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AZ ALKOTMÁNYBÍRÓSÁG ELLENSÚLYI SZEREPÉNEK MEGVÁLTOZÁSA A HATALOMMEGOSZTÁS RENDSZERÉBEN

(az alkotmány- és alapjogvédelem rendszerének átalakítása 2010 és 2012 között)

CHANGING THE BALANCING ROLE OF THE CONSTITUTIONAL COURT IN THE SYSTEM OF THE DIVISION OF POWER

(reshaping the constitutional system and the system of protection of fundamental rights in the period between 2010 and 2012)

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In the first two years of the second Orban cabinet public debate and international criticism was focused on the reshaping of the state order. There was virtually no independent authority or constitutional organ that did not undergo substantial changes as far as their operating methods, composition, and powers were concerned. Although the specific amendments would – in many cases – have been acceptable themselves, when viewed in their entirety, they seem to significantly weaken the system of checks and balances in Hungary. One of the most crucial debates both in Hungary and in the European Union concerned the Constitutional Court.

The reorganisation of the Constitutional Court is a symbolic part in the process that had led to the abolition of governmental checks and balances in Hungary and which caused a number of investigations to be launched against Hungary leading to much criticism and condemnation.[1]

The objective of this paper is not to draw a scientific comparative analysis of constitutional court models, but to present how the public law status and the balancing role of the Constitutional Court was altered between 2010 and 2012 by presenting the chronology of the constitutional process – and the concurrent procedure aimed at changing the system of legal order – with strict and limited focus on the constitutional and fundamental rights, and by presenting the most exacting documentation and logical sequencing of the events that had led up to the changes. In addition to this, this paper cannot afford to ignore the general aspects of the entire process of reorganisation.

On 28 June 2010, the Hungarian parliament had voted to set up an Ad-Hoc Committee in charge of the drafting of the Constitution (hereinafter: Ad-Hoc Committee). The committee held its constitutional meeting on 20 July. With this the constitutional process had begun as was already proclaimed by the prime minister. On 20 December 2010 the Ad-Hoc Committee accepted and put before the Hungarian parliament the concept entitled "General Principles Guiding Hungary's Constitution"[2] The debate of the concept was conducted in the Hungarian parliament in February and March. The new constitution, which eventually became – in view of the resurrection of the powers of the historical constitution – a Fundamental Law, was adopted by the Parliament on 18 April and signed by the President on 25 April. The constitutional process that changed the constitutional system and the system of protection of fundamental rights was brought to an end by the adoption of the cardinal law concerning the Constitutional Court at the end of 2011.

The constitutional legislature was supposed to be designed to allow the parliament of Hungary to decide the ways Hungary may wish to alter her public law order through wide public and expert debate. It must be seen though that the codification of legal provisions affecting power positions was not run as part of the constitutional legislature, but rather parallel to it. Beside the sublime constitutional process taking place before relatively wide public and professional interest, the practice of legislation and the practice appointing officials – the latter often being the product of the former – had already reshaped the system of checks and balances in Hungary through ten proposals that intended to alter the constitution before the adoption of the new Fundamental Law. In other words, the government had succeeded in concentrating power amidst the constitutional process well ahead of the new Constitution entering into effect. In this period, week after week new decisions were made – always following a private member's formal legislative motion – that helped abolish all governmental checks. These motions, in fact, originated from the government, but in order to evade the reconciliation requirement stipulated in the legislative law, they formally were put forward by MPs of the governing party. The Constitutional Court had adopted two resolutions to bring this unacceptable practice to the attention of the parliament of Hungary.[3]

1 Changing the order of appointing constitutional judges

One motion that fitted neatly into line with those described above was that of MP Márta Mátrai. On 7 June 2010, the government representative thought that since *"the presently effective appointment rules cannot guarantee the uninterrupted and continuous operation of the court"*, it was now time to change the order of appointing constitutional judges.[4] According to the former practice, the incumbent government could appoint constitutional judges in consultation and agreement of the opposition only. All parliamentary factions would delegate one member into the nomination committee which would make a majority decision. The reason why the National Round Table worked out and opted to apply this method was to prevent political interest to govern the appointment of constitutional judges as much as possible. Opposition, or for that matter, government veto could prevent any person that was unacceptable by the other side for his/her political disposition or set of beliefs from becoming a member of the Constitutional Court. Of course, the system had flaws that could rightly be criticised since after all the proposed persons had always been nominated after some sort of political bargaining, and it is unquestionably true that this rule had many times caused nomination procedures to get stuck and remain unresolved sometimes for years. Therefore the idea of the government having a two-thirds parliamentary majority to create a better system was clearly not the works of the devil. The problem with the motion was that it really was about nothing else but the concentration of power. According to the proposal, an eight-member nomination committee – this was later changed to 9-15 members –, whose composition would represent the parliamentary distribution of parties, would be set up. Now this committee could now, without any real impact from the opposition, nominate people for the posts.[5] The new law was applied once it came into effect. When new constitutional judges were to be nominated, the nomination committee, set up in accordance with the new law, had accepted all the

nominations of the different parliamentary parties; then on 22 July 2010, the government representatives elected the two constitutional judges they had nominated.[6] This is a technique of exercising power that many would call cynicism. If one thinks about it a little, it is easy to see that changing the nomination rules was not important to prevent the opposition from nominating people, but to ensure that people favoured by the government side would actually become nominees without having to get the consent of the opposition. The practice of electing government-backed nominees leaves no doubts about the government's real intentions as far as the amending motion is concerned.

