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Court-Packing Accomplished – The Changing Jurisprudence of a Subordinate Constitutional Court

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Abstract

The worldwide decline in democracy poses a major challenge to the independence of constitutional courts, which are the guardians of constitutionalism and the rule of law. The international literature on constitutional adjudication is therefore understandably concerned with how judicial independence is undermined in different types of authoritarian regimes. However, less attention has been paid to how the practice of these courts evolves when they are directly or indirectly controlled by the government. This article examines how the practices of the Hungarian Constitutional Court changed following the successful court-packing by its government, which exercised its constitution-making parliamentary majority to subvert the Court, which was once one of the most activist constitutional courts in Europe. In this case, political influence was fully exercised; this study shows how the Constitutional Court, in order to maintain a semblance of independence, uses several different methods to uphold the government's will. The Hungarian example may be instructive as it illustrates where the dismantling of judicial independence can lead.

Keywords: Constitutional Jurisprudence; Court Packing; Hungarian Constitutional Court; Judicial Independence.

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I. INTRODUCTION

If the decline of democracy is indeed a worldwide trend, it is reasonable to assume that this process affects the role of constitutional courts in those countries where these bodies are the guardians of democracy and the rule of law. Experiences in Europe seem to confirm this presumption, showing that in countries such as Hungary and Poland, where nationalist populist governments have long been in power, constitutional courts, which used to play a significant role, have been effectively packed with justices sympathetic to the ruling governments. This is particularly noticeable in Hungary, where the Constitutional Court, one of Europe's most powerful and firmly activist such bodies in the 1990s, has become a servant to the will of the majority government. It is now widely accepted that the Court has been packed by the ruling parties that came to power in 2010 and has since served the interests of the government under a populist, semi-authoritarian regime.[1]

Not surprisingly, this situation has attracted wide scholarly interest, and a number of studies have investigated this process and its political-legal circumstances.[2] However, this work generally aims to describe only how the Hungarian Constitutional Court was neutralised and how its composition was changed to be advantageous to the government. Much less attention has been

[1] See, for example, Matthijs Bogaards, "De-Democratization in Hungary: Diffusely Defective Democracy," *Democratization* 25, no. 8 (2018): 8, https://doi.org/10.1080/13510347.2018.1485015; Pablo Castillo-Ortiz, "The Illiberal Abuse of Constitutional Courts in Europe," *European Constitutional Law Review* 15, no. 1 (2019): 61-3, https://doi.org/10.1017/S1574019619000026; Bojan Bugarič, "Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism," *International Journal of Constitutional Law* 17, no. 2 (2019): 605, https://doi.org/10.1093/icon/moz032; Theo Fournier, "From Rhetoric to Action, A Constitutional Analysis of Populism," *German Law Journal* 20, no. 3 (2019): 370-72, https://doi.org/10.1017/glj.2019.22; Gábor Halmai, "Populism, Authoritarianism, and Constitutionalism," *German Law Journal* 20, no. 3 (2019): 307, http://dx.doi.org/10.1017/glj.2019.23; Fruzsina Gárdos-Orosz, "Challenges to Constitutional Adjudication in Hungary After 2010," in *The Role of Courts in Contemporary Legal Orders*, ed. M. Belov (The Hague: 2019), 324, 336-39; Nóra Chronowski, Ágnes Kovács, Zsolt Körtvélyesi and Gábor Mészáros, "The Hungarian Constitutional Court and the Abusive Constitutionalism" (Working Papers (published) presented for Research Center for Social Sciences of the Hungarian Academy of Sciences, 2022).

[2] On the Hungarian Constitutional Court, see, for example, Attila Vincze, "Wrestling with Constitutionalism: The Supermajority and the Hungarian Constitutional Court," *Vienna Journal on International Constitutional Law* 8, no. 1 (2014), https://doi.org/10.1515/icl-2014-0105; Imre Vörös, "The Constitutional Landscape After the Fourth and Fifth Amendments of Hungarian Fundamental Law," *Acta Juridica Hungarica, Hungarian Journal of Legal Studies* 55, no. 1 (2014): 1-20, https://doi.org/10.1556/ajur.55.2014.1.1; Zoltán Szente, "The Political Orientation of the Members of the Constitutional Court Between 2010 and 2014," *Constitutional Studies* 1, no. 1 (2016): 123-49, https://constitutionalstudies.wisc.edu.

