Hungary's Constitutional Transformation

Kriszta Kovács & Gábor Attila Tóth*

Hungary – Democratic state structure – Two-thirds parliamentary majority – First flurry of constitutional amendments of 2010 – Checks and balances – Media – *Ex post facto* legislation – Hungarian Constitutional Court – Judicial review – Wholesale constitutional review and Basic Law of 2011

Introduction

More than two decades after the post-communist constitutional transition, Hungary is in the spotlight again. As a result of the 2010 elections, the governing majority has two-thirds of the seats in parliament, which makes constitutional revision exceptionally easy. This is not only conjecture, since the Constitution has been changed ten times within half a year, including a reduction of the Constitutional Court's competencies. In April 2011, on the first anniversary of the 2010 election, a brand new constitution was promulgated, named the Basic Law.

The objective of this paper is to describe how these changes are altering the basic structure of the Hungarian State. We first briefly outline the state structure based upon the 1989 Constitution. Second, we show how the flexible Constitution and the hostile political climate have challenged the constitutional stability. Third, we describe the flurry of controversial constitutional changes including limitation of the competencies of the Constitutional Court immediately after the elections. Fourth, we review the process of the adoption of the new constitution, the Basic Law. And finally, painting with a broad brush, we introduce the main features of that new constitution.

* Kriszta Kovács is a Chief Adviser of the Hungarian Constitutional Court, and Liaison Officer of the Venice Commission. Gábor Attila Tóth is Associate Professor at Debrecen University. A shorter version of this paper was presented at the Law and Society Institute, Humboldt University in January 19, 2011. This article only reflects the personal opinion of the authors. Comments are welcome at: kovacs@mkab.hu, tga818@law.unideb.hu.

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Constitutional structure

Hungary has been a constitutional democracy since 1989. Like other countries in the region, the peaceful, co-ordinated political transition resulted in revolutionary outcomes: democratic institutions replaced an authoritarian regime, pluralist society replaced the dominance of communist ideology. Compared to the speedy political transformation, the text of the Hungarian constitution was changed only gradually. In 1989-1990, amendments of the old Constitution created the legal frameworks of the new democracy that can be characterised by the main institutions of constitutionalism: representative government, a parliamentary system, an independent judiciary, ombudsmen to guard fundamental rights, and a Constitutional Court, to review the laws for their constitutionality. The most crucial elements of the substantively new Constitution were promulgated on the thirty-third anniversary of the 1956 revolution, two weeks before the fall of the Berlin Wall. According to one of the groundbreaking principles, 'The Republic of Hungary shall recognise the inviolable and inalienable fundamental human rights; respecting and protecting these rights are primary obligations of the State.'[1] This means that the constitutionally protected moral rights are not constituted but only recognised and respected by the constitution-maker.[2]

The Hungarian constitutional structure follows Western European traditions in establishing an adapted parliamentary system instead of importing a United States presidential architecture.[3] The Constitution copies the German chancellor-led system including a weak president elected by the parliamentary representatives.[4] The prime minister heads the executive and the government is the supreme body of that branch, responsible to parliament. Considering only the relation between the legislature and the head of state, in normal circumstances the balancing power is the president's limited right of veto.

It is the Constitutional Court that is considered to be the safeguard of fundamental rights and an institutional guarantee of the separation of powers. As in other central and eastern European countries,[5] the Hungarian form of judicial protection of the Constitution is closer to the concentrated German model, with

[1] Art. 8(1) of the Constitution.

[2] *See* J. Kis, *Constitutional Democracy* (CEU Press 2003) p. 119.

[3] L. Garlicki, 'Democracy and International Influences', in G. Nolte (ed.), *European and U.S. Constitutionalism* (Cambridge University Press 2005) p. 264.

[4] In spite of this, several scope-of-authority controversies have revealed a characteristic uncertainty that occurs in the Hungarian and other Central European parliamentary systems. Vindicating real power as the head of state and the depository of national sovereignty sometimes leads to theatrical struggles. From a comparative perspective, *see* N. Dorsen et al., *Comparative Constitutionalism. Cases and Materials* (Thomson-West 2003) p. 269.

[5] With one exception: after the transition Estonia – following the Scandinavian model – set up a Constitutional review chamber in its Supreme Court.

only one supreme body's jurisdiction to review legislation, than to the diffuse US judicial review. The Constitutional Court is institutionally separated from the ordinary court system[6] and has unique, *erga omnes* constitutional interpretative authority. Under the 1989 Constitution the broadest competence of the Constitutional Court is the abstract constitutional review of legal rules, even when there is no case or controversy. Anyone is entitled to bring an action without limitation; there are no deadlines to be observed, nor is the applicant required to show any impact or other legally protected interest (*actio popularis*).[7] In the first two decades the great majority of the proceedings fell in this category.

At the same time, the competence of the Constitutional Court in examining constitutional complaints is unusually limited. It can only review individual complaints alleging the judicial application of an unconstitutional law in the course of the proceeding. Thus, in Hungary, in a concrete controversy ending in a judicial decision, only the law applied can be reviewed, not the decision itself. If the Constitutional Court concludes that an unconstitutional law has been applied, the procedure may be re-opened. If it is only the application of the law that was unconstitutional in the concrete case, the Constitutional Court is powerless. There is no legal remedy in cases where fundamental rights are violated as a result of judicial application itself.[8]

Despite this shortcoming, the Constitutional Court is the most important institution to maintain the constitutional balance of powers. Because of the establishment of a one-chamber legislature, the constitutional system does not contain a limiting upper house. Since Hungary is a unitary state, it cannot realise the vertical separation of powers doctrine of federalist states. The country has a parliamentary system in which the executive and legislative powers are intertwined and the president has strongly limited competencies, even considering his veto powers. Hence, the real constitutional checks on the powers of the parliament are the fundamental rights recognised by the Constitution and the Constitutional Court that interprets and upholds those rights.