László Sólyom, the then president of Hungary, sent the adopted bill back to the Parliament for reconsideration. Similarly to the opposition factions, he held the view that the law would eliminate the coercive force of compromise from the system therefore the already deficient law would further deteriorate. The law *"cannot fulfil its role as a safeguard for formal and substantive reasons"*. In his paper, which is on a par with a research study in terms of quality, he sharply criticised the statute for editing, grammatical and substantive flaws and proposed that a nomination system that was similar to the practices of many European countries whereby the constitutional judges were elected by the legislation with the participation of another constitutional organ or organs should be set up.[7] When the motion was negotiated again in parliament, the proponent only adopted the President's recommendation as far as the composition of the nomination committee was concerned in her new, amended motion.[8] One opposition party proposed that another constitutional organ should be involved in the process of electing constitutional judges.[9] In the repeated debate, the representatives had restated and interpreted the President's paper.[10]

We cannot just ignore that the same bill – tacitly, as a side effect – abolished Article 24 (5) of the Constitution. This section came into force during the Horn cabinet and was designed to ensure that the concept of the constitution could only be adopted by a four-fifth majority of the votes of the parliamentary representatives, i.e. despite the ruling party having a two-thirds majority, the consent of at least one opposition party would also have been necessary. The "as a side effect" refers to the fact that the justification of the bill contains not a single word on the reasons for abolishing this article. Despite being bombarded with repeated questions,[11] the proponent refused to add any verbal reasoning to her proposal. No matter how we look at it, this action cannot be interpreted in any other way – and to this the opposition factions agreed[12] – than the ruling parties' intention to have this provision adopted with the parliament unnoticed on the side. Finally and unfortunately in the absence of the proponent there was debate over whether the provision the amendment was designed to declare null and void was still in force or not.[13] I must acknowledge that this debate was indeed legitimate. Nevertheless, when we look at the government's intentions, this legal debate bears no significance. The government's disinclination to introduce or maintain – the choice of words really depends on our legal interpretation as described above – the four-fifth rule is obvious. What the government wants instead is to eliminate the obstacle that had prevented the government coalition from adopting the constitutional concept without opposition support. It is interesting to note that even the radical right in the parliament had called Gyula Horn more democratic in the debate in reference to the law: *"Unfortunately, we must also say that even the Horn cabinet was more serious about national cooperation than the incumbent government parties, for it was the Horn cabinet which – empowered by their two-thirds majority – introduced the constitutional provision which you now want to abolish."*[14]

With the adoption of Márta Mátrai's private legislative motion, two checks had fallen that prevented the government majority from making independent decisions.

2 The Constitutional Court in the early stages of the constitutional concept

The constitutional legislative work began with the chairperson of the Ad-Hoc Committee asking – in line with and in the order and upon the authorisation of the decision adopted by the Committee at its constitutional meeting – the leaders of public organisations, the leaders of national and ethnic minority national interest representation organs, the national interest representations of local municipalities, the Institute of Legal Studies of the Hungarian Academy of Sciences, the constitutional faculties of state, church and foundation-run universities, and 5 civic organizations nominated by the parties each to send their opinions and ideas to the Ad-Hoc Committee. In addition to the above, anyone was allowed to send in their opinions, which were also accessible to anyone through the website of the Parliament. Of this latter, there were nearly two hundred ranging quite widely in terms of quality. The list of commenters included for example, the Hungarian Thermal Pump Association, the National Assembly to Restore Constitutional Legal Continuity, the Universe Church, and the Tájszólam Public Benefit Association. Also, there were many private individuals that sent in their opinions. Sometimes these were signed or initialled. The following recommendation, for example, came from Uncle Tony: *"It must be made clear whether barnstorming had indeed been made compulsory because it has been widely used to stupefy the citizens."* This paper considers it unnecessary to evaluate these opinions.

a) Recommendations made by the institutes requested

The vast majority of the scientific workshops also make no mention of the Constitutional Court. Perhaps it was the Institute of Legal Studies of the Hungarian Academy of Sciences that wrote most about it. The institute recommended that the scope of the Constitutional Court powers be set out in the constitution, the institution of constitutional appeal be

introduced, the number of the members in the Constitutional Court be increased to 15, the re-election of the constitutional judges be abolished, and at the same time, the length of their mandate be increased. The Batthyány Society of Professors recommended that the mandate of the constitutional judges be increased quite up to the election of their successor if their mandate was to end because of their age reaching 70 or their mandate terminating. In all other cases, if the parliament is unable to elect a new judge within two months, the court should be allowed to co-opt one as they please. Finally, in case of constitutional breach by default, the Constitutional Court should be allowed to make up for the gap in the legislation. Béla Pokol recommended it to be set out in text that the Constitutional Court resolutions should not be used in court procedures as a source of law, actio popularis should be abolished, and that only judges and one-third parliamentary members should have the right to initiate ex post constitutional review proceeding. The president of the Constitutional Court should be elected by the parliament for a term of 12 years and their re-election should be prohibited by law. The resolutions of the Constitutional Court should only be applicable once they have passed the test of review once the new constitution has come into effect and the constitution should provide that the constitutional judges be answerable. Albert Takács, a tutor at the Corvinus University argued for the introduction of the institution of constitutional appeal; Károly Tóth the institution leader of Károli Gáspár University of the Reformed Church in Hungary urged for the involvement of the Constitutional Court in the constitutional process.

b) Recommendations made by the president of the Constitutional Court

The leaders of public organisations and of the professional and interest representation organisations – as was expected – only commented on constitutional provisions that were under their own scope of authority.

Upon the request of the chairman of the Ad-Hoc Committee, the president of the Constitutional Court sent off his preliminary comments on the guiding principles of Hungary's constitution which had been discussed by the entire board.[15] In this the president recommended that the principles of constitutional judicature – similarly to the more important organisational issues – should be included in the constitution under an independent chapter. The Constitutional Court should operate as an organisation separate from the courts, and the new constitution should set out: the general scope of constitutional review of statutes, the right to abolish laws and other statutes, the general binding force of its decisions, and the final, non-appealable nature of the decision. According to the president, having the Constitutional Court's full scope of powers set out in the constitution would have been desirable and could have acted as a safeguard. He recommended that actio popularis should be abolished and the right to initiate constitutional review should be conditional upon legal interest. As a consequence, he was in favour of the introduction of constitutional appeal. He would have considered it proper to introduce ex ante review of certain international contracts. At the same time, he recommended that the review of conflict with international contracts be narrowed in general. He suggested that the scope of authority to establish a breach of constitution by default should be upheld. He recommended that constitutional control over ruling on resolutions to ensure legal consistence should be maintained and laid down. The task of reviewing the legal compliance of local government legislation, he would have delegated to administrative courts. The most important guarantee arrangements governing the Constitutional Court's order of procedure should be regulated in laws requiring a two-thirds majority, whereas detailed rules are best regulated in a procedural order defined by the Constitutional Court.

