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SEPARATION OF POWERS AND THE POLITICS OF CONSTITUTIONAL REFORMS, INCLUDING JUDICIAL INDEPENDENCE

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INTRODUCTION

Constitutional courts in Central and Eastern Europe played an important role in the democratic transitions of the early 1990s. As a logical political response to erstwhile communist regimes, these institutions were designed to be strong safeguards of individual rights against oppressive state power. The broad competences of, and the public trust in, constitutional courts rendered them significant players in the political arena. After two decades of stable functioning, constitutional courts and ordinary courts in both Hungary and Poland are facing serious political and legal challenges from the countries' new political majority. Do these developments amount to a paradigm shift in the concept of constitutionalism, or are they signs of democratic decay? What is the responsibility of constitutional courts in the current situation and what is the proper attitude the courts should assume? This chapter examines these questions with special attention to the constitutional developments in Hungary.

DEMOCRATIC TRANSITION AND THE ROLE OF THE CONSTITUTIONAL COURT

Following the end of World War II and after the Soviet occupation of the country, in August 1949, with the Hungarian Working People's Party in complete control of Hungary, a constitution based on the 'Stalinist' 1936 Soviet Constitution was adopted. The constitution confirmed the party's leading role. Hungary became a 'people's republic', manifested in a "state of the workers and working peasants". A Presidential Council elected by parliament was to operate as head of state, yet the true power rested with the Working People's Party, its leading role enshrined in the document. The parliament met for some ten days each year, adopting only a few acts. Most rules took the form of presidential and ministerial decrees. Real control was not even exercised through officially published laws, but mainly by internal orders, prescripts or even informal *ad hoc* instructions. A variety of fundamental rights was guaranteed, but only to the working people (or in line with their interests). Moreover, no means existed to enforce these mandatory rights. While the constitution declared citizens' right to personal liberty and security, this did not prevent the execution of hundreds and the imprisonment of tens of thousands on political grounds without a fair trial. The document was essentially what James Madison called a 'parchment barrier'.

The most important feature of Hungarian democratic transition in 1989-90 was that it took place in the form of negotiations and compromises, sustaining the governability of the country and the operability of the state system. The Constitutional Court was one of the first 'products' of the democratic transition; it started functioning on January 1, 1990, before the first free election took place. The Constitution, amended in 1989, granted the Constitutional Court the competence to review and annul any act or other legal rule it found to be unconstitutional. The Constitution declared that everyone had the right to initiate proceedings before the Constitutional Court in the cases specified by law. The eleven justices of the Court were to be elected (for a period of nine years) by a majority of two-thirds of all members of parliament, and Act XXXII of 1989 on the Constitutional Court [ACC], regulating the competences and organization of the court, was to be adopted by a majority of two-thirds of the votes of the members of parliament present [Article 32/A of the Constitution, 8(3) ACC]. The ACC stipulated that the *ex post* review of legal provisions may be initiated by anyone (any person or organization, even in the absence of a concrete judicial procedure or decision, on the basis that the applicant in question considered the contested provision to be contrary to an article of the Constitution (this was the so-called *actio popularis*) [see Article 1 b), 21(2) of ACC]. The Court was also afforded the competence – among others – to declare an unconstitutional legislative omission on the part of the legislator (in case it failed to legislate on a subject matter, resulting in the violation of the Constitution), and call upon the legislator to perform this task within a time-limit prescribed by the Court. Again, this procedure could be initiated by anyone or even *ex officio* by the Court itself [Article 1 e), 21(4), 21(7), 49 of ACC]. The president of the Court was elected from among and by the justices themselves. Based on the bitter experience of the previous communist regime, the institutional independence and the strong competences of the Constitutional Court were designed to make the Constitution a practically enforceable fundamental law and to serve as an effective safeguard for the protection of individual basic rights against potentially oppressive

state power. Furthermore, guarantees were also laid down in the Constitution, such as the principle of rule of law and judicial independence.

Although the principle of separation of powers was not explicitly mentioned in the Hungarian Constitution, the Constitutional Court has consistently enforced it in its decisions as an integral part of the principle of the rule of law – and as one of the most important organizing and functional principles of the Hungarian governmental system. The Court accepted the traditional tripartite division of the branches of government. When defining its own legal status in the early period of its functioning, the Constitutional Court ruled that when exercising powers directed to specific parts of the Constitution, it will take into consideration the principle of division of powers.¹ Accordingly, it consistently rejected the idea of assuming the responsibility of the government or the legislature in the framework of preliminary norm control.²

In its 1993 landmark decision on the appointment of judicial leaders, the Constitutional Court defined the characteristics of the judicial branch within the system of powers. “When interpreting the principle of the separation of powers (as a part of the principle of the rule of law) the Constitutional Court based its decision on the way the principle of separation of powers is used in today’s parliamentary systems, and on the way it is formulated in the Constitution. The ‘separation’ of the legislative and executive branches today essentially means the division of powers between the parliament and the executive branch, although these are politically intertwined. The parties forming the governing majority of the parliament are entitled to form a government, and the parliament votes on the bills the government introduces. [...] Under these circumstances the main character of the judicial branch, as opposed to the other two ‘political’ branches, is that it is constant and neutral [notwithstanding the fact that the judiciary enforces the bills and decrees that are often created to enact political programs]. This neutrality is expressed by article 50 paragraph 3 of the Constitution which declares that the judges are independent and only subordinated to the law. [...] Therefore the judicial branch is independent from the political motivations of the other two branches, and in this sense it is constant and continuous. Hereinafter the Constitutional Court interprets the neutrality of the judicial branch as described above”.³

The Constitutional Court has not only joined the political process as a new organization protecting the Constitution, but it has become a key player of democratic transition by shaping its own competences with great autonomy. The Court began laying the groundwork for the rule of law in 1992 decisions by setting forth with the democratic transition, a ‘rule of law revolution’ has taken place. In these decisions, the Constitutional Court interpreted many requirements stemming from the principle of the rule of law and the concept of constitutionality. Among others: state power must be exercised according to the law (that is enacted and officially published in due order); the

1 31/1990 (XII. 18.) ABH Constitutional Court Decision

2 Constitutional review of Acts adopted by the Parliament but not yet signed by the President of the Republic and not yet published in the Official Gazette.