[6] The main reason for this was that the transition was characterised by a deep mistrust among the new elites and the masses in the judiciary. The judiciary was considered to be a means of the previous oppression. *See* A. Sajó, 'Contemporary Problems of the Judiciary in Hungary', in *The Social Role of the Legal Profession* (International Centre for Comparative Law and Politics, University of Tokyo 1993).

[7] L. Sólyom and G. Brunner, *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court* (The University of Michigan Press 2000) p. 81.

[8] Hence, Georg Brunner's conclusion is well founded: 'The arrangement for a constitutional complaint constitutes the most unsuccessful provision of the Constitutional Court Act.' G. Brunner, 'Structure and Proceedings of the Hungarian Constitutional Judiciary', in L. Sólyom and G. Brunner, ibid., p. 84.

Flexible Constitution – hostile parliamentary parties

In substantive terms the political transition two decades ago breathed new life into the Hungarian Constitution. Since the models of the reshaped Constitution were international human rights instruments, as well as the more recent Western constitutions, it was written in the language of modern constitutionalism. As regards the constitutional principles and the institutional architecture, Hungary, like other central European states, belongs to the community of modern liberal democracies.[9] Nevertheless, it is the only nation in the region that did not adopt an entirely new constitution after the fall of Communism.[10] In formal terms, the 1989 Constitution was a mere modification of the Stalinist 1949 Constitution.

Compared to those of other European states, the Hungarian Constitution is easy to amend. The Constitution does not render any provision or principle unamendable and it requires only the votes of two-thirds of members of parliament (258 members of Hungary's 386-seat parliament).[11] Despite the fact that the Constitution cannot be modified or amended by the ordinary law-making procedure according to a simple majority rule, it is regarded as relatively flexible rather than rigid, because one legislative body has the sole power to change the constitutional text. Neither a referendum, nor any other form of ratification (e.g., approval by the subsequent parliament) is required for the adoption of a new Constitution or a constitutional amendment.

According to the 1989 Constitution, with regard to particular rights and constitutional principles (including free speech, freedom of conscience, freedom of association and assembly, the electoral system, etc.), any act substantially affecting those rights must be approved by a two-thirds majority of the votes of the members of parliament present. The two-thirds majority can not only modify the Constitution and the above-mentioned crucial acts, but also elect the president of the Republic, the Supreme Court chief justice, the members of the Constitutional Court and ombudspersons.

These two-thirds rules incompletely represent both a theoretical consideration and a practical agreement between the government and the opposition during the transition period. According to the pact, in order to govern the state properly, the

[9] This is why Timothy Garton Ash calls the central European revolutions non-utopian. T.G. Ash, *Facts are Subversive. Political Writing from a Decade without a Name* (Atlantic Books 2009) p. 51.

[10] In comparison with the Polish constitutional transformation, the two systems had developed side by side for less than a decade. In the aftermath of the Polish Round Table Agreement, the old constitution was amended in April 1989, and the first democratic parliament then reshaped the relations between the legislative and executive branches of the State ('Small Constitution'). In contrast with the Hungarian events, the reformed Polish Constitution was finally replaced in 1997 by a completely new constitution for Poland.

[11] Art. 24(3) of the Constitution.

simple parliamentary majority does not suffice to reshape the constitutional architecture or limit fundamental rights. The requirement of qualified majority is supposed to function as an actual control over the governing majority in power. It can be seen as a guarantee to protect constitutionalism in Hungary. However, it makes the constitutional balance fragile. Wide co-operation between the parliamentary parties and a common commitment toward constitutional values are normally required in modernising the constitution. Otherwise the Constitution could become the victim of a governing majority.[12]

Prior to 2010, there was only one period, between 1994 and 1998, when the government was supported by two-thirds of the seats in parliament. Even though on a number of issues the then-ruling parties failed to seek the consent of the opposition regarding certain acts requiring a two-thirds majority, the governing coalition also expressed some willingness to co-operate with the opposition in constitution-making. They modified the procedural guaranties of the Constitution, to the effect that parliament should decide on the cornerstones of the new Constitution by a four-fifths majority in the preparatory process.[13] Because of the hostile political environment and the divergent constitutional conceptions, the talks in the constitution-making process further collapsed in 1997. The ideas of the rival political parties regarding the legal frameworks of the political community were diffuse enough to prevent a consensus on a brand new constitution. This is why although the 1989 Constitution was amended several times (e.g., to empower Hungary to join NATO and the European Union), the conception of fundamental rights and the basic structure of the state under the 1989 Constitution remained untouched until 2010.

After the 2010 elections, an immediate flow of constitutional changes

Hungary's latest parliamentary election, the sixth since the 1990 founding elections, took place on 11 and 25 April 2010. In this election 263 of the 386 members of parliament were elected from the then opposition parties Fidesz and the

[12] Since Hungary has a mixed – majoritarian and proportionate – electoral system with 176 single member districts, county lists and compensatory lists, a party can secure two-thirds of the parliamentary seats with a little more than 50% of the votes.

[13] Art. 24(5) of the Constitution: 'The majority of four-fifth of the votes of the Members of Parliament is required to pass the parliamentary resolution on the detailed rules on the preparation of the new Constitution.' The provision was repealed by a constitutional amendment adopted by a two-thirds majority on 5 July 2010. Andrew Arato argues that this provision was unchangeable: one cannot change by two-thirds what only four-fifth can change. A. Arato, 'Orban's (Counter) Revolution of the Voting Booth and How It Was Made Possible', <www.comparativeconstitutions.org/2011/04/arato-orbans-counter-revolution-of.html>, visited 15 May 2011.

Christian Democratic People's Party, giving them a majority of 68% of the seats with 53% of the votes.[14]

It was a majority sufficiently large to amend the Constitution or rewrite it totally. Both were to happen. First, the election results opened the way for a flow of constitutional changes. In the first year of its term the ruling coalition adopted a range of constitutional amendments. Let us first focus on these modifications of the 1989 Constitution.