paid to the real impact of these changes on the functioning of the Constitutional Court. Even in these circumstances, several scenarios are conceivable. Given that the erosion of the Court's independence was a gradual process spanning several years, the Court could, in principle, have resisted the political demands of the majority government and the newly elected members. It could have insisted on the formal guarantees of its independence and asserted the role defined for the Court by the Constitution. Nevertheless, complete passivity is also conceivable in such circumstances – a scenario in which the Constitutional Court neither attempts to obstruct the will of the government nor actively supports it. Finally, it is also possible for the Court to become a submissive instrument of the government, showing loyalty and serving its political interests.

As far as the role of the Hungarian Constitutional Court and its place in contemporary constitutional polity is concerned, its behaviour and general strategy are grey zones that are less well researched. Therefore, this article will examine the changes in the jurisprudence of the government-friendly packed Constitutional Court, paying special attention to those cases and controversies which are politically meaningful.

This article will also demonstrate how the Constitutional Court has become a servant of government interests and how this has occurred. Considering the circumstances, where the populists have usually held a two-thirds majority in parliament since 2010[3] – a constitution-making majority – an authoritarian transition has taken place. This was perhaps not surprising, although it was not inevitable.

For the purpose of this study, Part 1 explains the situation of the Constitutional Court and constitutional review in the run-up to and after the turning point of 2010. Part 2 presents an analytical framework for assessing the political bias of the Court. The third part analyses the practice of the Court after 2010, exploring whether and how the Court's jurisprudence has evolved as a result of these changes. In doing so, these subsections describe the behavioural strategies developed and used by the Court to support the government.

[3] Between 2015 and 2018, the government did not reach a two-thirds majority.

II. DISCUSSION

2.1. Constitutional Court and Constitutional Review Before and After 2010

The Constitutional Court was one of the newly established institutions after the fall of communism in the course of the democratic transition of Hungary in 1989-90. The Court was established in the mould of the German *Bundesverfassungsgericht,*[4] establishing a European model of a centralized system of constitutional review with constitutional guarantees of independence and wide-ranging powers. From 1990 onwards, the Constitutional Court established a rich and extensive jurisprudence; it dealt with virtually almost all the classical issues typical in Western countries with much longer constitutional traditions. Undoubtedly, the Court achieved a preeminent position in the Hungarian constitutional system and played a major role in elaborating and standardizing living constitutional law. In the first nine years of its operation, the Court pursued strongly 'activist' practices in terms of its jurisdiction and interpretations.

In 2010, the former right-wing opposition party Fidesz and its satellite party, the Christian Democratic People's Party, won a two-thirds, constitution-making parliamentary majority. The new government, exploiting its overwhelming majority in Parliament, sought to neutralise all institutions whose role was to counterbalance the executive power. It was, therefore, essential for the government to put the once powerful Constitutional Court under political dominion. In doing so, one of the first steps was transforming the process of nominating Constitutional Court justices, practically introducing the partisan selection of members of the Court. Beyond this, the number of constitutional justices was increased from 11 to 15. In this way, pro-government judges became the majority, and since 2016, all the members of the Constitutional Court have been nominated by the governing parties.

Nevertheless, the government was distrustful of the Constitutional Court from the very beginning. The ruling coalition parties felt that this body could

[4] Gábor Halmai, "The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court," in *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, ed. Wojciech Sadurski (Kluwer Law International, 2002), 195-208.

be an effective obstacle to their ambition of comprehensively overhauling the legal system. Therefore, using its parliamentary supermajority, the government severely curbed the Court's powers, depriving it of the power of review of public finance legislation. In parallel, the scope of responsibility of the Constitutional Court has also been significantly reduced by the abolishing of the so-called *actio popularis* – that is, every citizen's right, even if lacking any personal interest, to turn to the Court to ask for a review of the constitutionality of a statutory act. As a result, only the government, at least one-quarter of the members of parliament, the President of the *Kúria* (the supreme court), the Prosecutor General, and the Commissioner for Fundamental Rights may initiate ex-post reviews of legislation at the Constitutional Court. However, in 2011, following the German model, the possibility of lodging individual constitutional complaints was extended to cases where the final judgment itself was unconstitutional because it violated a constitutional right. As a result, the outcome of many of the Court's decisions has changed significantly: more than 95 percent of its decisions have been made with regard to constitutional complaints. At the same time, abstract constitutional reviews have been significantly reduced. This means that the Court's constitutional role has substantially shifted from being a check on the legislative branch to controlling the judiciary.