c) Debate in the Ad-Hoc Committee's Justice, Constitution and Legal Protection Task Force

The Ad-Hoc Committee started work after forming six task forces; four being led by government party members, and two by the opposition. The task forces were given independence as regards their order of work. The "Justice, Constitution, and Legal Protection" Task Force was set up to deal with the judiciary, prosecuting organs, the Constitutional Court and parliamentary commissioners. Being the deputy chairman of the Ad-Hoc Committee and the leader of this task force, I recommended that in view of the extremely short deadline, the many thousands of comments received by the Ad-Hoc Committee and falling partly under the scope of competence of this task force should be dealt with by each faction, and whatever they agree with should be put forward in the form of faction opinion either orally or in writing on the first meeting of the task force. Following this and in accordance with the proposal I put forward, the points made can be discussed and voted on, then we can go onto the next faction proposal. I suggested that in addition to this, we could also invite the leaders of the organisations concerned and give them the right of consultation. Apart from this latter notion of inviting leaders, the task force agreed to the proposed timetable. It also approved of my proposal concerning the acceptance of the task force report. This prescribed that the report should indicate all the proposals put forward in the following breakdown: all factions agree – the parliamentary majority (2/3) agree – at least two opposition factions are in support – other recommendations.

At this point, please allow me to quote the constitution concept draft on the Constitutional Court word for word for the sake of historical correctness rather than use my own words and also to give you its brief justification, which we compiled with the experts our task force had involved in the work before we voted on the proposals:[16]

The new Constitution ought to regulate the entire scope of responsibilities and competences of the Constitutional Court as well as the most important rules

concerning the Constitutional Court's order of procedure. Safeguarding the implementation of the provisions of the constitution is the fundamental duty of the Constitutional Court.

In order to ensure the sovereignty of the Constitutional Court, it is essential for the Constitution to regulate the entire scope of responsibilities and powers as well as the most important provisions of the Constitutional Court's order of procedure. The amendment of the constitution linked to the draft of the Constitutional Court act of 2003 also followed the same principle with a view to preventing the legislator from encumbering the court with tasks that were alien to its profile of activities. Of the competences currently included in the effective Constitutional Court act, it is not advisable to adopt the practice of ruling over disputes over competences – not exercised anyway – and the dissolution of the body of local government representatives which may be operating contrary to the Constitution.

The institution of ex post control must be upheld and set out in the new Constitution and must be made exercisable to anyone without any limitations on time.

In addition to the right to abolish statutes, these two procedural provisions have guaranteed – and the actio popularis has done this at a constitutional level – that the institution was a key partner (and not a subordinate subject of) to legislation and the constitutional legislature was able to keep the entire legal system under control. Any reference to legal certainty made against these values is deceptive since the Constitutional Court has been – from the very onset – paying particular and careful attention to this point of consideration.

The new Constitution provides that ruling on the Supreme Court's resolutions adopted to ensure legal consistence is reviewable.

Although the Constitutional court had previously clearly passed a ruling over the fake debate that went on, yet we cannot afford not to settle the issue in a prescriptive manner in order to establish a clear relationship between the two organs.

The new Constitution makes it possible for the Constitutional Court to suspend the applicability of the statute that is contrary to the Constitution as a temporary measure.

The Constitutional Court does not rule in haste in matters requiring complex judgement; at the same time, as regards the norms that are already coming into effect, ex post annulment cannot fully remedy the consequences of a constitutional breach (as is typically the case with the act on the legal status of government officials). A legal institution that is comparable to the court suspension of an administrative order would on the whole help spare the legal system.

The Constitutional Court annuls the legal statute that is in breach of the constitution in full or in part; in the case there is room for constitutional interpretation of the matter, the Constitutional Court may define the governing constitutional requirements for the application of the legal statute.

This regulation, which is still effective to date, must be included in the new Constitution as well.

The Constitutional Court cannot change the content of a legal statute even if particular provisions of the statute have been annulled. The Constitutional Court has no right to review court decisions except where, according to the decision of the Constitutional Court arrived at pursuant to a constitutional appeal, the annulment of the provision applied in the criminal proceeding would result in a weaker punishment or legal measure, or result in the limitation of liability or exemption from under liability. The scope of tasks of the Constitutional Court is extended to include ruling over fundamental right issues.

In recent years there have been a number of instances when the Constitutional Court had practically changed the content of a legal statute by declaring a norm that was contrary to the Constitution null and void. By establishing this practice, the question whether the Constitutional Court has already surpassed its scope of competence under the current legal environment can legitimately be raised. It is good and proper however if the new Constitution clearly defines this restriction over the powers of the Constitutional Court. Ruling over issues concerning fundamental rights would be a new component in addition to the current scope of tasks of the Constitutional Court. In Hungary at present there is no full-scale, comprehensive legislature addressing fundamental rights – the one and only exception might be the legal protection institutions legislature. If anyone's legal claim is solely based on his fundamental rights having suffered a breach (as opposed to a specific act of violation of the law), the claim may only be effectively enforced in a limited manner through the Constitutional Court's special constitutional review proceeding. By extending the current constitutional appeal, this gap in the legislation may be filled in.

The eleven members of the Constitutional Court are elected by the parliament. The manner of nominating a person for the post of constitutional judge, the conditions of becoming a constitutional judge, and the terms of terminating the mandate are defined in the new Constitution. The nomination rules must apply an order of procedure that will coercively require effective consultation and conciliation in order to make even the representatives who otherwise enjoy the comfort of a qualified majority have an interest in reaching a consensus. In order to exclude the possibility of enforcing party political interests, more stringent rules should be applied to fulfil the post of constitutional judge. The committee making the nominations for the members of the Constitutional Court should include one member from each group of representatives.

