is to set up by January 2018. The new administrative courts will have jurisdiction over issues concerning the National Bank, the Media Council and the Public Procurement Arbitration Board, as well as cases brought in connection with the lawfulness of decisions passed by other government institutions, e.g. cases concerning information of public interest; election, referendum; assembly; decisions

[21] Attila *Vincze*: Judicial independence and its guarantees beyond the nation state – some recent Hungarian experience, Journal of the Indian Law Institute Vol. 56, № 2, 2014, 204.

[22] On 18 September 2006 a massive demonstration was held near the Hungarian Parliament. The protests, allegedly attended by 40,000 people, concerned the audio recording, which surfaced on 17 September 2006, on which the then Prime Minister Gyurcsány admitted to lying to the public for a couple of years, including lying about budget deficit. Police violence during the crowd control ended in criminal or offence procedures.

concerning the media or tax matters. The drafts are brand new and under parliamentary debate at the time of writing the present report (November 2018), but it is clear from them that the executive branch will have a wider influence on administrative courts than on ordinary courts. The competences related to the administration of justice – especially budgetary matters and judicial appointments – will belong to the minister of justice in case of administrative courts, thus this model seems to be different from the administration of ordinary courts in Hungary. In a state governed by the rule of law a professional and independent system of administrative courts may contribute to the effective judicial protection. However, if the interrelated requirements of the rule of law are not observed in a state then a separate court cannot balance the overwhelming powers of the executive.

3. Closing remarks

The rule of law backsliding in Hungary is also indicated in the Rule of Law Index of the World Justice Project.[23] The reasons for this trend are the instability and unpredictability of the constitutional frameworks, the limited institutional capacity of the Constitutional Court, the practice in the field of judicial appointments (which are not based on meritocratic rules), the functioning of the public prosecutor office and the absence of its transparency, and the dynamics of legislation (which is rapid, rhapsodic, changeable). Despite the systemic changes of the Hungarian rule of law state, the European Commission did not commence a rule of law framework mechanism in the case of the country. The recently initiated Article 7 TEU procedure based upon the report of the European Parliament.[24] Thus, the initiation came from a political actor, and even if the report was quite detailed, it was not convincing for the Hungarian government. If the procedure turns into pure political debate, then it hardly will contribute to the state of rule of law in Hungary.

[23] *Jakab* András and *Gajduschek* György: Jogállamiság, jogtudat, normakövetés, in Társadalmi Riport 2018 (eds. *Kolosi* Tamás and *Tóth* István György), TÁRKI, Budapest, 398-403. https://www.tarki.hu/sites/default/files/trip2018/397-413_Jakab-Gajduschek_jogrend.pdf

[24] Rule of law in Hungary: Parliament calls on the EU to act, http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act