3 38/1993 (XII. 18.) ABH Constitutional Court Decision; see also: István Stumpf, The Hungarian Constitutional Court’s Place in the Constitutional System of Hungary, Civic Review, Vol. 13, Special Issue, 2017.

fact that Hungary is a constitutional state only becomes a reality when the Constitution (including human and civil rights and the principle of the rule of law) is truly and unconditionally enforced, therefore, the entire legal system must be brought into harmony with the Constitution; not only the regulations and the operation of the state organs must comply strictly with the Constitution, but the Constitution's values and its 'conceptual culture' must permeate society as a whole. Although the Court was divided when it came to the interpretation of its own exact role, the majority believed that, in the given historic situation, the Constitutional Court was compelled to play an activist role.

The inherited grave economic difficulties, the differences in party politics, the inherent tension within the governing coalition, the inexperience and unpreparedness of the new political elite, and mutual distrust quickly eroded the people's trust in the multi-party system. In this vacuum of politics and trust, the Constitutional Court became a key player with its chosen role as a rule of law revolutionary and its activist attitude. Some of the most important decisions of the Court (abolition of the death penalty, decisions on compensation and transitional justice acts, the demarcation between competences of the president and the executive) often generated strong political reactions. According to critics, the Court only pursued the acknowledgement and legitimacy of the West in the early nineties, failing to demonstrate any understanding for everyday reality from its 'ivory tower'. According to Csaba Varga, one of the most radical critics of the Constitutional Court: "the Court encroached upon the whole political process, and in many cases it determined the course of the process, forcing the entire society, the political class, the parties and among them the legislative, executive, and judicial branches that represent society under their arbitrary philosophies, views, and the obligations and restraints that go with them; thereby restraining the chances of a will to change the system – a will to substantially overcome the past and enter into a new phase of nation building" (Varga, 2006:540). As described by another early critic of the Court, Béla Pokol, activism overly transfers the weight of the most important decisions affecting the society from the parliament to the Constitutional Court, thereby eroding the fundamentals of the parliamentary system based on elections and the parliament.⁴ As opposed to the legal nihilism of the one party state, they fetishized the law, putting the rule of law in the center of the new catechism.⁵

POLITICAL CONSTITUTIONALISM

There is no single definition of judicial activism in academic sources. "Most of the time it reflects disapproval: the Court does not adhere to the text of the Constitution, ignores precedent, uses an unacceptable method of interpretation, invades the territory of legislation, or just makes a deci-

⁴ Pokol 1992:154

⁵ Stumpf op. cit.

sion that the critic disapproves on political grounds. Those opposing constitutional jurisdiction is of the view that the whole institution of constitutional revision of parliament's acts is activism". (Tóth 2009: 17)

The debates gained momentum in recent years through papers of academics supporting political and legal constitutionalism.⁶ Activities of constitutional courts and supreme courts moved to the center of attention in Hungary and abroad. Political criticism of legal constitutionalism claims that there has been a 'coup d'état' in the courtroom and that certain decisions (with political character) of the courts restricted the latitude of the executive and legislative branch in tackling crises. These voices demand a return from 'governance by judges' to governance by elected and accountable leaders.

Supporters of political constitutionalism believe that legislators holding a democratic mandate are much more capable and have a stronger legitimacy to solve problems emerging as a result of 'reasonable disagreements' within society. Judges of the constitutional courts on the other hand ignore the majority opinion of society, and regularly represent minority opinions that are not shared by the wider political community. Political constitutionalists believe that the substance of the constitution is not about the boundaries that constitutional provisions set against the legislator through the human rights catalogue, but about democratic decision-making, which leaves the final decision in the hands of elected politicians. As for the separation of powers, checks and balances are not constituted by veto actors (e.g. the constitutional court), but by the parties competing in free elections.⁷

These debates then gain an additional dimension in case of conflicts within federal states between the states and federal governments (courts),⁸ likewise within the European Union between member states and institutions of the Union.⁹

6 The legitimacy and effectiveness of constitutional jurisdiction is basically questioned by University College London professor Richard Bellamy in his recently published book: *Political Constitutionalism. A Republican Defense of the Constitutionality of Democracy*. Cambridge University Press, 2007.

7 In a recent publication, Béla Pokol added an international dimension to the arguments of political constitutionalists. "[...] the decisions of the ECHR of Strasbourg, the regulations of the global constitutional-advisory organizations, and the constitutionalized "general" international law would take control over the constitution itself, its amendments, and the constitution making power. Thus, the circle would close, and the most important characteristic of a state, the power to adopt a constitution, would cease to exist." In the end of his article, Béla Pokol envisions the threat of a forming global constitutional oligarchy. *Jogelméleti Szemle*, December 2013.

8 "A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy." SCOTUS Justice Antonin Scalia dissenting in *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); decided June 26, 2015.

9 "European politics characterized by the extreme dominance of human rights logic and the downright limitation of the majority principle is in sharp contrast with the principle of total sovereignty of a one-party parliamentary majority" (Pócsa, 2012).