It is also worth noting that a constitutional amendment in 2013 repealed all previous rulings of the Constitutional Court made prior to the entry into force of the Fundamental Law on 1 January 2012. Consequently, the justice-packing of the Constitutional Court has been fully achieved. The institutional safeguards of the judicial independence of the Court have not proved to be sufficient to protect the integrity of the body. But this is only one side of the coin. Although it can plausibly be assumed that a packed court will not be an obstacle to the legal aspirations of the executive power, this is only a presumption. In Hungary, however, quite a lot of time has passed since the Court was subverted, so it is worth examining whether the jurisprudence of the Constitutional Court has really changed to when it was ostensibly independent of the government, and if so, how.

2.2. How to Assess the Political Bias of a Constitutional Court? An Analytical Framework

If the legislative or the executive branch of a country not only infringes on the independence of the constitutional court but also undermines it, i.e., it successfully packs the court with government-friendly justices, it is reasonable to assume that the constitutional body will make politically motivated decisions. This is likely to lead, at least in part, to new rulings and outcomes whereby the constitutional court will rule in accordance with the vested interests of the ruling parties. However, this cannot be taken for granted: although the purpose of packing the court in one's favour is clearly undertaken to neutralise the constitutional court as a counterweight to governmental power, the intended change in jurisprudence, at least in principle, is not self-evident. Even justices who are appointed to the bench as a result of their political loyalty can become genuinely autonomous, and, in accordance with their oath, undertake their constitutional functions impartially and independently of the interests of the government. Therefore, it is not enough to only identify breaches of judicial independence, but it is also worth examining whether the case law of the court has been altered as a result. Of course, it is reasonable to hypothesize that the jurisprudence of the constitutional court in such a case is tailored to the political interests that were able to influence its composition or functioning, but this is still a rational assumption that requires proof.

Although there are no generally accepted standards for assessing political bias, this does not mean that it cannot be tested. The effectiveness of subverting a court, i.e., the political bias of a captured constitutional court, can be affirmed if its practice meets the following criteria:

1. a well-defined political force (e.g., governing parties) or institution(s) (such as the bodies that nominate constitutional justices) is able to unilaterally and significantly influence the composition of the court;
2. the integrity of the court is then substantially skewed in a way that cannot be justified by legal or professional arguments; and

3. the new case law, at least in politically significant cases, favours the political force or institution that influenced the composition of the court.

It is hard to imagine these conditions being met simultaneously or repeatedly in respect to an independent constitutional court. It is not necessary for the verification of the latter criteria that such bias should extend to all cases or be without exception. Even a genuinely partisan constitutional court needs to maintain a semblance of independence. Additionally, a change in jurisprudence must be definite; i.e., it must support the interests of the same political force in the most important cases.

The recent changes in the jurisprudence of the Hungarian Constitutional Court seem to be an ideal case study for such an examination because, as explained above, the latter has for some time been a fully biased court whose composition and powers have been unilaterally determined by the parties in government since 2010.

Nevertheless, some disclaimers must be made. First, the ruling party factions, taking advantage of their parliamentary supermajority, unilaterally adopted a new constitution in April 2011, which came into force on January 1, 2012, under the name of "Fundamental Law". It should be noted, however, that the new constitution largely left the previous system of power-sharing unchanged, and the constitutional regulations of basic rights did not fundamentally differ from the previous constitutional text. At the same time, when there was a shift from the previous case law of the Constitutional Court, it must be taken into account whether it was a natural change resulting from a change in the text of the constitution. Second, the Fundamental Law also contains some rules for constitutional interpretation, which, in principle, bind the Constitutional Court so that jurisprudential changes may be a consequence. Here, too, however, it is worth drawing attention to the fact that these interpretative canons are not arranged in a hierarchy, and there is no way to enforce them, as a result of which the Constitutional Court has, in principle, considerable wiggle room regarding the methods it applies to interpretation. Past practice has confirmed

this; although the Court refers relatively often (albeit irregularly) to specific methods of interpretation prescribed in the Fundamental Law, the actual effects can hardly be demonstrated in case law.