Representative organs

Soon after the inaugural sitting of the newly elected parliament, a symbolic constitutional amendment was adopted to reduce the number of parliamentary deputies. Hungary currently has a 386-seat parliament, while under the new rules the number of members of parliament 'shall not exceed 200.' An additional thirteen members 'may be elected' to represent the national and ethnic minorities.[15] Parliament also reduced the number of local government representatives, and with a constitutional amendment paved the way for the local representative body to name a vice mayor to substitute the mayor. Henceforth, even a non-elected member of the local representative body (e.g., a political ally of the mayor) may be appointed as vice mayor.[16]

Reducing the number of members of parliament as well as local government representatives requires essential statutory changes in the election system and procedure. Concerning the parliamentary deputies these statutes have not been launched yet. (The next general elections are scheduled for 2014.) However, on a local level the parliamentary majority has already modified the substantive and procedural statutory rules of the elections and significantly reshaped the boundaries of the electoral constituencies. Local government elections were held based upon these new provisions in October 2010.

Administering justice

In order to speed up court proceedings and to achieve 'law and order' in society, a new constitutional provision was adopted. According to this, court secretaries,

[14] The Christian Democratic People's Party (KDNP) is a satellite party which ran on a joint list with Fidesz. After the election a parliamentary fraction of KDNP was formed, and the two parties signed a coalition agreement.

[15] Art. 20(1) of the Constitution. The number thirteen refers to the fact that currently thirteen nationalities are settled in Hungary. That means that until this time thirteen minorities fulfilled the necessary criteria of the Minority Act, but the list has an open nature, so further minorities can be acknowledged with the according legal status. Art. 61(1) *A nemzeti és etnikai kisebbségek jogairól szóló törvény* [Act on the Rights of National and Ethnic Minorities].

[16] Art. 44/B(1) of the Constitution.

that is lawyers without a judicial appointment, may rule on cases within the competence of local courts, among others cases concerning the detention of those committing minor offences.[17] Although the new addendum declares that when administering justice the court secretaries are independent and answer only to the law, as a result of the new rule, not only judges can decide in legal disputes. Moreover, the court secretaries have the competence to rule on deprivation of personal liberty. It is a question whether this solution meets the relevant constitutional and international human rights standards.

The governing majority has also made significant changes with regard to the constitutional status of the public prosecutor's office. In the future parliament is to elect the chief public prosecutor by a two-thirds majority instead of a simple one, and the term of the mandate has increased to nine years from six. The chief prosecutor can also be re-elected an unlimited number of times.[18] In addition, members of parliament may no longer address interpellations to the chief public prosecutor.[19] According to the reasoning given, the change was intended to reinforce the independence of the public prosecutor's office. However, the means applied do not clarify the constitutional status of the prosecution, which has been unclear since 1989. On the one hand it is not under the jurisdiction of the Minister of Justice, therefore the minister could not be held responsible for the unlawful actions or omissions of the prosecution. On the other hand the prosecution does not enjoy an independent status like the judiciary, because prosecutors work within a strong hierarchical system with the obligation to obey the orders of higher-ranking prosecutors. With the modifications, the majority further enhanced legal uncertainty instead of trying to accommodate it.

Media

Brand new constitutional provisions on freedom of expression have been adopted by parliament. The amendments on the one hand stylistically refurbish the right to freedom of speech and of the press,[20] while on the other they entail significant changes. Formerly, the Constitution required parliament to adopt a statute on

[17] Court secretaries are law school graduates, who after the three-year clerkship pass the state professional exam and a vocational exam. They must serve for at least one year as a court secretary, after which they are eligible for judicial appointment.

[18] It is also worth mentioning that based upon the recently adopted rules, should the parliament in 2019 fail to elect a nominee because the future governing party does not have a two-thirds majority in parliament, the current chief prosecutor will remain in office.

[19] Art. 27 of the Constitution. The possibility remains for the members of parliament to pose questions (not followed by the vote of the plenum) to the chief public prosecutor.

[20] The relevant part of the former Art. 61(1) reads as follows: 'In the Republic of Hungary everyone has the right to freedom of expression.' The first sentence of Art. 61(1) in force reads as follows: 'In the Republic of Hungary everyone has the right to freedom of speech and of expression.'

preventing information monopolies, by a two-thirds majority of its members. Protecting and promoting media pluralism by adopting a special act is no longer a constitutional aim. It has been replaced by the 'protection of the diversity of the press',[21] which is not an equally effective guarantee for the goal to be achieved. A lack of a constitutional requirement to adopt an act about prevention of information monopolies may lead to a narrow interpretation of the diversity requirement. It may not include anti-monopoly rules (which are an important means to diversity), but only rules ensuring a diversity of media content. However, as a Recommendation of the Council of Europe Committee of Ministers points out, there is a difference between promotion of structural pluralism of the media on the one hand, and content diversity on the other.[22] The former refers to a sufficient variety of media outlets provided by a range of different owners, while the latter to a sufficient variety of information, opinions and programmes being disseminated by the media and available to the public.

The majority introduced a scheme merging the former telecommunications and broadcasting regulatory authorities and it established one powerful Media Authority, providing this with a constitutional status and giving a competence for its head to issue decrees which are binding on everyone. The head of the Authority is appointed by the prime minister for a term of nine years, which – under the given circumstances – ensures that the government has a solid influence on the performance of the Media Authority. Moreover, such a long term of office could ensure that even if the government loses its parliamentary majority in the next elections, the officials it appointed will remain in power for almost a decade.