The new nomination system – a result of the summer amendment of the current effective Constitution – making the nomination committee unnecessary and also failing to impose the very minimum personnel requirement of having no conflict of party interest are jointly suitable to make nomination the subject of direct political prey hunting. A balanced solution is required regarding both questions, but the solution must also take into account the continuous and uninterrupted operability of the court.

The rules concerning the election of the president of the Constitutional Court must be included in the new Constitution.

The president of the Constitutional Court is one of the five dignitaries; its role is pivotal in terms of the operability of the court. At least this would require that the election by and from among the members of the constitutional judges, and the length of their mandate be stipulated in the constitution.

The new Constitution states the principle of independence and irremovability of the judges of the Constitutional Court.

It is a provision requiring no further explanation. It guarantees the independence of the court.

The new Constitution provides for the length of the mandate of the members of the Constitutional Court which is set at 9 years and also prohibits their re-election.

Today the Constitution only provides for the rules of nomination and election, but not for the term or the personnel conditions of the mandate despite the fact that these can influence the independence of the judges at least as much as the parliamentary majority required for their election. Setting out the excluding factors to fill the post even in the exceptionally detailed Austrian constitution takes one or two paragraphs: an equally detailed regulation just might not be too much to pay to ensure party neutrality of the constitutional judges. Noting can have a greater impact against the actual independence of an institution than having a leader weighing up the chances of his/her re-election when making decisions or performing actions. Resolving this direct conflict of interest in these cases is more important than the re-election of a good leader, which may, no doubt, contribute to the continuity of institutional operation.

The recommendations received the following support:
The representatives of all factions agreed to the following recommendations:

The new Constitution ought to regulate the entire scope of responsibilities and competences of the Constitutional Court as well as the most important rules concerning the Constitutional Court's order of procedure. Safeguarding the implementation of the provisions of the constitution is the fundamental duty of the Constitutional Court.

The institution of ex post control must be upheld and set out in the new Constitution and must be made exercisable to anyone without any limitations on time.

The Constitutional Court annuls the legal statute that is in breach of the constitution in full or in part; in the case there is room for constitutional interpretation of the matter, the Constitutional Court may define the governing constitutional requirements for the application of the legal statute.

The Constitutional Court cannot change the relevant content of a legal statute even if particular provisions of the statute have been annulled.

The eleven members of the Constitutional Court are elected by the parliament. The manner of nominating a person for the post of constitutional judge, the conditions of becoming a constitutional judge, and the terms of terminating the mandate are defined in the new Constitution.

The new Constitution states the principle of independence and irremovability of the judges of the Constitutional Court.

The new Constitution provides for the length of the mandate of the members of the Constitutional Court which is set at 9 years.

Recommendations that enjoyed the support of the parliamentary (2/3) majority:
The new Constitution makes it possible for the Constitutional Court to suspend the applicability of the statute that is contrary to the Constitution as a temporary measure. (supported by Fidesz, MSZP, KDNP and LMP, but not supported by Jobbik)

The rules concerning the election of the president of the Constitutional Court must be included in the new Constitution. (supported by Fidesz, MSZP, KDNP; Jobbik and LMP abstained)

Recommendations that enjoyed the support from the representatives of at least two factions:
The nomination rules must apply an order of procedure that will coercively require effective consultation and conciliation in order to make even the representatives who otherwise enjoy the comfort of a qualified majority have an interest in reaching a consensus. In order to exclude the possibility of enforcing party political interests, more stringent rules should be applied to fulfil the post of constitutional judge. The committee making the nominations for the members of the Constitutional Court should include one member from each group of representatives. (supported by MSZP, Jobbik, and LMP, but not supported by Fidesz and KDNP)

The Constitutional Court has no right to review court decisions except where, according to the decision of the Constitutional Court arrived at pursuant to a constitutional appeal, the annulment of the provision applied in the criminal proceeding would result in a weaker punishment or legal measure, or result in the limitation of liability or exemption from under liability. The scope of tasks of the Constitutional Court is extended to include ruling over fundamental right issues. (supported by MSZP, and LMP, but not supported by Fidesz, Jobbik and KDNP)

The new Constitution should prohibit the re-election of the constitutional judges. (supported by MSZP, and LMP, but not supported by Fidesz, Jobbik and KDNP)

Other recommendations:
The new Constitution should set out that the ruling on resolutions to ensure legal consistence by the Supreme Court be reviewable. (supported by MSZP, but not supported by Fidesz, Jobbik, KDNP, and LMP)
The new Constitution should set out an appropriately short procedural deadline for the Constitutional Court of 6 months in general. (supported by Jobbik, but not supported by Fidesz, MSZP, KDNP, and LMP)

What might be worth adding to all this is that informally we also talked about two more alternatives.

One of them was about the possibility of having a two-chamber parliament in which the upper house could take over the larger share of the scope of powers of the Constitutional Court, while the other option was that the court might be integrated into the judiciary, into the newly established Curia. Eventually, this did not take place, however, the scopes of power the Constitutional Court was deprived of have not been given back by either the Fundamental Law or the cardinal law.