CONSTITUTIONAL DEVELOPMENTS IN HUNGARY AND POLAND AFTER 2010

Hungary

The 2010 elections in Hungary brought a landslide victory for the Fidesz-KDNP coalition. The governing forces, which held a constitutional majority, began preparing a new constitution. The adoption of the Fundamental Law of Hungary shows that the national-conservative majority seized the “constitutional moment” and carried out the largest scale reform since the system change, as regards the contents and the structure of the Hungarian legal system, in many points motivated by criticisms of the previous constitutional system. The Fundamental Law, adopted exactly one year after the 2010 elections, was intended to symbolize – even in its name – a break with the previous system which was based on the pacts of the old elite. A new political generation introduced its demand for a position that is not bound by the compromises of the previous era, that doesn’t accept ‘nullifying’ the historical constitution, that considers the importance of the family in maintaining the community, and that does not give up the idea of uniting the nation without moving borders. The preamble of the Fundamental Law, the National Avowal, on the one hand, symbolizes breaking with the former, politically neutral constitutional identity; on the other hand, it is intended to play an important role in the interpretation of the constitution. According to Article R paragraph 3 of the Fundamental Law: “The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution”. If we sum up the criticisms of the previous constitution, it is apparent that the Fundamental Law incorporates the most important provisions that the old constitution lacked according to critics. Community-centered regulation is built in next to the human rights catalogue borrowed from the Fundamental Rights Charter; citizens’ obligations also appear beside citizens’ rights; among the legal interpretation requirements of the courts, common sense and public good appears, as well as the presumption of legal acts serving moral and economical purposes (Article 28). Strengthening the role of the state, limits on selling national wealth also became part of the Fundamental Law.¹⁰

However, the Fundamental Law shows an interesting dichotomy: it suggests a return to the historical roots of Hungarian statehood in its rhetoric, but is connected to the democratic constitution of 1989 in its normative contents. Moreover, it has built in elements of the previous jurisprudence of the Constitutional Court. Unlike the old constitution, the Fundamental Law explicitly declares the principle of the separation of powers: “the functioning of the Hungarian State shall be based on the principle of division of powers” (Article C paragraph 1). The Fundamental Law has maintained the republican form of government, and did not make radical changes to the governmental structure. However, some shifts have taken place in the relationship between constitutional institutions. The Budget Committee appeared as a new actor in the system of checks and balances, which may signifi-

¹⁰ Stumpf op. cit.

cantly limit the actions of parliament, because no central budget may be adopted without the consent of the committee. Although the president did not acquire the right to dismiss the parliament (in times of serious constitutional or political crisis, due to lack of confidence), as the preparatory committee first suggested, he is still capable of shortening the term of the parliament if the latter does not adopt the central budget for the year by March 31. The previous constitution also included the privilege of the president to dismiss parliament if it fails to elect a prime minister within 40 days of the first candidate being introduced. Besides the president's power of political veto (sending a bill back to parliament for reconsideration), the president's power of constitutional veto (sending the bill to the Constitutional Court in case the President considers it to be unconstitutional) was broadened. However, the Fundamental Law also sets forth that if the president does not exercise his veto rights, he must sign the bill into law within 5 days. As for the government, the Fundamental Law strengthens the position of the prime minister (chancellor-type government). The institution of the so-called 'constructive no-confidence vote' was upheld. As a new constitutional regulation, besides the government, the prime minister can now assign duties to the ministers. The inclusion of autonomous regulatory organs (with the power to issue decrees) in the Fundamental Law also adds a new player to the system of separation of powers.

The sharpest conflicts within the constitutional system following the 2010 election arose between the Constitutional Court and the two-thirds majority parliament, which appeared as both the legislative branch and the constitution enacting/amending power. This conflict has led to important changes regarding the position of the Constitutional Court within the system of powers. The amendments made to the ACC and the Constitution in 2010 and 2011 included some major modifications that affected the Court's role as a check to the parliamentary majority. The composition of the *ad hoc* parliamentary committee responsible for the nomination of the judges to the Constitutional Court was re-adjusted: the original rule stipulated one member per parliamentary group; while the new rule enabled membership proportions to follow the relative sizes of the parliamentary groups, which enabled the governing majority to nominate judges without the necessity to compromise with opposition parties [Article 6 of ACC]. A constitutional amendment limited the powers of the Court in the field of financial legislation: acts on state budget and taxes could only be reviewed by the Court in connection with a few specific basic rights.¹¹ The election of the president of the Court was put into the hands of the two-thirds majority of the parliament; and the number of judges was raised from 11 to 15. These changes remained in force after the adoption and entry into force of the Fundamental Law and the new Act Nr. CLI/2011 on the Constitutional Court. In addition, the new regulations abolished the 'actio popularis' based ex post norm control, formerly one of most powerful competences of the court.