On the basis of this constitutional amendment, the legislature has adopted acts relating to the new media authority, to 'content regulation' and to procedures and sanctions. According to the Act on institutional changes, the president of the Authority is also the head of the Media Council,[23] the competence of which is not limited to regulating and controlling broadcast media, but supervises the print and internet outlets. In parallel to this, the basic approach of the Act on content regulation is to place all media in the same regulatory basket: broadcast, print, and online (news portal, professional blogs) media, by extending the content regulatory framework to the print and the new media. This means that not only does the same body oversee the different media providers, but the content requirements are also the same. Last but not least, the Act concerning the procedures and sanctions paves the way for the Media Council to impose large fines on print, online

[21] Art. 61(2) of the Constitution.

[22] 'Recommendation Rec(2007)2 of the Council of Europe Committee of Ministers on media pluralism and diversity of media content', <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1089699>, visited 15 May 2011.

[23] The Media Council members are elected by the two thirds parliamentary majority for nine years. Under the given circumstances this results in a one-sided body.

and broadcast media or even to shut down an organ permanently, which could have the effect of discouraging the press from expressing criticism. International bodies like the Organization for Security and Co-operation in Europe, the Council of Europe Commissioner for Human Rights and the European Commission have found the institutional transformations and the restrictions of the press freedom inappropriate.

The OSCE analysis emphasised that although the media legislation represented an attempt to modernize Hungarian media law by responding to the challenges posed by technological change, this was done mainly by extending the traditional regulatory framework to the new communication services. The report criticised the institutional design of the Media Authority which 'may, if deliberately (mis)used for this purpose, create conditions for the realization of the 'winner-takes-most' or indeed 'winner-takes-all' scenario in the current term of parliament, in defiance of the principle of the division of powers and of the checks and balances typical of liberal democracy.'[24]

According to the Council of Europe Commissioner for Human Rights, the provisions regarding appointment, composition and tenure of existing media regulatory bodies 'lack the appearance of independence and impartiality, quite apart from a *de facto* freedom from political pressure or control.' [25]

As is well-known, the European Commission expressed concerns about the compliance of media legislation with EU law concerning four issues. These issues comprise extended usage of the obligation of balanced coverage, application of fines to broadcasters legally authorised in other member states, rules on registration of all media content providers and a broadly applicable provision under which media content may not cause offence, even by implication, to individuals, minorities or majorities. Following the intervention of the European Commission, Hungarian parliament restricted the balanced coverage requirement to broadcasting and limited the range of sanctions with regard to media service providers resident in other member states. In addition, media legislation was amended so that all media (including press and online media) are subject to subsequent registration and not prior authorisation by the Hungarian authorities. And last but not least the ban on offensive content was softened.[26]

[24] Karol Jakubowicz was the author of the OSCE analysis, <www.osce.org/files/documents/1/3/71218.pdf>, p. 5, visited 15 May 2011.

[25] CommDH(2011)10, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1751289>, visited 15 May 2011.

[26] <http://nol.hu/media/file/attach/61/10/00/000001061-1855.pdf >, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/89>, visited 15 May 2011. Some argue that media legislation as amended upon intervention by the European Commission does not comply in every aspect with the EU law and its underlying human rights principles. *See*, e.g., the Letter of the

Retroactive legislation

In addition to the media package, in the second half of 2010 the parliamentary majority adopted a constitutional amendment on retroactive tax obligation, which permitted the legislature to tax retroactively incomes received from public funds (from pensions to extra bonuses for former high-ranking government officials) if the income was given contrary to 'good morals' by state organisations.[27] The aim of the new amendment was to create an exception to the prohibition of *ex post facto* laws and the constitutional limits of taxation established by the Constitutional Court. Based upon this constitutional provision, an act was adopted concerning a 98% tax on public sector severance pay above HUF 2 million (approximately euros 7300). It was to be applied to the pay received by public sector employees who left their jobs after 1 January 2010.

Several petitioners challenged the Act before the Constitutional Court. The Justices unanimously declared the Act unconstitutional, and annulled it *ex tunc*. The Court did not examine explicitly the constitutionality of the new constitutional amendment, but took this for granted by applying it in the current case. According to the reasoning of the Court, the constitutional amendment makes an exception to the prohibition of retroactive legislation only in cases of incomes paid *contra bono mores*. Despite this, under the challenged Act the 98% tax was applied to severance pay received legally, in accordance with 'good morals'. The 98% tax was aimed not only at incomes that the new government considered going against 'good morals', such as excessive public sector bonuses, but also at the wages and salaries of public sector workers, such as civil servants and public sector employees (doctors, teachers), that were completely legitimate. In the Court's view, payments received according to former statutory regulations could not be seen as incomes *contra bono mores* and could not therefore be taxed retroactively to the beginning of the year 2010, even under the new constitutional amendment. Moreover, although the constitutional amendment paves the way for the legislature to introduce special taxes on certain incomes, 98% seemed to be a confiscatory tax and was therefore contrary even to the newly enacted article of the Constitution.[28]

Shortly after the Court decision, the ruling coalition launched a new version of the constitutional amendment allowing any income from public funds to be

Hungarian Civil Liberties Union to Neelie Kroes, European Digital Agenda Commissioner, <http://tasz.hu/files/tasz/imce/kroes_letter_0223.pdf>, visited 15 May 2011.

[27] The first version of Art. 70/I(2) of the Constitution reads as follows: 'In cases of income received from public funds serving as a contribution to public revenues, special taxes may be introduced by statute retroactively as of the beginning of the given tax year if the income was given contrary to good morals by organisations managing state property or by organisations owned mostly by the state or governed by the state.'