3 The second play of parallel constitutional legislature – narrowing the scope of powers of the Constitutional Court

Before the Ad-Hoc Committee began to discuss the task force reports, the Constitutional Court, on 26 October 2010, had declared the[17] *"Act CX of 2010 on enacting and amending certain acts with economic and financial subject matter"* – i.e. the act that allowed a surtax to be levied on severance pay in the public sector with retroactive effect – null and void and contrary to the constitution.[18] Bringing the act into effect was a matter of prestige for the ruling parties as they had promised in their election campaign and also thereafter that they would reclaim all "indecent and shameless severance pay".[19] Apart from declaring another symbolic act null and void, this had really been the first time since the elections when an organ managed to halt the government and it did so by taking the opposition's side since at the time of the discussion of the draft, the opposition parties were loud and clear in their criticism of the proposed act claiming that it would be contrary to the Constitution for its retroactive effect. After the decision of the Constitutional Court, on the very same day, the Fidesz faction leader submitted a private member's legislative motion identical to the abolished act. The only difference to the original was that retroactive effect was now defined not only up until the beginning of the year in review but up to 5 years. In addition to this, using a motion to amend the constitution and by amending the act on the Constitutional Court[20] – in which it proposed to curtail the scope of powers of the Constitutional Court –, it aimed to prevent the court from declaring the resubmitted law null and void again. The idea behind the amending proposals was to rule out the chance of a referendum on *"the budget, the implementation of the budget, the central taxes, levies and contributions, custom tariffs, and the contents of the laws on the central conditions of local taxes*". It also deprived the Constitutional Court of the chance to review the content of any law that cannot be altered by way of a referendum. The reasoning the proponent added beside the three-line appraisal of the Constitutional Court's past activities ran: *""with the cementing of the rule of law, it is now unjustifiable for the constitutional court to possess such a wide scope of competence*".[21] As a result, the control over legislation in these subject matters was now of the past. The proposal had immediate and serious pubic repercussions. Not only was it sharply criticised by leftists, but also by authoritative right-wing public figures.[22]

The two proposals were debated by the Parliament in a joint debate. In his exposé the faction leader did not say a single word about the two bills; he only talked about the moral obligation to recollect severance pay, something that really was not the subject matter of either proposal.[23] The keynote speaker of the larger government party also only talked about the shared will of the voters and the need to reclaim severance pay.[24] This attitude may be described as verbal evasion, which may not be a good thing, but is certainly a better choice than the alternative option. From this the following can be deduced: the government parties believe that any means can be applied in order to enforce voters' will. Now, the voters' will, which is considered sacred, authorises them to do anything including acts that may surpass legal principles, norms, even the entire system of rules defining the outlines of social cohabitation. It would have been interesting to receive the answer to the question why the written reasoning of the proposal and the proponent's exposé were entirely different. It was the only thing that transpired from the speech. It would also have been interesting to learn why the reasoning that was shared with us in writing did not come up at all during the preparation of the constitution. It is obvious that the real reason was uttered in the exposé of the proponent. Sad as it may be, there is only one conclusion to draw from this: the proponent added false written reasoning to a proposal aimed at amending the constitution.In the discussion of this agenda item, the government parties – finding the debate visibly, but understandably uncomfortable – resorted to a technique that had been tested and proven before in a number of comparably awkward situations – i.e. the debate over the amendment of the scope of competences of the OVB (National Election Committee) – and did not close the debate with a Points of Order, but had practically boycotted it. In the general debate they did not even have anything to say except for the mandatory proponent's exposé and the keynote speaker's speech. I must add that the smaller government party did not even have a keynote speaker. There were two government party representatives making their contribution in a total of six minutes in the more than 4-hour debate, but even in these six minutes they were talking about something other than the bill. The government did not have an opinion on the proposal. Not even whether it was in support or against it. It was visible and tangible that the government was playing for time to see how the public and the international players would react. Nonetheless, the faction leader emphasised his extreme openness to receive any well-meaning proposals for amendment.[25]

The arguments of the opposition parties were more or less the same. The representatives that rose to speak emphasised that being granted a two-thirds authorisation in a democracy does not mean totalitarian powers, and not everything is permissible on the pretext of the "voting booth revolution". The proposal was seen as a spectacular demonstration of the government's power while the government's atti-

tude was seen as an attempt to punish the organisation that had the courage to oppose it rather than to acknowledge the decision of the Constitutional Court. Many have indicated that it had never led to any good when the government began to relativise legal regulations in the name of justice. This was at the time when the government's ideas about the private pension funds began to surface. Many representatives argued that the bills were mainly designed to limit the scope of competence of the constitutional court to prevent it from being an obstacle in the face of the government's budgetary plans. Similarly, it was also put forward that the other aim of the proposal was for the government to prevent its fiscal plans from being overridden by a referendum. Some went as far as claiming that the reasoning did not reflect the true intentions of the legislators; even the proponent had presented different reasons in his exposé and the press and was not actually talking about the proposal, and the government party representatives did not participate in the debate. In the respondent's response, the faction leader had practically not replied in effect to any of the points raised.[26]

In the detailed and final debate of the proposal, the faction leader emphasised that he had consulted the non-government sector in response to their requests he would accept two modifications. One of them would not tie the rules on Constitutional Court powers to the prohibition on referendums. It must be noted here that this alone causes no substantive changes whatsoever; it merely synchronises the provisions of the act on the Constitutional Court with the other amendment, the amendment of the constitution in a legal technical sense. According to this, the Constitutional Court will not entirely be deprived of its powers to review statutes of a fiscal nature. The Court may continue to review such laws provided that the fundamental rights to life and dignity, the protection of personal data, the freedom of thought, conscience and religion, or to Hungarian citizenship are violated.[27] Many have interpreted this as a positive development. However, this is merely jugglery. Two steps forward and one dubious step backward. Having submitted a proposal that caused public dismay, then taking one illusory step backward after public conciliation and upon pressure from the civil sphere can hardly be described as the outpouring of democratic sentiments when, in fact, nothing actually happened. This technique was not developed on the go and it seemed to work. The only problem with it was that it was not necessarily a trademark of democratic systems. No review for constitutionality may be instigated on the grounds of right to property. The Minister of State for Public Administration and Justice, in the debate of the special commission had practically said that the right to property was not included among the reasons of revision because the tax laws would inevitably violate it.[28] An interesting argument. Disallowing the Constitutional Court to overrule laws concerning finances on the grounds of the right to property is almost not allowing the court to do so at all. I would really be interested to know what would happen if, let's say, the Constitutional Court declared a tax law null and void on the grounds of the disproportionate limitation of the freedom of conscience. Just because the reasoning is an outright and obvious – even if deliberate – flummery, the provision will still continue to be finally and irreversibly binding on everyone. It would be extremely sad if Hungary got to a stage where state power organs were openly rivalling. There might just be one thing even sadder than that: if the Constitutional Court would eventually "get the message".