2.3. Changing Constitutional Jurisprudence After 2010

A pro-government bias has been on the rise in the rulings of the Hungarian Constitutional Court since 2010, in parallel with the government majority's ability to gradually occupy the Court and to impose its own conceptions through constitutional amendments, the adoption of a new constitution and the regulation of the Constitutional Court Act. Following the 2010 election, when some original members of the Court remained who had been elected on the basis of political consensus, the Court still showed some resistance to overtly unconstitutional governmental aspirations, annulling several laws passed by the new parliamentary majority. Thus, in 2011, it invalidated a law that imposed a 98 percent tax on the extremely large severance payments of public officials with retroactive effect, arguing that a legally acquired severance payment cannot be regarded as unfairly acquired income, as the contested law did, and that retroactive taxation was contrary to the rule of law.[5] In 2012, it repealed the laws that empowered public authorities to sanction the use of public spaces for living accommodation for the homeless,[6] as well as the so-called "Transitional Provisions", which contained a number of rules completing and detailing the new constitutional text.[7] In the same year, the Court struck down specific provisions of the Church Law of 2013, which deprived more than 300 religious denominations, with the exception of 32 churches, of their church status and made this granting conditional on parliamentary approval.[8] It is to be noted, however, that most of these unconstitutional provisions were incorporated into the text of the constitution by Parliament, with the votes of the governing party MPs, in the Fourth Amendment to Fundamental Law in 2013.

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5 Constitutional Court, Decision no. 184/2010. (X. 28). The European Court of Human Rights declared the application of the law to be contrary to the European Convention on Human Rights. See Decision of ECtHR of 14 May 2013 on the case of N.K.M. v. Hungary, no. 66529/11. See Decision of ECtHR of 25 June 2013 on the case of Gáll v. Hungary, no. 49570/11. See Judgment of ECtHR of 2 July 2013 on the case of R. Sz. v. Hungary, no. 41838/11.

6 Constitutional Court, Decision no. 38/2012. (XI. 14).

7 Constitutional Court, Decision no. 45/2012. (XII. 29).

8 Constitutional Court, Decision no. 6/2013. (III. 1).

Notwithstanding this, the Court's initial resistance to the new parliamentary majority should not be overestimated. Thus, for example, the Constitutional Court tacitly acknowledged the exemption of public finance legislation from constitutional review. However, the Fundamental Law allows for review in certain narrowly defined cases (e.g., in the case of the violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and rights related to Hungarian citizenship). Despite these exceptions, the Court has never made use of these possibilities. Therefore, constitutional review has not been applied in blatant cases such as the simple withdrawal by the State, without compensation, of savings held in private pension funds in 2011[9] or the openly discriminatory and arbitrarily imposed so-called extra-profit taxes introduced in 2010 and 2022.

However, as time progressed and the number of members loyal to the government increased within the Constitutional Court, leading to the Court finally being composed exclusively of candidates from the governing parties, the institution developed several judicial strategies and interpretative patterns which, depending on the nature of the given case, and also by trying to preserve the appearance of the Court's independence, were suitable for supporting the government's political interests.

2.3.1. Silence of the Court

On several occasions, the Constitutional Court has avoided uncomfortable decisions by simply not taking them.[10] In this respect, these cases can be considered uncomfortable ones, which are clearly unconstitutional, but an annulment decision would have caused some inconvenience to the government.

The most prominent example of this was the so-called CEU Case. The Central European University (CEU) was founded and sponsored by George Soros, who was portrayed by government-sponsored campaigns as a public

[9] Zoltán Szente, "Breaking and Making Constitutional Rules: The Constitutional Effects of the Financial Crisis in Hungary," in *Constitutions in the Global Financial Crisis: A Comparative Analysis*, ed. C. Xenophon (Farnham, 2013), 255-56.