[28] Decision 184/2010. This was the first measure of the governing majority to fail in a legal forum.

taxed retroactively up to five years.[29] Besides the constitutional provision, parliament voted again for extra tax on certain incomes. The new Act states that with effect from 2005, public sector employees must pay extra taxes on severance payments which exceed the HUF 3,5 million threshold.[30]

Limiting the Constitutional Court

The modifications of the constitutional rules on taxation in order to override settled constitutional case-law were not the first steps in limiting the role of the Constitutional Court. After the inaugural sitting of the newly elected parliament, the majority changed the constitutional regulation of the constitutional justices' nomination process. Hitherto, the members of the Constitutional Court had been nominated by a special committee consisting of one member of each parliamentary fraction and elected by a two-thirds majority of the plenum. Under the new rule, the Constitutional Justices can be nominated by a parliamentary committee whose members are appointed from and by the parties according to their share of seats in parliament. Consequently, even in the nomination process there is no longer a need for consensus. The parliamentary majority is able to nominate candidates without working together with the opposition or even with its own coalition partner.[31]

When the Constitutional Court declared the 98% tax unconstitutional, the ruling coalition responded by initiating a constitutional amendment that would have withdrawn issues that are already removed from the circle of potential referendum targets – such as questions on taxes, pensions, international obligations – from the Constitutional Court's jurisdiction. In general, questions falling within the competence of parliament may be the subject of a national referendum. But according to the Constitution, there are some issues on which a national referendum may not be held. The official justification stated that 'if the people do

[29] The new version of Art. 70/I (2) of the Constitution reads as follows: 'In cases of income received from public funds serving as a contribution to public revenues, statute may retroactively as of the beginning of the fifth tax year before the given tax year, introduce a special tax that shall not reach the amount of the income where this income was given by organisations managing state property or by organisations owned mostly by the state or governed by it.'

[30] There is a HUF 2 million cap for managers of state-owned enterprises, companies owned by local governments and senior officials in the public sector, including municipalities. In its Decision 37/2011 the Constitutional Court annulled again the retroactive effect of the 98% tax. The decision was based on the Court's competence to protect human dignity. The Court argued that the retroactive effect of the tax was an affront to this right, since it attempted to tax gains on which tax had already been lawfully paid; therefore the law was annulled. Due to the wording of the law, the decision pertains to payments effected in 2010, too, even if they did not fall in the 'retroactive' category. Two days after delivering the Decision, Parliament approved a new law, under which a 98% tax can be levied on severance pays given after 1 January 2010.

[31] Based upon this constitutional change, the majority nominated and elected two new justices.

not have the right to decide on an issue, the Constitutional Court shall not either.' This amendment would have removed large parts of the Constitutional Court's jurisdiction.

The proposal caused an uproar in academia and the public. Even the Court itself issued a public statement emphasising that the Constitutional Court's control should extend to all legal norms, irrespective of their subject-matter, and that the Constitutional Court should be entitled to annul unconstitutional norms.[32] In consequence, the government withdrew the constitutional amendment in question and initiated another version that would have modified the Constitutional Court's jurisdiction in another way. According to this, the Court would have been able to *annul* acts affecting the budget, the implementation of the budget, taxes, contribution payments and duties only if they violate the right to life and dignity, the right to protect personal data, the freedom of thought, conscience, religion and the rights connected to Hungarian citizenship. In that case the Constitutional Court still would have had the right to *declare* a budget or tax-related act unconstitutional as, for example, being in contradiction with the right to property, but its ruling would have been powerless, as it could not have annulled such an act. As a consequence, acts held unconstitutional by the Constitutional Court would have been part of the Hungarian legal system.

In order to avoid this unwanted consequence, ultimately, the competencies of the Constitutional Court have been restricted so that the Court cannot even *review* the constitutionality of certain financial measures. This means that the Court may examine the constitutionality of acts related to the state budget, central taxes, stamp duties and contribution's, custom duties and central requirements related to local taxes only if the petition refers exclusively to the right to life and dignity, the protection of personal data, the freedom of thought, conscience and religion or the rights connected to Hungarian citizenship. But the Constitutional Court may not assess these acts for example with regard to the principles of non-discrimination, rule of law, proportionality of burden-sharing, and the prevalence of the right to property.

The selection of rights for which there can be constitutional review raises the following questions: Why just these rights and not others? Why for example the right to life and the protection of personal data but not the non-discrimination clause and property rights? In order to understand the motivation behind the selection, there is little point in searching for principled reasons. Hungarian case-law reflects that the Constitutional Court has annulled tax and other financial measures by referring to those rights and principles which are missing from the list. Property rights, acquired rights and the so-called reliance interest in maintain-

[32] The public statement is available on <www.mkab.hu/index.php?id=press_release_on_the_modificiation_of_the_constitutional_court_s_fields_of_competence>, visited 15 May 2011.

ing the social benefits were the references of the annulments. The Constitutional Court from the very beginning of its operation has been active in reviewing financial measures. In 1995 the Court issued a series of decisions which blocked the immediate implementation of cuts in the system of child support, sick pay, maternity leave, and other social programs by invalidating several parts of the Economic Stabilisation Act, the government's IMF-required austerity programme.[33] Since then, the Court has reviewed several tax measures. It annulled the regulation on the expected corporate tax base[34] and decided that 'quasi taxation' of family allowance was against the Constitution.[35] Recently the Court found the property tax unconstitutional.[36] These cases were the symptoms of a theoretical separation of power dilemma. If the Constitutional Court, not having political responsibility, frequently makes a policy choice better left to the governing majority, democratic decision-making is confounded. The government officials gave a definite answer to this problem when they made it clear that they saw no choice but to limit the power of the Constitutional Court. Otherwise the recent 'crisis taxes' imposed on banks, energy companies, foreign retail and telecommunication firms might be deemed unconstitutional. Hungary faced a growing budget deficit and was on the verge of a severe economic crisis. To solve this, parliament chose to introduce the series of unconventional, 'windfall taxes' and budget policies instead of structural, social and economical reforms.