In the final debate, the Minister for Public Administration and Justice made his very first contribution to the parliamentary debate. His arguments were not unlike those of the proponent. He provided no real, substantial answers; all he talked about was that because of the general authorisation the government had received it could not afford to sit idly, they had to reclaim severance paid to the public administration. His contribution though had one important message to convey: at least on the day of voting it was formally revealed that the government was in support of the proposals.[29] The closing words of the proponent raised the question whether the amendment was necessary to reclaim severance pay adding that the proponent had been open to all ideas presented in the course of public conciliation.[30]

4 Debate in the Ad-Hoc Committee

The Ad-Hoc Committee discussed the report of the task force on 10 November 2010. By this time, all three opposition parties had abandoned the constitutional legislature for the very reason that the bill designed to curtail the powers of the Constitutional Court had been passed.

According to the minutes however, the co-leader of the task force – KDNP's deputy faction leader – emphasised two important things in his introduction. On the one hand *"we have no intentions to affect any changes as regards the area of observation under the scope of authority of the task force…"* and in reference to the report he confirmed that: *"we have clearly listed everything we would like to keep unchanged in the Constitution nonetheless."*[31] There was only one representative to make a comment on the partial concept affecting the Constitutional Court and it was the chairperson of the committee. He found the proposal far too detailing and believed that this really was not the place to take a stance on the role of the Constitutional Court in the state organisation. I think we can legitimately ask what then the place to take a stance is if not in the debate over the constitutional legislature. Or are we just supposed to grant our approval to a constitution in which the most fundamental issues have not yet been decided? But let's continue to observe the argument. The chairperson of the committee – in opposition of his fellow party member, the co-leader of the competent task force – considered the powers of the Constitutional Court something that should be reconsidered at a later stage therefore he suggested that they adopt a regulatory framework that *"leaves room for the reconsideration of this issue in a cardinal law"*.[32]

And with this we arrive at the most serious question, the question of a smaller, more concise constitution. The government majority had all along been arguing for a constitution devoid of unnecessary detailed regulations, with focus on the most important stipulations only. One can agree with the principle. I thought the direction was just about right but as it transpired this had not necessarily been underpinned by conceptual arguments that could be defined as professional or principled. It is unquestionably true that by desiring a more concise, or as was often referred to in the debate, a "core" constitution, one can avoid having to answer uncomfortable and undecided questions on the pretext that these would be regulated in the election law, or the sectoral or organisational laws. One of the most absurd such notions came from the government party leader of one of the task forces who claimed that it would be a trifle matter concerning minute details and therefore should not be included in the constitution if – in the event of introducing a second chamber – the new body should be set up as a result of popular general election or on the basis of corporative principle. I cannot help but also include under the same heading the fact that the concept, which was later adopted, contained only a few specific stipulations, and guarantees concerning the constitutional court.

Based on a decision of the Ad-Hoc Committee, experts in the committee drafted the text which was supposed to be the final concept. The concept put before and eventually adopted by the Parliament has the following to say about the Constitutional Court:

Comprising of constitutional judges elected by two-thirds of the parliamentary representatives, the Constitutional Court shall review any piece of legislation for conformity with the constitution for the enforcement of the constitution and the protection of constitutional rights. In case of nonconformity with the constitution the Constitutional Court shall define the relevant legal consequences. No member of the Constitutional Court shall be affiliated to any political party or engage in any political activity besides those that arise from the powers of the Constitutional Court. They are nominated in a manner defined in the constitution. The competence, organisation and operation of the Constitutional Court shall be regulated by a cardinal Act.[33]

Reading this again, the question I am puzzled by is who the instigator was behind the text. How did the author of the text know that the Ad-Hoc Committee's government party members will vote for the concept when the concept did not reflect the opinions of the members according to the memos of the committee and the minutes. There are a number of issues left out which the Ad-Hoc Committee's Justice, Constitution, and Legal Protection task force had given its unanimous support and not even later had anyone questioned these at subsequent committee sessions. The chairperson of the committee suggested that the scope of powers of the Constitutional Court should be left out entirely from the concept, but had no objections against the inclusion of the guarantee rules concerning the election of constitutional judges and many more. Of course we could say that the author of the text might still have known something because the Ad-Hoc Committee – now comprising government party representatives only – unilaterally voted for it to be proposed. What I find puzzling – or should I say that the presentation of the presumed causes would not be compatible with a professional paper – is why the government representatives had changed their minds within only a couple of weeks. This is despite the fact that the government party was being represented in the Ad-Hoc Committee by recognised political experts. Fidesz, for example, was being represented by a former minister of justice, the then chairperson of the Parliament's Constitution, justice and order of business committee (hereinafter: Constitution committee); whereas KDNP was being represented by the deputy faction leader of the group of representatives as the co-leader of the task force. To the meetings of the task force I always invited the departmental heads of the Ministry of Public Administration and Justice, as well as the President's Office with a right of consultation, and they also had no contrary opinions.

5 Debate of the concept of the constitution at the plenary session

In the debate of the constitution concept six people had a say about the Constitutional Court. They included four government party and two opposition representatives given that the radical right-wing party returned to the process of constitutional legislature as opposed to the two other opposition parties. The chairperson of the Ad-Hoc Committee in his exposé described the part of the proposal that would affect the Constitutional Court. In four sentences he explained that the proposal was not an attempt at protecting the exact system of means of constitutional protection as this would be included in a cardinal law.[34]

György Rubovszky, the co-leader of the Constitution and Legal protection task force urged for the adaptation of the regulatory model of the effective constitution and argued that the constitutional court's right of review of local government regulations ought to be transferred to the courts.[35] The third government party speaker, Imre Vas was also in favour of this proposal.[36]

One of the opposition speakers proposed – and not without reason I believe – that the wording of the concept, namely that the Constitutional Court *"shall establish the legal consequences in case of a constitutional breach"*, could not guarantee the right to annulment.[37] In acknowledgement of the dubiousness of the text, one government party representative assured the Parliament that they did not intend to abolish the right to annulment, while the chairperson of the Ad-Hoc Committee – besides denying their intent to abolish the right – argued that the wording was good and proper.[38] Finally, there was one Jobbik representative to speak for the transfer of the right to review local government regulations, actio popularis, and the introduction of procedural deadlines.[39] On the whole, if we were to find a final con-

clusion to draw from this brief debate, we would have to look elsewhere other than the actual clash of arguments. We ought rather to look at the fact that the range of arguments could be presented in a few sentences by simply recalling the above substantive components.