[10] András Jakab, "Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary," *The American Journal of Comparative Law* 68, no. 4 (2020): 775-76, https://doi.org/10.1093/ajcl/avaa031.

enemy. The university was persecuted by legislation that defined impractical and unprecedented conditions for foreign-funded universities with the apparent aim of making it impossible for the CEU to operate in Hungary. The law was clearly unconstitutional for several reasons.[11] The Constitutional Court first postponed issuing a decision on the grounds that it had set up an ad hoc working group to study the case, although this working method had not been used before. Later, it suspended the proceeding, saying that it had to wait for the outcome of a parallel case before the European Court of Justice, although it had never done so in other cases (because the CJEU does not base its decisions on Hungarian Fundamental Law). The Court thus postponed the issue for years until the CEU moved to Vienna. The CJEU subsequently ruled that the law was contrary to European Union law,[12] and the legislation was amended accordingly. Finally, in 2021, the Constitutional Court terminated its proceedings for a formal technicality, treating the case as moot, saying that the petitioners who had lodged the initial constitutional complaint in this case had not extended their petition to cover the new law.[13]

2.3.2. Changing the Dominant Interpretation of Constitutional Provisions

The changes in constitutional jurisprudence could easily be justified by the fact that a new constitution had entered into force, but in many cases, the constitutional text had not changed substantially, and the Constitutional Court itself stated that in such cases, earlier case law could be taken into account even if the Fourth Amendment repealed all decisions taken before the entry into force of the Fundamental Law.[14]

However, the Court has always been ready to reinterpret even substantive constitutional concepts if the government had a serious interest in doing so. For example, it changed the previous practice concerning the relationship between domestic law and European Union law, declaring that if the EU institutions

[11] See details in Nóra Chronowski and Attila Vincze, "The Hungarian Constitutional Court and the Central European University Case: Justice Delayed is Justice Denied," *European Constitutional Law Review* 17, no. 4 (2021): 688-706, https://doi.org/10.1017/S1574019621000407.

[12] Decision of CJEU of 6 October 2020 on the case of Commission v. Hungary, C-66/18.

[13] Constitutional Court, Decision no. 3318/2021. (VII. 23); Constitutional Court, Decision no. 3319/2021. (VII. 23).

[14] Constitutional Court, Decision no. 22/2012. (V. 11); Constitutional Court, Decision no. 13/2013. (VI. 17).

implement the shared competences in an 'incomplete' way, national authorities may unilaterally take measures necessary to ensure the effective exercise of them.[15] In the same judgment, the Court spectacularly reinterpreted the right to human dignity. Despite its doctrinal foundation being deeply entrenched in Hungarian constitutional law since the early 1990s as a "mother right" (even of unenumerated rights) and a source of individual autonomy, the inherently individualistic nature of the right to human dignity was essentially reversed. It was reinterpreted on a community basis and linked to the recently invented constitutional identity. According to the otherwise embarrassing argumentation, the personal identity of citizens belongs to their human dignity. But this is threatened if "the traditional social environment, which the individual occupies at birth and is independent of him" changes because of people coming from other cultures and who do not conform to the traditional social identity of the Hungarian population.[16, 17] In fact, the judgment tries to support the government's anti-migrant policy and its stance, conflicting with EU institutions on this issue.

It was also a blatant change in case law when the intimidated Constitutional Court, after having declared unconstitutional and annulling a law that imposed a 98 percent tax on the extreme severance payments (as mentioned earlier) with retroactive effect in 2010,[18] the following year upheld retroactive taxation if it extended only to the beginning of the current tax year.[19]

2.3.3. Defining Constitutional Requirements in Order to Save Contested Laws

Another method the Constitutional Court uses is to legitimize constitutionally questionable governmental will by formulating constitutional requirements for the application or interpretation of contested law rather than annulling manifestly unconstitutional provisions. This was the case, for example, with the law giving

[15] Constitutional Court, Decision no. 32/2021. (XII. 20).
[16] Ibid.
[17] For further examples of changing constitutional court practice, see Nóra Chronowski, "The Post-2010 'Democratic Rule of Law' Practice of the Hungarian Constitutional Court Under a Rule by Law Governance," *Acta Juridica Hungarica, Hungarian Journal of Legal Studies* 61, no. 2 (2020): 36-158, http://dx.doi.org/10.1556/2052.2020.00267.
[18] Constitutional Court, Decision no. 184/2010. (X. 29)
[19] Constitutional Court, Decision no. 37/2011. (V. 10).