However, reforming the position of the Constitutional Court in itself did not immediately put a definite end to the conflicts. Tensions increased in late 2012, early 2013, when the Court partially

¹¹ The Constitutional Court shall have powers to review the Acts on the central budget, on the implementation of the budget, on central taxes, duties and contributions, on customs duties, and on the central conditions for local taxes, if the breach of the Constitution alleged in the petition is exclusively limited to the violation of the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or is in connection with the rights related to Hungarian citizenship. [Constitution 32/A(2)]

nullified the Transitional Provisions of the Fundamental Law,¹² and then, initiated by the preliminary norm control request made by the Hungarian president, ruled several provisions of the Act on the Electoral Process to be unconstitutional.¹³ These two decisions were related, because the need for voters to register themselves before elections had also been written into the Transitional Provisions by the second amendment of the Fundamental Law,¹⁴ as a result, partial nullification provided the opportunity to carry out a constitutional review of the registration. The parliamentary majority retreated in the case of voter registration but took up the hatchet in the case concerning the constitutional amendments. The Fourth Amendment of the Fundamental Law, adopted by the Parliament in March 2013, not only incorporated most of the Transitional provisions in the Fundamental Law, but also included several other provisions that had been previously deemed unconstitutional by the Court. The amendment rearranged the system of the separation of powers by attempting to reign in the scope of authority of the Constitutional Court. Indirectly, the amendment prevented the Court from reviewing the text of all other amendments, except in a case of a breach of procedural regulations. The amendment also stipulated that the Court is bound by the content of the application, and that the Court may only broaden the scope of inquiry in case there is a close connection; the Fourth Amendment further annulled all previous decisions of the Court, but it did not rule out the possibility for the Court to arrive at the same conclusion. The amendment set forth a close deadline for the constitutional review based on judicial initiatives, and established the partial publicness of the proceedings of the Constitutional Court. Understandably, the Fourth Amendment stirred up heated political debates; many perceived it as the end of the principle of the separation of powers, and sanctions against Hungary were demanded from the Council of Europe for the breach of European Union law.¹⁵

Poland

The 1997 Constitution of Poland is part of a tradition based on the rule of law, democracy, fundamental freedoms and rights, a well-functioning system of judicial protection, and a constitutional court with a strong record of human rights protection, which are all built on the ideas of limited government, separation of powers, the centrality of the individual and respect for the self-imposed rules.¹⁶

The Polish general elections on October 26, 2015 completely reshaped the political scene, bringing the right-wing conservative party Prawo i Sprawiedliwość (PiS, 'Law and Justice' in English) back to power. Unlike the FIDESZ party in the Hungarian Parliament, which won the constitution-making

12 45/2012 (XII. 29.) ABH Constitutional Court Decision

13 1/2013 (I. 7.) ABH Constitutional Court Decision

14 See details in Stumpf op. cit.

15 Stumpf op. cit.

16 Tomasz Tadeusz Konieczny, Constitutional Fidelity and the Polish Constitution, Int'l J. Const. L. Blog, Aug. 11, 2017, at: <http://www.icconnectblog.com/2017/08/constitutional-fidelity-and-the-polish-constitution>

majority in 2010, PiS in Poland does not hold a supermajority capable of changing the 1997 Polish Constitution. Over the course of two years the ruling majority of PiS, using forced legislative procedures, adopted legal reforms that – according to certain scholars – *de facto* changed the system of government.¹⁷

Following the elections, the president refused to honor the appointment of justices made by the late parliament and to swear them in, while the parliamentary majority of PiS appointed its own judges, by arrogating to itself the power of constitutional review and retroactively extinguishing the term of office of the then actual president and vice president of the Court.¹⁸

In its recent ‘three acts,’ the Polish government took steps toward assuming greater control over the Supreme Court and the National Council of the Judiciary, as well as the ordinary courts. The first bill addressing the system of ordinary courts grants the Minister of Justice the exclusive power to appoint presidents and vice-presidents to all courts and introduces vague criteria for their removal. Furthermore, it contains temporary provisions in line with which the Minister of Justice may terminate the office of any or all current presidents without the need to state reasons for six months after the law comes into force. Moreover, the bill mandates a so-called ‘review’ of all executive functions within the courts, permitting newly appointed presidents to remove the presidents of various court departments and sections. The second act is the bill on the Supreme Court. It introduces the compulsory retirement of all current judges of the Court, except judges indicated by the Minister of Justice and approved by the President of the Republic to remain in office. While offering the judges a possibility to serve in other courts, it *de facto* removes them from office. Furthermore, the proposed law allows for the *ex lege* termination of service of almost 400 staff members of the Supreme Court, leading to their collective dismissal. The bill on the Supreme Court also establishes a new special disciplinary chamber in charge of disciplinary proceedings for all legal professions. The third act is the bill amending the Act on the National Council of the Judiciary. It terminates the office of all current members of the Council and introduces a new appointment procedure for the representation of judges in the Council.¹⁹

17 Anna Sledzinska-Simon, The Polish Revolution: 2015-2017, Int’l J. Const. L. Blog, July 25, 2017, at: <http://www.iconnectblog.com/2017/07/the-polish-revolution-2015-2017>

18 Tomasz Tadeusz Konieczny, Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense, Int’l J. Const. L. Blog, Dec. 6, 2015, at: <http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense>

19 Sledzinska-Simon, op. cit.

PARADIGM SHIFT OR DEMOCRATIC DECAY?

Many constitutional law experts have drawn a parallel between the current constitutional situation in Poland and Hungary. Grzegorz Ekiert highlights that both countries' governments argue that they are subverting the existing democratic institutions to make democracy stronger and more responsive to popular will; they claim that they are merely fulfilling their promises to the majority of voters who elected them. Even assuming that this is not a cynical ploy – he states – the fundamental question for Europe today is where democracy ends and an authoritarian system begins. He notes that the governments in these parliamentary democracies can easily bypass constitutional constraints with the approval of the constitutional court, should they be able to take control of it. According to Ekiert, recent constitutional developments in both countries have followed pretty much the standard playbook of authoritarian politics, the so-called 'salami tactics', a term employed decades ago by Hungarian Communist leaders to describe the imposition of communist dictatorship, involving a gradual takeover of the state, subversion of democratic institutions and the destruction of political opposition.²⁰