6 Debate of the Fundamental Law

A couple of days before the Parliament had a chance to vote on the long-debated constitutional concept, a representative of the larger government party proposed an amendment to change the rules governing the constitutional process. The amendment was accepted by the Parliament. According to this, it is not the Government to make a proposal for the legislative text on the basis of the accepted concept, but each group of representatives may do this themselves turning the concept into a sort of guideline that helps the work of the factions making the proposal.[40] This way, as was planned by Fidesz, a list of constitutional drafts would have been put before the Parliament and these would have been integrated into one to make the new constitution. The political aim was clear: in order to secure the legitimacy of the new constitution, the opposition had to be lured back into the process of constitutional legislature or at least the "moral battle" had to be won both domestically and across our borders. I must note here that this was also underpinned by the fact that almost without exception, all government party representatives went out of their way to include passages in their speeches to the effect that the opposition parties had left the voters down by abstaining from the debate. For this very reason did the Speaker of Parliament later withhold a portion of the MPs' pay. I am also convinced that the other reason with comparable gravity was that if the opposition walked into the trap, the constitution would have at least formally been based on consensus. The lack of openness to real compromise was evident to all opposition parties already in the Ad-Hoc Committee. In terms of quantity, there seemed to me consensus between the parties about the vast majority of the constitutional provisions. None of the parties questioned the need for the declaration of basic rights, the need for government, courts, prosecution offices, the Parliament, the Office of the Auditor General, or for provisions on the protection of property, even the recognition of ethnicities or an agreement on what Hungary's national anthem should be. Simply put: let's say 80% of the provisions, on which there was general agreement between the parties, the things that are taken for granted in democratic countries, could have been based on recommendations made by the opposition, while the remaining 20% could have come to be integrated in the final version of the new constitution from government party proposals only. This way in terms of its content we would still have a single-party constitution, but would formally look as if based on consensus. The deceitful nature of the proposition is well demonstrated by the fact that all in all one week was allotted for codification and public conciliation for each faction given that the motion was adopted on 7 March 2011 by the Parliament and the deadline for submitting recommendations was 15 March. For this reason none of the opposition parties submitted a draft legislative text, and two out of the three opposition parties still refused to participate in the process of constitutional legislature. It must be noted here that returning to the process was also – and mainly – rejected by the opposition parties because of the total lack of will and desire to reach a consensus by the ruling parties as it was evident in the course of public debate, the drafting of the constitution and the operation of the parliament. The opposition parties had – as is evident from this paper as well – put their recommendations and opinions before the Ad-Hoc Committee, i.e. their opinions and values were known and if there had been a will, these could have indeed been taken into consideration. Their abstinence was meant to be a symbolic gesture since the constitution is not only the most important act but a symbol with prescriptive or normative powers.

But going back to the provisions concerning the Constitutional Court: the ruling parties had devoted one paragraph to the constitutional rules concerning the constitutional court.

The Constitutional Court

Article 24

(1) The Constitutional Court shall be the supreme body for the protection of the Fundamental Law.

(2) The Constitutional Court shall:
a) examine adopted but not published Acts for conformity with the Fundamental Law,
b) review any piece of legislation applicable in a particular case for conformity with the Fundamental Law at the proposal of any judge,
c) review any piece of legislation applied in a particular case for conformity with the Fundamental Law further to a constitutional complaint,
d) review any court ruling for conformity with the Fundamental Law further to a constitutional complaint,
e) examine any piece of legislation for conformity with the Fundamental Law at the request of the Government, one-fourth of the Members of Parliament or the Commissioner for Fundamental Rights,
f) examine any piece of legislation for conflict with any international agreement, and
g) exercise further responsibilities and competences determined in the Fundamental Law and a cardinal Act.

(3) The Constitutional Court shall:
a) shall annul any piece of legislation or any constituent provision which conflicts with the Fundamental Law, within its competence set out in Paragraphs (2), Subparagraphs *b)*, *c)* and *e)* ,
b) shall annul any court ruling which conflicts with the Fundamental Law within its competence set out in Paragraph (2) *d)*,

c) may annul any piece of legislation or any constituent provision which conflicts with an international agreement, within its competence set out in Paragraph (2) *f)* ,
and shall determine further legal consequences set out in a cardinal Act.

(4) The Constitutional Court shall be a body of fifteen members, each elected for twelve years by a two-thirds vote of the Members of Parliament. Parliament shall elect, with a two-thirds majority of the votes, a member of the Constitutional Court to serve as its President until the expiry of his or her mandate as a constitutional judge. No member of the Constitutional Court shall be affiliated to any political party or engage in any political activity.

(5) The detailed rules for the competence, organisation and operation of the Constitutional Court shall be regulated by a cardinal Act.