the Minister of Justice the power to authorise secret surveillance by anti-terrorist authorities without providing basic guarantees. In this case, the Court considered it sufficient to compensate for the lack of judicial review by stating that the Minister is required to state the reasons for issuing such authorisations.[20]

In addition, when the constitutionality of some measures of the 2011 judicial reform was challenged before the Constitutional Court, among other things, on the grounds that the new legislation allowed for the manipulation of judicial appointments, the Court merely found that it is a constitutional requirement that the invalidation of the otherwise valid applications for judicial posts must be reasoned. The background to this was that the presidents of the *Kúria* and the National Office for the Judiciary (the central organ of judicial administration) had repeatedly declared applications invalid if their preferred candidates had not won them.[21] However, this did not prevent similar cases from occurring later.

This is precisely the weakness of the practice of establishing a constitutional requirement. It is not, in fact, an appropriate method of eliminating an unconstitutional situation, and such kind of disputes as *res iudicata* (claim preclusion) cases are not subsequently returned to the Constitutional Court.

2.3.4. Annulling Unconstitutional Statutes Without Effective Judicial Protection

For the pro-government Constitutional Court, reviewing laws that are clearly unconstitutional is more challenging. Over the past decade or more, despite the overwhelming parliamentary majority of the governing parties and their legislative omnipotence, a number of laws have been passed whose constitutionality has been strongly contested. In such cases, it used different methods, depending on the political significance of the subject of the law.

For example, when a law is clearly unconstitutional, the Court tries to save it by striking down some less important provisions but is careful to preserve the essential content. In this way, while it appears to act against such legislation, it does not eliminate the unconstitutionality. Another method is for the Court

[20] Constitutional Court, Decision no. 32/2013. (IX. 22).
[21] Constitutional Court, Decision no. 13/2013. (VI. 17).

to annul the contested law, but without providing any real legal protection for the damage or harm caused by the unconstitutional law. This is the case, for example, when a law is annulled but no guidance is given by the Constitutional Court on how to remedy the unconstitutional situation it has caused. And if no other body takes action, the unconstitutional effects of the law may linger without the persons concerned having been granted any subsequent legal protection. This happened precisely when Act CLXII on the Legal Status and Remuneration of Judges reduced the mandatory retirement age of judges from 70 to 62, as a result of which, in 2012, 274 judges – almost 10% of all serving judges – had to retire. The change especially affected court leaders since most of the latter were older judges.[22]

The Constitutional Court in 2012 invalidated several provisions of the Act, holding that such age limits can only be determined by a cardinal act.[23] However, the Court's ruling failed to provide any real remedy to the judges illegally removed since it did not contain any provisions on how to reinstate or compensate them. Then, neither the National Office for the Judiciary nor the President of the Republic, which are responsible for the appointment of judges, saw it necessary to take any action to reinstate the removed judges.

Another way to save the government's unconstitutional policy is for the Constitutional Court to invalidate the relevant law only with *ex nunc* (i.e., "from now") effect rather than *ex tunc* (retroactively to the date of the lawmaking). While this may, in some cases, be a legitimate method precisely for reasons of legal certainty (for example, when it is no longer possible to change a large number of closed legal relations afterwards), in other cases, it has the fundamental flaw of not providing legal protection against mass violations of rights caused by unconstitutional legislation.

The pro-government tactics of the Constitutional Court can be clearly seen in the case of the 2011 social security reform, which transformed former disability pensions into significantly reduced allowances regardless of the medical

[22] Zoltán Szente, *Constitutional Law in Hungary* (Alphen aan den Rijn: Wolters Kluwer, 2021), 210.
[23] Constitutional Court, Decision no. 33/2012. (VII. 17).

condition of the persons concerned. In a decision in 2013, the Court upheld the legislation,[24] but later, the European Court of Human Rights ruled that under this law, had violated the European Convention on Human Rights in several cases.[25] In 2018, the Constitutional Court declared that the 2011 legislation had violated the European Convention on Human Rights,[26] but did not annul the relevant part of the law, but merely found an unconstitutional omission of Parliament and called on the National Assembly to bring the legislation in sync with Hungary's international obligations, and, using a familiar technique, established a constitutional requirement. However, by then, the reclassification of disability pensions had long been completed, and the Court's decision did not provide any effective remedy to the more than 100,000 citizens[27] who had suffered rights violations.