Tom Gerald Daly notes that more often than not one cannot easily tell, whether reforms are aimed at a 'bad faith' hollowing out of democratic rule, or a bona fide rebalancing or transformation of the system. The existence of democratic decay is often contested. For instance, while many Polish scholars agree with the decay diagnosis, others are of the view that the state is simply moving toward a traditional republican mode of government. Therefore Daly suggests that any any diagnostics must be as clear, rigorous and objective as possible, while still leaving room for a broader assessment based on the overall picture. His thumbnail definition of 'democratic decay' is the "incremental degradation of the structures and substance of liberal constitutional democracy". The term 'liberal constitutional democracy' is employed to refer to democracy's conceptual content—especially its minimum content.²¹ Under "degradation of the structures and substance," Daly means linked open attacks or other deterioration of democratic structures (e.g. unbalanced focus on one element to the detriment of the others), and a cheapening and devaluing of the 'substance' of democratic governance (especially public faith in, and commitment to democratic rule).²²

Without trying to provide a fully comprehensive analysis and judgment on the question whether Hungary or Poland has fallen into democratic decay, in this chapter I build on the analytical premises of the Federalist Papers, especially no. 78, and assess these legal developments from the perspective of the rule of law, separation of governmental powers and judicial independence.

20 Grzegorz Ekiert, *How To Deal With Poland And Hungary*. Grzegorz Ekiert, Social Europe Edition, No. 13 August 2017

21 Daly does not elaborate further on what would be "democracy's conceptual content".

22 Tom Gerald Daly, *When is a Limp More than a Limp? Diagnosing Democratic Decay*, Int'l J. Const. L. Blog, July 12, 2017, at: <http://www.icconnectblog.com/2017/07/when-is-a-limp-more-than-a-limp-diagnosing-democratic-decay/>

CONSTITUTIONALISM

“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. *No legislative act, therefore, contrary to the Constitution, can be valid.* To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid” – writes Alexander Hamilton in *The Federalist*,²³ summarizing the main idea of a constitutional government, that is a limited government under a higher law. But, as James Madison adds, “a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands”,²⁴ so a functional constitution has to contain institutionalized mechanisms to control power. Where the judiciary (or a specific court) is empowered by the constitution to enforce the same by way of legal procedure, we unambiguously have a legal constitutionalist state.

Discussing the present situation in Poland, some experts argue that the country has moved from legal constitutionalism to political constitutionalism. However, as Daly points out, this argument conveniently ignores the fact that the express text of the Polish Constitution clearly sets out a legal constitutionalist system.²⁵ Article 79 gives the right to everyone whose constitutional freedoms or rights had been infringed, “to appeal to the Constitutional Tribunal for its judgment on the conformity with the Constitution of a statute or another normative act”. Ekiert draws attention to the unique character of democratic institutions, which “require loyalty and the cooperation of all political actors to function. They require minimal trust between those in power and the opposition. They require solidarity and public-minded behavior on the basis of commonly shared norms. The moment someone decides to break this fragile balance the system stops working”.²⁶ In effect, where the parliamentary majority starts to openly disregard the norms embedded in the constitution (especially, if the constitutional court, by some means, is rendered inoperable), concentrating powers, this may be regarded as a sign not of a paradigm shift from legal to political constitutionalism, but of a transition from constitutional democracy based on the rule of law to authoritarianism based on a state of lawlessness.

In Hungary, preceding the 2010 elections, the strategic decision-makers of Fidesz have long prepared to do away with the system based on the compromises, bargained by the economic, political

23 Alexander Hamilton, *Federalist No. 78*, in *The Federalist*, at: <https://www.congress.gov/resources/display/content/The+Federalist+Papers>

24 James Madison, *No. 48*, in *The Federalist*, at: <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-48>

25 Daly, *op. cit.*

26 Ekiert, *op. cit.*

and philosophical elite of the status quo, and to break “clotted post-communist structures”.²⁷ Analysts close to the national-conservative side kept emphasizing, that “what was carried out on the behalf of the rule of law by limiting multi-party parliamentarism, is considered as choking democracy today.”²⁸ They believed that serious distortions have taken place within the constitutional system, drastically limiting the governments’ scope of action. Therefore, the excessive separation of powers is to be cut back in order to restore the supremacy of the elected parliament, and to build a strong government with an effective public administration. Several proposals were formulated to change the constitutional system and to introduce innovations to the new constitution.²⁹ Finally, although the 2010 “revolution in the voting booths” has brought about the most radical transformation of the Hungarian legal system since the 1989-90 system change, the New Fundamental Law continues to be firmly anchored in popular sovereignty, democracy and the rule of law. The constitution-maker has rearranged the balance of powers, but the Fundamental Law has remained a written constitution with a fundamental rights catalogue and a Constitutional Court to enforce it (with the exception of financial acts, which are only narrowly subject to judicial review). For these reasons we may conclude that there has not been a major paradigm shift to political constitutionalism in the constitutional system of Hungary, although in respect to the restriction of the review of financial acts, the system may be considered a hybrid of the two models and therefore a ‘mixed constitution’.