Excluding the possibility of a constitutional review regarding financial measures means there will be no consequences for violating the Constitution in those areas. The selection of 'protected rights' could bring the Hungarian legal system into conflict with the rights protected by the European Convention on Human Rights and cases that could have been settled at a national level might end in condemnations of Hungary by the European Court of Human Rights. Therefore, as the Venice Commission clearly pointed out, restricting the Constitutional Court's competence in such a way that it would review certain state acts only with regard to a limited part of the Constitution runs counter to the aim of enhancing the protection of fundamental rights in Hungary.[37]

[33] *See*, e.g., Decisions 43-45/1995. The decisions of the Constitutional Court are available on <www.mkab.hu>. The Court held that the government's failure to maintain at least a nominal level of social support violates fundamental rights. In addition, the speed with which these programmes were modified violated the principle of legal certainty. *See* the analysis of K.L. Scheppele, 'A Realpolitik Defense of Social Rights', 82 *Texas Law Review* 1921 (2004). *See also* the strong criticism of A. Sajó, 'How the Rule of Law Killed Hungarian Welfare Reform?', 5 *East European Constitutional Review* 1 (1996), p. 31.

[34] Decision 8/2007.

[35] Decision 127/2009.

[36] Decision 8/2010.

[37] Opinion 614/2011 on three legal questions arising in the process of drafting the new Constitution of Hungary (Venice, 25-26 March 2011), p. 10. *See* more on this the next paragraph of this article.

Towards a new constitution: The Basic Law

A closer look at the constitutional developments reveals that the above constitutional changes to some extent were only first steps in a greater development. Most of the above-mentioned changes (e.g., concerning the media, retroactive taxation) in fact only served a temporary goal. In the long run they will not be part of the constitution.

Very soon after the 2010 elections, the new prime minister announced that he would provide a brand new Constitution for the nation. As the first step, the two-thirds parliamentary majority adopted a 'proclamation on statement of national co-operation.'[38] Later a governmental ordinance was published in Hungary's official gazette which made it compulsory for the proclamation to be prominently displayed in governmental buildings and strongly recommended the same in independent public institutions. The proclamation declares:

> [A]fter 46 years of occupation, and 20 confused years of transition, Hungary has regained the right and power of self-determination, […] In spring 2010, the Hungarian nation gathered its strength once again, and brought about a successful revolution in the polling booth. Parliament declares that it recognises and will respect this constitutional revolution. […] Parliament declares that in April's election a new social contract was born. […] The pillars of our common future will be work, home, family, health and order.[39]

Donning the mantle of revolution, the ruling coalition started to work on a new Constitution. It argued that the period of post-communist transformation should draw to a close, and for this reason Hungary needed a new Constitution. The prime minister personally established a council and named its members to elaborate a draft. In addition, a special parliamentary ad-hoc committee has started to develop the regulatory frameworks of the new Constitution. Although at the outset all the parliamentary parties were represented in this committee, the opposition quit immediately after the Constitutional Court's competence was seen to be curbed. Within a couple of months, the remaining committee had completed its preparatory task and published its regulatory plans.[40] Subsequently, parliament discussed this regulatory framework and decided that the document was no longer seen as determining the direction of framing the Constitution, but served as a support-material for the deputies' constitution-making work.[41] The

[38] 1/2010. (VI. 16.) *OGY politikai nyilatkozata* [Proclamation of the Parliament].

[39] 1140/2010. (VII. 2.) *Korm. Határozat* [Governmental Resolution].

[40] *Magyarország Alkotmányának Szabályozási Elvei* [Regulatory Frameworks of the Constitution of Hungary], <www.parlament.hu/biz/aeb/resz/munkaanyag.htm>, visited 15 May 2011.

[41] 9/2011. (III. 9.) *OGY határozat* [Parliamentary Resolution].

ruling coalition set up a three-member panel of politicians (instead of the parliamentary committee) to draft the text of the new Constitution.

Meanwhile, the deputy prime-minister requested the Venice Commission to prepare a legal opinion on three particular issues arising in the constitution-making process: (1) the incorporation of the EU's Charter of Fundamental Rights in the planned Constitution; (2) the significance of preliminary constitutional review; and (3) the abolition of *actio popularis* and the extension of direct individual complaint. In the absence of a draft of the new Constitution, the Commission limited itself to general comments on the three given issues, however, expressing doubts about the process of adoption of the new Constitution: the limited public debate, the lack of transparency of the process, and the tight schedule established for its adoption.[42]

To lend the constitution-writing process legitimacy, a National Consultation Body was set up with the aim of sending a questionnaire to every citizen of Hungary. The questionnaire was composed of twelve issues including the relation between fundamental rights and obligations; the restriction of the public debt; the role of the family, public order, labour and the health; the need for extra votes for mothers as a proxy for their children; the ban on levying taxes on the expenses related to child rearing; the protection of future generations; the conditions of public procurements; the togetherness of Hungarians across frontiers; the protection of natural diversity and national treasures; the protection of land and water; the need to write the possibility for a life imprisonment sentence into the Constitution, and the obligation to testify before a parliamentary commission if a person is summoned. According to unaudited data, approximately 900,000 citizens have filled in and sent back the questionnaires. The answers were in the middle of being processed when the draft new Constitution was submitted to parliament.

On March 14, 2011 the draft text of the new Basic Law was released.[43] The parliamentary agenda ensured five days for the plenary debate about the concept and four days about the details. That meant nine days from start to finish. The Basic Law was promulgated on April 25 (Easter Monday). The date was chosen to identify the Basic Law with the first anniversary of the election victory. It is to enter into force on January 1, 2012.

The Basic Law has been criticized for lack of transparency and insufficient dialogue with the opposition, as well as for failing to institute substantial profes-

[42] Opinion 614/2011 on three legal questions arising in the process of drafting the new Constitution of Hungary, *supra* n. 37. On 25 March 2011 the Monitoring Committee of the Parliamentary Assembly of the Council of Europe decided to ask the Venice Commission for an opinion on the new Constitution.

[43] The name Basic Law implies that the document is only a part of the historical constitution, not the Constitution of the Republic of Hungary.

sional or open public debate and for the hastiness of the constitution-making procedure. However, not only the manner in which the Basic Law was framed, but also several aspects of its content are disputed widely.[44] These are discussed below.