2.3.5. Legitimizing the Government's Aspirations

Although the governing parties have always unscrupulously exploited their parliamentary supermajority to adjust legislation and, eventually, the whole legal system to their own interests (as evidenced by, for example, the eleven amendments to the Fundamental Law that entered into force on 1 January 2012), the Constitutional Court has played an auxiliary role in serving governmental interests. This was necessary because the Fidesz-KDNP government, on the one hand, has greatly accelerated the law-making process, resulting in frequent errors, and on the other, has been less sensitive to constitutional standards, which has often led to constitutional controversies. In playing this role, the Court, especially after 2013, has frequently assisted the government in upholding a number of laws whose constitutionality was thoroughly disputed or which were later found to be contrary to EU law. For this purpose, the Court has used several different methods, from changing the previously established constitutional standards to

[24] Constitutional Court, Decision no. 3027/2013. (II. 12).

[25] Decision of ECtHR of 13 December 2016 on the case of Béláné Nagy v. Hungary, no. 53080/13; Decision of ECtHR of 7 March 2017 on the case of Bactzúr v. Hungary, no. 8263/15.

[26] Constitutional Court, Decision no. 21/2018. (XI. 14).

[27] According to the data of the Central Statistical Office, the number of people receiving disability pensions fell by around 180,000 between 2011 and 2016. Központi Statisztikai Hivatal, *Mikrocenzus 2016 - A népesség gazdasági aktivitása* (Budapest: Központi Statisztikai Hivatal, 2017), 4-25, https:/www.ksh.hu/docs/hun/xftp/idoszaki/mikrocenzus2016/mikrocenzus_2016_5.pdf.

resorting to extra-constitutional sources or even departing from the constitutional text when necessary to achieve the desired interpretation.

For example, in the "foreign currency loan case",[28] the Court could only support the government's policy of retroactively amending thousands of private contracts by law by overruling its previous practice in some respects regarding the rule of law, legal certainty and the right to a fair trial.[29] When the government's political interests required it, the Court interfered in market and property relations, regardless of its previous practice concerning the defence of the market economy. Thus, it did not provide protection against market-restrictive measures of the state that transformed or decisively influenced the previous property and market structures. The purpose of these interventions was to build patronage and create a national capitalist class. For instance, re-regulating the retail and wholesale distribution of tobacco products, which first involved withdrawing retail licences by law and then redistributing them in the form of concession contracts, was considered constitutional.[30] The decision significantly narrowed the scope of property protection against direct government intervention in the market compared to previous practice. Although the European Court of Human Rights declared changes of ownership under the law to be in breach of the European Convention on Human Rights, this could provide for effective legal protection only in certain cases[31] and did not affect the constitutionality of state-assisted changes of ownership or the underlying legislation.

The Constitutional Court also directly served the government's political aspirations when it 'discovered' the concept of constitutional identity in a 2016 decision. This followed the government's fierce opposition to the EU's refugee and immigration policy, but due to a momentary lack of a constitution-making

[28] Constitutional Court, Decision no. 34/2014 (XI. 14).

[29] Nóra Chronowski and Fruzsina Gárdos-Orosz, "The Hungarian Constitutional Court and the Financial Crisis," *Acta Juridica Hungarica, Hungarian Journal of Legal Studies* 58, no. 2 (2017): 139-54, https://doi.org/10.1556/2052.2017.58.2.2; Fruzsina Gárdos-Orosz, "Constitutional Justice in Credit Crisis: The Hungarian Case," *Südosteuropa: Journal of Politics and Society* 66, no. 1 (2018): 94, https://doi.org/10.1515/soeu-2018-0006; Fruzsina Gárdos-Orosz and P. Gárdos, "Decision 34/2014 (XI. 14.) – Foreign Currency Loan," in *The Main Lines of the Jurisprudence of the Hungarian Constitutional Court: 30 Case Studies from the 30 Years of the Constitutional Court (1990 to 2020)*, eds. Fruzsina Gárdos-Orosz and K. Zakariás (Baden-Baden, 2022), 393-411.