According to Hamilton, one of the fundamental principles of a republican government is the right of the people to alter or abolish an established constitution, whenever they find it inconsistent with their happiness. Nevertheless, he warns that “it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions”. Hamilton expressly points to a requirement that follows from the principle of the rule of law in constitutional republics: “[u]ntil the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act”.³⁰

The aforesaid principles seem to have guided the decision of the Hungarian Constitutional Court on the Transitional Provisions,³¹ and later, the adoption of the Fourth Amendment of the Fundamental Law. When elaborating on the decision on the Transitional Provisions, the Court faced grave questions, such as whether the Constitutional Court has the competence to review the Fundamental Law itself and its amendments, and the question of which legal source category the Transitional Provisions of the Fundamental Law fits into. The consistent practice of the Court was that it may

27 Tellér, 1999:51

28 Pokol 2011:451

29 Pokol, 2011: 453–455

30 Federalist No. 78

31 Decision 45/2012 of the Constitutional Court. English version available: http://www.mkab.hu/letoltesek/en_0045_2012.pdf (accessed 24 August 2017).

not review the constitution itself, but the Court did not rule out the possibility of a review when the legal validity of an amendment is contested. The Court based the possibility of reviewing the Transitional Provisions on the assumption that the leader of the country, by enacting the Fundamental Law, intended to create a stable and permanent constitutional system, defining the Fundamental Law's scope, contents and structure. The Court ruled that based on the criteria deriving from the Fundamental Law, there may only be one single source of law at the apex of the hierarchy of legal sources. The Transitional Provisions disrupted this coherence, the Court argued, since the provisions seek to elevate multiple provisions to the apex, which are not built into the text of the Fundamental Law. It can cause uncertainty within the constitution in case the contents and scope of the Fundamental Law are obscure or may be defined in multiple ways. "The Fundamental Law obliges the Constitutional Court to examine all those laws that break up the internal unity of the legal system, in particular those that violate the unity of the Fundamental Law itself. Accordingly, it is not only a right but a constitutional obligation of the Constitutional Court to protect the Fundamental Law against any legislative decision that would hinder or deteriorate the enforcement of the provisions contained in the Fundamental Law, rendering its legal contents, scope and position in the hierarchy of the sources of law, as well as the contents of the Fundamental Law as a constitutional standard, uncertain. The Constitutional Court's obligation to protect the Fundamental Law includes the duty to protect it as a single and unified document." The Constitutional Court made it clear that, without that degree of incorporation, no new provision shall become part of the Fundamental Law. The majority reasoning of the decision left open the possibility to review the content of constitutional amendments regarding their compliance with "the substantial requirements, guarantees and values of democratic states under the rule of law" and check whether the amendments "create insoluble contradictions between the regulations of the Fundamental Law".³²

By elaborating and applying the concept of the 'incorporation order' in its decision, the Constitutional Court made it clear that it shall not accept the legislative circumvention of the Fundamental Law, so where the parliament (even with the same parliamentary majority that adopted the Fundamental Law) wishes to enact regulations evidently deviating from the actual content of the Fundamental Law, the Fundamental Law must be formally amended. With the adoption of the Fourth Amendment, the parliament acknowledged this concept, as it formally incorporated most of the Transitional Provisions into the Fundamental Law. On the other hand, by explicitly restricting the Court in its review of constitutional amendments (except from a procedural point of view), and by amending the Fundamental Law to include other legal provisions that the Constitutional Court had formerly judged unconstitutional, the parliament also clarified its position that its two-thirds majority is the main constitutional power and it accepts no limits in exercising this right (thus, if it is of the view that the Court made the 'wrong' decision, it can overrule the Court's decision by introducing the annulled provision into the body of the Fundamental Law).³³

³² Stumpf, op. cit.

³³ As already mentioned, unlike the parliamentary majority in Hungary between 2010-2014, PiS in Poland is not a supermajority capable of changing the Constitution. So there has been no similar direct conflict between the constitution amending power and the Constitutional Tribunal, political tensions have erupted in the constitutional system in a different way.

Others considered the European Union's criticism as an attack on Prime Minister Orbán because of his effort to re-politicize political matters and to enforce the mandate given to him by the majority of voters. This line of argument claimed that Orbán's effort contradicted the main trend of European Union politics of turning political matters into legal problems, meaning that solving social problems should take place on the legal/judicial plane.³⁴ However, it is worth noting that the fundamental source of this political and constitutional problem is the fact that there is no separate constitution-making and constitution-amending power in the Hungarian constitutional system, since both may be enacted by a two-thirds majority of all members of parliament. Moreover, there is no significant difference either between the single majority of votes required to form a government (elect the prime minister) and the two-thirds majority. Hence, if a political party simply wins with a large margin at the general parliamentary elections (e.g. owing to poor performance of the previous government), it can easily become not only the governing majority, but at the same time also hold a constitutional majority, without any substantial or significant procedural restrictions. This means that the constitutional system in Hungary is structurally fragile and this is not a new feature introduced by the Fundamental Law; the same rule has applied since the democratic transition in 1989 (the difference is that no parliamentary majority had the power and/or the will to amend the constitution unilaterally before 2010).

The constitutional structure of Poland seems to be somewhat more resilient. A bill to amend the Constitution must be adopted by the Sejm by a majority of at least two-thirds of votes with the presence of at least half of the statutory number of deputies, and by the Senate by an absolute majority of votes with the presence of at least half of the statutory number of Senators. If a bill to amend the Constitution relates to the provisions of the chapter on the fundamental rules of the Republic of Poland, the chapter on the freedoms, rights and obligations of persons and citizens, or the chapter on the amendment of the constitution, holding a confirmatory referendum may be required by one-fifth of the statutory number of deputies; the Senate; or the President of the Republic [Article 235 of the Constitution].

SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE

"The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated"³⁵ and "[i]n republican government, the legislative authority necessarily

³⁴ Stumpf, op. cit.