The main features of the Basic Law

Ideology

The Basic Law, and especially its preamble called the 'National Creed', changes the characteristics of Hungarian constitutionalism. The 1989 Constitution established a secular state based upon a pluralist society. The leading principles were liberty, equality and democracy. The New Basic Law does not follow the idea of a secular state. It has its foundations in historical and religious considerations. The National Creed places special emphasis on values such as family, nation, loyalty, faith and love and is dominated by religious references. It was written in the spirit of not just Christianity but specifically the Catholic faith. This is what the reference to Saint Stephen and the Holy Crown (of St. Stephen) implies: 'We are proud that one thousand years ago, our King Saint Stephen established the Hungarian State on solid foundations and led our country to become part of Christian Europe' and 'we acknowledge the nation-preserving role of the Christian faith.' The National Creed explicitly mentions 'the Holy Crown, which embodies the constitutional continuity of the state and the unity of the nation' and the historical constitution.[45] In this way the Basic Law not only remembers the historical role of Christianity in founding the Hungarian State, but expresses that the Hungarian constitutionalism present is based upon traditional Christian faith.

The historical references of the National Creed negate the post-World War II, communist and post-communist eras (including 1989) by declaring that the country lost its autonomy on March 19, 1944 and this autonomy 'was restored on May 2, 1990 with the opening session of the first freely elected national as-

[44] *See*, e.g., the joint opinion of the Eötvös Károly Policy Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee. <tasz.hu/en/freedom-of-speech/third-wave-new-constitution-hungary>, visited 15 May 2011. After the submission of this article leading Hungarian academics wrote an amicus brief to the Venice Commission <http://lapa.princeton.edu/hosted-docs/amicus-to-vc-english-final.pdf> and on 20 June 2011 the Venice Commission released its Opinion 618/2011 on the New Constitution of Hungary, <www.venice.coe.int/docs/2011/CDL-AD%282011%29016-e.pdf>.

[45] More on the 'one thousand years constitution' and the doctrine of the Holy Crown, *see* J.M. Bak and A. Gara-Bak, 'The Ideology of a "Millennial Constitution" in Hungary', 15:3 *East European Quarterly* (1981) p. 307.

sembly.' In addition, the Basic Law invalidates the first Hungarian written Constitution of 1949, which directly affects the validity of the 1989 Constitution.[46]

It is important to emphasise that the National Creed is not only a solemn declaration; it has normative effect: 'The provisions of the Basic Law shall be interpreted in accordance with its objectives, the National Creed contained therein and the achievements of our historical constitution.'[47] Consequently, the basic principles of the relationship between state and church, as well as fundamental rights, could be interpreted in accordance with the Christian faith and the historical constitution. Moreover, some Basic Law provisions reflect this ideological shift. First of all, fundamental rights go hand-in-hand with obligations and responsibilities: the Charter of Rights entitled Freedom and Responsibilities. This chapter contains a provision under which only a man and a woman can marry,[48] there is a provision seeking to 'protect the foetal life from the moment of conception'[49] and allowing life imprisonment without parole.[50] In addition, provisions against discrimination of sexual orientation are absent.

'We the nation'

Connected with these developments, the Basic Law rewrites the category of 'We the people'. The 1989 Constitution identified the 'people' with those citizens who reside in the country and who are the subjects of the legal rights and obligations. Contrary to this, the Basic Law expresses that there is 'one single Hungarian nation that belongs together' and it consists of all ethnic Hungarians regardless of their habitual residence and the centre of their interests. Although the Basic Law does not define the notion of the nation, it follows from its provisions that 'the members of the Hungarian nation' include Hungarians living abroad, even without an effective link to the State. The document therefore enshrines an ethnic vision of Hungary.

As a logical consequence of this view, the Basic Law ensures Hungarian citizenship for those not residing in the country and paves the way for granting the right to vote for those who do not have strong factual ties to the Hungarian State.[51] People who are not the subjects of legal rights and responsibilities can decide on Hungarian political and legal issues. They will have the possibility to take part in

[46] Interestingly, the Basic Law was adopted according to formal procedural requirement set by the 1949 Constitution and it retains this rule (in this sense it shows legal continuity) contrary what the preamble expresses.

[47] Art. R(3) of the Basic Law.

[48] Art. L of the Basic Law.

[49] Art. II of the Basic Law.

[50] Art. IV of the Basic Law.

[51] Art. XXIII of the Basic Law.

the parliamentary elections, even though they live outside of Hungary, therefore they do not fall under the scope of the acts adopted by parliament, nor take the consequences of the political decisions.

The classical expression 'We the people' refers to the notion of popular sovereignty, which among others means government of the people, by the people, for the people. The Basic Law hinders the majority of the voters in reshaping the policy of the government in a very unique manner. Unlike the 1989 Constitution, under the Basic Law not only acts concerning fundamental rights and constitutional organs, but those on normal policy issues shall be regulated by a two-thirds majority.[52] Much legislation, notably on national assets, tax issues, pension system and family policy requires qualified majority.[53] Moreover, the prior approval of the Budgetary Council is needed for the adoption of the Act of parliament on the central budget. If it is not given, and the budget is consequently not adopted by March 31 of the respective year, the head of state may dissolve parliament.[54] This solution splits the authority to adopt the budget between parliament and the non-elected Budgetary Council, the members of which are delegated by state leaders. In this way the Basic Law makes political alteration difficult and puts a heavy burden on future parliamentary majorities by constraining future governments in realizing their own political programmes.

Constitutional checks

The Basic Law seems to affect the independence and the competences of the Constitutional Court. First, the previously changed nomination rules concerning the members of the Constitutional Court are maintained; the ruling coalition therefore has absolute freedom to nominate judges. As regards the election procedure, the president of the Court will no longer be elected by his fellow justices for three years but by parliamentary majority for twelve years, like every other member of the Court. The Basic Law enlarges the Court's membership from eleven to fifteen, adding up to four new justices to the bench.[55] The changes do not anticipate that the ruling majority can decide on the composition of the Court, which may endanger the legal precondition of independence, that is, the Court's plurality.