[30] Constitutional Court, Decision no. 3194/2014. (VII. 15).

[31] See, for example, the Decision of CJEU of 13 January 2015, on the case of Vékony v. Hungary, no. 65681/13.

majority in Parliament, it was unable to pass a constitutional amendment that would have banned the admission of asylum seekers to the country, which the EU had called for on the grounds of the principle of solidarity between member states. This decision, at the petition of the Commissioner of Fundamental Rights, stipulated the Court's own powers to review the validity of EU law in the future to protect Hungary's sovereignty and constitutional identity.[32] This was an innovation, as the notion of constitutional identity had hitherto been completely unknown in Hungarian constitutional law.[33]

In the case of the voting rights of Hungarians living abroad, the Constitutional Court once again openly represented the interests of the government in a case that could have directly influenced, at least in theory, the outcome of the general elections. The constitutional controversy was triggered by the law that allows Hungarians living abroad to vote by post to promote their willingness to participate in parliamentary elections. However, the same possibility was refused for Hungarian citizens who live in Hungary but are abroad on election day. They may only cast their votes in person at Hungary's diplomatic missions abroad, which often makes it very difficult for them to exercise their right to vote. The reason for the clear discrimination was that while Hungarians living abroad are predominantly Fidesz voters, citizens working abroad are more likely to be opposition sympathisers. However, the partisan Court did not declare the apparent discrimination unconstitutional, saying that the protection afforded to the right to vote as a fundamental right does not extend to how the fundamental right is exercised.[34]

Nevertheless, apart from the highly controversial or even clearly erroneous decisions and a reduction in the level of constitutional protection, the strongest proof of the lack of independence or political bias of the Constitutional Court is that it has failed to prevent the systematic erosion and dismantling of the rule of law since 2010. In fact, it has not been an obstacle to the authoritarian

[32] Constitutional Court, Decision no. 22/2016. (XII. 5).
[33] The concept of constitutional identity was introduced only by the Seventh Amendment to the Fundamental Law in May 2018.
[34] Constitutional Court, Decision no. 3086/2016. (IV. 26).

transition, but its promoter, and thus bears a heavy responsibility for destroying democracy because it was precisely the defence of constitutional democracy that was to have been its basic function and *raison d'être*. This institution not only fails to fulfil its constitutional function but also works adversely: it is not a defender of constitutionality but a legitimizer of the political aspirations of the government, even against Fundamental Law, if necessary.

III. CONCLUSION

In Hungary, nationalist-populist parties won such a supermajority in the parliamentary elections in 2010 that allowed them to overhaul the entire constitutional system and eliminate institutional checks and balances that could limit the will of the executive. This led to the Constitutional Court becoming a completely biased court: all its members were chosen by the ruling parties. The practice of the Court subsequently evolved in such a way that constitutional interpretation became a means of legitimising the will of the government majority.

The Constitutional Court has used various methods to serve the interests of the government. This is because the Constitutional Court has always been concerned with maintaining the appearance of independence and, therefore, has taken care in some cases to balance the political expectations of the government with professional requirements. For this purpose, the Court has developed various techniques, which, however, share the common characteristic of ensuring and legitimising the government's will in all politically important cases.

In sum, the fact that its composition is determined exclusively by the governing parties, which have a constitution-making majority in Parliament, has fundamentally transformed the character of the Court: from being the supreme guardian of the Constitution, the very active counterweight of the legislative and executive powers, to becoming a submissive servant and legitimiser of the government's will.

The post-2010 developments in the Hungarian Constitutional Court highlight the importance of institutional guarantees of independence. At the same time, they also show that these safeguards themselves are insufficient to defend the

rule of law and constitutional democracy; a supportive constitutional culture must be built up to serve as a barrier against an authoritarian transition and the erosion of these guarantees. However, once the courts are subordinated to political will, these guarantees no longer have any particular value; they become empty institutions and procedures designed to mask the subordination of the courts.

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