³⁵ Federalist No. 78

predominates”³⁶ – observe Hamilton and Madison. If this applies in a constitutional system with the classical separation of the three branches of government, it is all the more true in a parliamentary democracy, where the executive is elected by the legislative majority and is dependent on the confidence of the latter. As Ekiert explains, “the fundamental problem of parliamentary democracies is the danger of the tyranny of the majority. The moment you have one more seat in the parliament than the opposition, you can basically do whatever you want”. The only check on the power of the parliamentary majority is the constitutional court and an independent judiciary. The moment the constitutional court is taken over by the parliamentary majority, its power is almost absolute.³⁷

Hamilton argues that “the complete independence of the courts of justice is peculiarly essential in a limited Constitution”, agreeing with Montesquieu that “there is no liberty, if the power of judging be not separated from the legislative and executive powers”, as liberty would “have everything to fear” from the judiciary’s siding with– or dependence from –either of the other branches of government. According to him, nothing can contribute so much to the authority and independence of the judiciary as permanency in office, this is therefore to be regarded as an indispensable ingredient in the constitution. As opposed to permanency, periodical appointments would pose a danger to the independence of judges, for “if the power of making them was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either”.³⁸ The same argument can be applied to contest the possibility to remove judges from office.

In 2010 during the first phase of the constitution drafting process in Hungary, many experts supported the idea of turning from the centralized (European) model of constitutional jurisdiction to the decentralized (American) model. According to these experts, a system of constitutional protection should have been created where the Curia (Supreme Court of Hungary) takes the role of the Constitutional Court, and lower level courts would have become the primary institutions of fundamental rights protection. The creation of a separate administrative court system and administrative supreme court also came up. The governing majority feared that the abolition of the Constitutional Court would be interpreted by international observers as repealing democracy, and that ordinary courts of law were not prepared to dispense constitutional justice. Eventually, the parliamentary majority stopped short of engaging in the conflicts that would have come with the radical reform of constitutional protection and the judiciary, but many significant changes were made.³⁹

On the one hand, the restriction of the competence of the Constitutional Court in financial matters and the abolition of the *actio popularis*; the modification of the nomination process of Constitutional Court judges; raising their number to 15; transferring the right to elect the president of the Court from the members of the Court to the parliament resulted in an institution which – in view of its competences – became less able and – based on its composition – potentially less keen to serve

36 Federalist No. 51

37 Ekiert, op. cit.

38 Federalist No. 78

39 Stumpf, op. cit.

as a strong counterbalance to the parliament (and the incumbent parliamentary majority).⁴⁰ However, based on the new ACC, once a member of the Constitutional Court is elected (even though not for permanent tenure, but) for twelve years, the judge may not be removed from office by either of the other branches of government, and may not be re-elected following the end of that tenure (thus gaining both formal independence and relief from the inclination to please any political force in order to be re-elected) [Articles 6(3) and 15-16 of ACC]. On the other hand, by creating the Curia, the parliament created the grounds for dismissing the president (and vice-presidents) of the former Supreme Court. At the same time, the new National Office for the Judiciary and its president, who is elected for nine years, took over the management of the judicial system (from the former National Council of Justice and its president). In 2011, the parliament also lowered the retirement age of judges serving at ordinary courts from 70 to 62-65 years, which would have forced many judges (typically holding senior positions) to unexpectedly and unwillingly retire within a year; but Constitutional Court ruled this piece of legislation to be unconstitutional.⁴¹ As a result, apart from the dismissal of the few judicial leaders mentioned above (in connection with the reform of the central institutions of the judiciary), at the time the Fundamental Law entered into force in 2012, the vast majority of judicial offices remained unaffected by any significant structural reform. The Fundamental Law stipulates that judges shall be independent and only subordinated to the law; they shall not be given instructions as to their judicial activities, and may only be removed from office for the reasons and in a procedure specified in a cardinal act (that is an act adopted with two-thirds majority) [Article 26(1)]. The cardinal act referred to does not provide institutional means for the legislative or the executive branch to interfere with judicial activities or to remove judges from office.

Regarding judicial independence in Poland, experts paint a grimmer picture. According to Sledzinska-Simon, the entry into force of the recently adopted ‘three acts’ will potentially have serious consequences. “It is clear that the officially declared goal of improving the effectiveness of the judiciary covers a less subtle objective to control the executive offices in ordinary courts and indirectly have influence on the administration of justice. [...]the] immediate effect would be the concentration of power in the hands of the Minister of Justice and the parliamentary majority (and, importantly, the limitation of some of the presidential prerogatives). By taking over the Supreme Court, the government would also gain influence over any question of the validity of elections and nationwide referenda. By appointing the First President of the Supreme Court, it would automatically decide the Chairperson in the Tribunal of the State adjudicating cases of constitutional offence.” She also adds that newly established “disciplinary chamber’s autonomous position vis-à-vis the First President of the Supreme Court makes it ripe for abuse by the Minister of Justice who, via his representative,

40 In February 2015, the term of office of Constitutional Court President Peter Paczolay ended. In March and April 2016 the term of office of three other judges also ended, among them the then President, Barnabás Lenkovics. The vacancies at the Court were not filled between 2015 and April 2016, because the government parties had lost their two-thirds majority in the Parliament by then and no compromise could be made with the opposition parties on the candidates. After April 21, 2016 the CC kept operating with 11 members (instead of 15), and without an elected president. The president’s duties were exercised by the Vice President. After half a year of uncertainty, the governing majority reached a compromise with an opposition party. The four vacancies were filled and the Vice President was elected President by a tripartisan two-thirds majority in Parliament. Since December 1, 2016 the membership of the Constitutional Court is complete, stable, and the legality of the institution’s operation is basically undisputed.