[52] It is not clear either whether these so-called 'cardinal acts' could be subject of constitutional review or whether they would constitute a criterion for such a review.

[53] Art. 38, Art. 40 of the Basic Law.

[54] Art. 3(3), Art. 44 of the Basic Law.

[55] In addition to that, one more justice can be elected to fill a vacant seat on the Court. On 24 June 2011 there was an amendment to the Constitution in force concerning the Constitutional Court. According to the amending laws the Constitutional Court consists of fifteen members as of 1 September 2011. Parliament shall elect the judges necessary to complete the fifteen-member body by 31 July 2011 and the president of the Constitutional Court. The mandate of the newly elected president shall start on 1 September 2011, the present president's mandate expires on the same day.

Second, while the Basic Law retains most of the competences of the Court, changes are considerable. Although the Venice Commission in its previously mentioned opinion advised that 'in order to avoid over-politicizing the mechanism of constitutional review, the right to initiate the *ex ante* review should be limited to the President of the country',[56] a French-type *a priori* constitutional control was introduced. The government, the speaker of the parliament and those submitting the Bill can initiate the preventive control of the act not yet signed by the speaker. The parliamentary majority then decides whether it will ask the Court for an advisory opinion. In absence of such a preventive review, the head of state has the right to initiate the proceeding of the Court to review the constitutionality of the not yet promulgated Act.

The *ex post* review of the unconstitutionality of legislation is restricted. Previously every person was entitled to take action for constitutional review against a normative act after its enactment. This mechanism made it possible to eliminate from the legal order unconstitutional laws, such as the death penalty sanction, the criminal offence of defaming the honour of an authority or an official person, and the arbitrary regulation of partners in a domestic partnership which excluded those of the same sex from among persons living in a common household and in an emotional and economic union. The Basic Law abolishes the *actio popularis*. Only the government, the ombudsperson and one quarter of the members of parliament can turn to the Constitutional Court, which means that according to the existing seats in parliament all the opposition parties (from left to far right) would have to agree on a petition.

The Basic Law shifts the focus of the constitutional review from the law itself to its application. The legal consequence of holding a piece of legislation unconstitutional can be annulment, but it can be other legal consequences as well, to be set out in a cardinal act.[57] The cardinal act would prescribe for instance that the Court shall not annul the challenged norm but can only declare its unconstitutionality.

The Basic Law introduces a German-type constitutional complaint, making it possible to complain not only against a normative Act but also against the violation of a fundamental right through an individual act (administrative act, decision of the judiciary) based on a normative act. It should be welcome that the mechanism of individual complaint related to a concrete case includes the possibility to challenge the unconstitutional application of a legal norm.

It is worth mentioning, though, that the limitation of the Court's competencies connected with financial matters has not been repealed. According to the new wording, as long as state debts exceeds half of the Gross Domestic Product, the

[56] Opinion 614/2011 of the Venice Commission, *supra* n. 37, at p. 14.
[57] Art. 24(3) of the Basic Law.

Court may review and annul budgetary, tax, pension, custom legislation exclusively due to violation of the right to life, dignity, the protection of personal data, freedom of conscience and the rights related to Hungarian citizenship. Therefore competence concerning every kind of *ex post* constitutional review is restricted in such a way that the Court has the power to overview and annul budgetary and tax measures only in special circumstances and with regard to a limited part of the Constitution.[58]

At the time of the political transition it was undisputed that Hungary should have an independent and respected constitutional court separate from the ordinary court system. More than twenty years of constitutional adjudication have proven – despite sometimes inconsistent interpretation of the law – that the Constitutional Court serves as the most important institution maintaining the constitutional balance of powers in the Hungarian legal system. Changing the Constitution in a way that reduces the number of legal rules that may be reviewed by the Court is a serious step back.

Of course, not only the Constitutional Court but also the international human rights tribunals, first and foremost the European Court of Human Rights, may serve as an important check on the ruling majority and as one of the main protectors of human rights. But the national instruments of constitutional checks and balances cannot be substituted by international instruments. For instance, although recently the European Court of Human Rights has handed down several important decisions against the Hungarian State, it had only minor impact on the national legislative process and the application of the law.[59]

Conclusion

In conclusion, the recent legal actions fundamentally alter the Hungarian secular constitutional system and weaken the institutional checks and balances. As this article has outlined, the Constitution agreed upon by the parties in 1989 was based on the principles of liberal democracy and the rule of law. However, as we have shown, the provisions for changing the Constitution do not require a sufficiently high approval level to prevent abuses of democracy. The article has also shown how the ruling coalition has used its two-thirds parliamentary majority to adopt several constitutional changes concerning the representative organs, the judiciary, the media and the Constitutional Court. Finally, we introduced the process and the

[58] *See* Art. 6, Art. 24 and Art. 37(4) of the Basic Law.

[59] *See*, e.g., ECtHR 14 April 2009, Case No. 27274/05, *Társaság a Szabadságjogokért* v. *Hungary* on access to public data, ECtHR 26 May 2009, Case No. 31475/05, *Kenedi* v. *Hungary* on researching the State Security Archive, ECtHR 20 May 2010, Case No. 38832/06, *Alajos Kiss* v. *Hungary* the right to vote of persons under guardianship.

main ideas of the newly adopted constitution, the Basic Law. As we remarked, there was no political consensus about the necessity of constitution-making nor about the content of a new constitution, and the opposition parties did not take part in the preparation process.

The Basic Law changes the characteristics of the Hungarian constitutionalism leaving the idea of a secular state, by rewriting the category of 'We the people' and by reducing the constitutional checks. The future of the Hungarian constitutionalism, however, depends not only on the original text of the Basic Law but also on the actions of the Hungarian people and the commitment of European societies.