41 33/2012 (VII. 17.) ABH Constitutional Court Decision

would have the power to initiate disciplinary proceedings against any judge”. The above mentioned legislative actions are supplemented by a “political campaign portraying the judiciary as the allegedly most corrupt, and yet immune, social caste”.⁴²

Chief Justice of the Supreme Court Małgorzata Gersdorf, after the introduction of the (third) bill amending the Act on the National Council of Judiciary, dramatically declared that “the époque in which we relied on the principle that the democratic state is ruled by law, as expressed in Art. 2 of the Constitution, has ended”.⁴³ The former presidents of the Constitutional Tribunal published a joint statement in which they seriously condemn the act. According to their opinion, the acts – if not *de iure*, but *de facto* modify the Constitution – providing discretionary power to the Minister of Justice to appoint court presidents, “which confers on the government the power of permanent tampering with judicial independence by establishing a corps of politically obedient judges”. This amendment, together with the composition of the National Council of the Judiciary, the dissolution of the current and the establishment of a ‘new’ Supreme Court “will eventually abolish the independence and autonomy of the Polish judiciary from political institutions”. The former presidents of the Tribunal also highlight that the neutralization of the Constitutional Tribunal has made the effective constitutional review of statutes and their application impossible and leads to arbitrary and unconstitutional legal solutions.⁴⁴ I would not add here further commentary.

THE ROLE OF THE CONSTITUTIONAL COURTS IN CRISIS

“In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger”⁴⁵ – warns the author of the Federalist against the potential grave consequences of the unrestricted power of the government controlled by a unified political majority.

In my firm opinion, there is no democratic alternative to the rule of law, no effective governance may be carried out without stable constitutional foundations. If we sacrifice the values and constitutional stability of the rule of law on the altar of *ad hoc* political interests, society as a whole will

42 Sledzinska-Simon, op. cit.

43 Mikuli, Piotr: An Explicit Constitutional Change by Means of an Ordinary Statute? On a Bill Concerning the Reform of the National Council of the Judiciary in Poland, Int’l J. Const. L. Blog, Feb. 23, 2017, at: <http://www.iconnectblog.com/2017/02/an-explicit-constitutional-change-by-means-of-an-ordinary-statute-on-a-bill-concerning-the-reform-of-the-national-council-of-the-judiciary-in-poland>

44 Steinbeis, Maximilian: Statement by the former presidents of the Constitutional Tribunal: Andrzej Rzepliński, Marek Safjan, Jerzy Stępień, Bohdan Zdziennicki and Andrzej Zoll, VerfBlog, 2017/7/13, <http://verfassungsblog.de/statement-by-the-former-presidents-of-the-constitutional-tribunal-andrzej-rzeplinski-marek-safjan-jerzy-stepien-bohdan-zdziennicki-and-andrzej-zoll/>

45 Federalist No. 51

have to pay the price and it is simply not worth it. In a democratic rule of law state, separation of powers must respond not to the question of who defeats whom, but to the substance of the system of constitutional responsibility which ultimately serves the common good.

In the system of separation of powers, the constitutional requirement of cooperation must prevail. The court(s) authorized to carry out constitutional review (hereafter: constitutional courts) in a parliamentary democracy bear a special responsibility as the only real counterbalance to the legislative and executive branch. The responsibility is even greater where the court faces a political majority in the legislature capable of amending the constitution (eg. parliamentary super majority), admitting, “that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community”.⁴⁶

On the one hand, I propose that constitutional courts in situations of democratic crisis should exercise their competences *to their limits* to protect the constitutional foundations of the state such as the separation of the branches of government, in particular, the independence of the judiciary, and all those political rights and democratic institutions (freedom of speech, freedom of information, fair electoral system, etc.) which enable the political system to self-correct in a democratic way (e.g. at the following elections). However, the constitutional courts should be careful not to elevate themselves above the constitution and the valid rules governing their competences and procedures – whatever valid cause they claim to defend –, because overstepping the limits would be contrary to the rule of law and detrimental to the culture of the rule of law and democracy (which may potentially backfire at a later point in time). Moreover, judicial activism that violates the competences of other branches of government can serve as a means of direct (and willful) encroachment upon the democratic process.⁴⁷

Constitutional courts have the competence to rule on the constitutionality of the cases brought before the court and also have the constitutional – and moral – duty to strictly defend constitutional principles, rights and the system of checks and balances. But the constitutional courts have no competence to render political decisions – especially to decide economic and social questions – in place of the democratically elected legislative branch, if the question is not sufficiently stipulated by the constitution itself. An important lesson from the recent constitutional history of Hungary, as Pokol warned in 1992, is that judicial activism – besides being justly criticized from the theoretical point of view of the separation of powers – “may lead to the point where major political forces consider cutting back constitutional jurisdiction, or, in a more radical move, completely abolishing it. Activism

46 Federalist No. 78

47 As the recent case of the Supreme Court of Venezuela shows. The government-dominated Supreme Court of Justice of Venezuela issued a ruling in which it stated that “in order to preserve the country’s rule of law” it felt forced to transfer to itself (“or to the entity that the Court decides”) all the powers enjoyed by Parliament, while – in a second ruling, issued the next day – it stripped the members of the National Assembly of their immunity. see more: Couso, Javier: Venezuela’s Recent Constitutional Crisis: Lessons to be Learned From a Failed Judicial Coup D’etat, Int’l J. Const. L. Blog, Apr. 12, 2017, at: <http://www.iconnectblog.com/2017/04/venezuelas-recent-constitutional-crisis-lessons-to-be-learned-from-a-failed-judicial-coup-detat-i-connect-column/>

is dangerous not only to the political system and parliamentarism, but to the institution of constitutional jurisdiction itself”.⁴⁸

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48 Pokol, 1992:154

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