The original motion contains a number of changes compared with the quoted and finally adopted version.[41] Some of these were only designed to eliminate formal and coherency issues with no effect on content. This includes, for example, that indent c) of section (2) was separated into two, indent c) and indent d) now. From this it followed that section (3) had to change and was now broken up into three indents.[42] Only three amendments actually entailed changes to content. One of them was that section (4) of the draft was omitted. The provision would have transferred the curtailment of the powers of the Constitutional Court concerning laws with a financial and economic subject matter to Article 24 of the Fundamental Law. Although the amending motion did nothing but place the provision under Articles 37 section (4) in the Fundamental Law, what made it a real change in terms of content was that with the amendment in place, the law was now only applicable up to a specified amount of state debt.[43] With that Article 24 was divided into 6 sections as opposed to 5. The other substantive change was that in addition to a quarter of the Government and parliamentary representatives, the commissioner of fundamental rights was also given the right to initiate ex post control.[44] This had huge significance later when after the adoption of the Fundamental Law the constitutional court rulings could almost only be initiated through submissions of the ombudsman only. The ombudsman became the main guardian of the Constitution. Finally, the third substantive amendment changed the number of constitutional judges from eleven to fifteen.[45]

At the Parliament's plenary session, the president of the Constitutional Court also rose to speak. In his speech, he repeated the proposals the Ad-Hoc Committee sent him and which I described before. A new element in his speech was that he was in favour of ruling out the re-election of constitutional judges and the extension of their mandates. It was in the period between the sending of the proposal and this speech that the powers of the Constitutional Court were curtailed as I described above. In this respect, the president was clear in his expressions: *"The chances of effective constitutional protection would suffer if the new Constitution – in approval of the proposal made to this aim – would uphold the curtailment of the Constitutional Court's powers as was accepted last November... In the course of ex post review of the legal regulations, there are two main requirements constitutional judicature must meet. One of them is that constitutional court control be extended to all legal regulations without consideration for what they regulate. The other one is that any legal regulation that is contrary to the Constitution should be declared null and void by the Constitutional Court. The curtailment of powers in November was without exception in Europe and its continued upholding is unjustifiable.*[46]

The parliamentary debate was interesting. Being the keynote speaker, the faction leader of the larger ruling party highlighted the provisions affecting the Constitutional Court. His assessment was that opposition criticism did make a difference after all, and if the opposition parties had the ability of insight, they would notice that in consideration and acceptance of the criticisms they were about to accept a completely new regulation. It is not that they were increasing or decreasing the powers, but that they were giving it new meaning. It was his belief and conviction that these did not weaken, but strengthen the Constitutional Court.[47] As far as absurdity goes, it really was an exceptional delivery.

The Fundamental Law was debated in more than 44 hours over a total of nine sittings by the Parliament including general and detailed debates, the closing debate and voting. Adding up the length of time each representative devoted to the Constitutional Court, it transpires that approximately one hour was spent discussing matters concerning the Constitutional Court. This really cannot be considered much but it is still double that of the time devoted to justice. To sport, for example, the representatives devoted much greater time.[48] Furthermore, it really is not timing, but the superficiality of the debate that gives us real cause for real concern. The two ruling party representatives did nothing but provide an objective description of (read out) the specific provisions of Article 24.[49] The representatives of the opposition parties – and as two parties had left the Parliament session, actually this meant Jobbik – criticised the curtailment of the Constitutional Court's powers, termination of the *actio popularis*, extension of the duration of constitutional judges' mandates, in other words, "cementing Fidesz's appointees", and considered the idea of allowing individual members of parliament to apply to the Constitutional Court only if one-fourth of all MPs signed the submission as unacceptable. In their opinion this was another sign of removing governmental checks. Mention was also made of the costs incurred by the increased number of constitutional judges.[50] What was, however, even more interesting is that three representatives of the government party, including the chairman of the Ad-Hoc Committee, openly and clearly criticised the maintained practice of curtailing the powers of the Constitutional Court.[51] Unfortunately, to no avail. And once the Parliamentary discussion is

mentioned, I think reference should also be made of the fact that none of those who moved a motion replied to the questions raised in connection with the Constitutional Court.

The Fundamental Law adopted significant substantive changes. These alterations might be analysed from various points of view: the extent of changes caused in the operation of the Constitutional Court, and the effects of the new powers and competences on the judicial practice. Perhaps, this will have its importance felt at a later date, just as the Constitutional Court's interpretation of the provisions of the new Fundamental Law. Every element in the new model – for instance, the constitutional appeal – has its examples in other European legislations, and literature, while in Hungary so far there has been no such practice worth analysing. For my part, as seen below in my analysis of the cardinal law, I would rather confine myself to the evaluation of the provisions that regulate the public law status of the Constitutional Court, its relations to the legislature, the executive and the judiciary, and the external and internal considerations of the checks and balances. Meanwhile it is worth looking into the reasons why the constituent power picked exactly this model.

It is well-known that the second Orbán cabinet used legislative amendments and a related staffing policy that serves the same purpose in order to refashion the public law system to ensure the widest possible elbowroom for the government and the government majority in Parliament, or in other words, to do away with the governmental checks. In my opinion the transformation of the rules regulating the Constitutional Court served the same purpose. And this is obvious. As I have mentioned, one can, of course, analyse each provision separately if it serves development or not, however, I think the underlying reason for the transformation of the system elements was different. The governing majority approved only those of the proposed changes which served to weaken the counterbalancing role of the Constitutional Court vis-à-vis the government.

Article 24 certainly offers the benefit that it was not codified with the philosophy of a "small" constitution in mind. Nevertheless, regulation remains insufficient. Numerous guarantees which had been unanimously supported by the competent working group of the Ad-Hoc Committee and proposed by the Constitutional Court to be regulated in the Constitution were omitted from the Fundamental Law. For instance, part of the competences are included, however, certain competences required in the constitutional review proceeding are only regulated in the cardinal law. Previously, it was a clear understanding that all competences and powers should be regulated in the constitution.

Perhaps the most profound change was the abolition of the *actio popularis*, despite the fact that in the Ad-Hoc Committee each faction recommended its retention. Undoubtedly, the fact that irrespectively of being affected or not, anyone could request the constitutional review of any statute caused massive workload for the Constitutional Court. This rule resulted in an enormous amount of cases in arrears, and there was a high number of pending submissions the Court had not started to discuss for many years. The *actio popularis* was a peculiar institution of the change of regime: it was instrumental in clearing the legal system, and survived for more than twenty years on justification that everybody is interested in having constitutional statutes. Many of the Constitutional Court's milestone decisions were born of motions submitted on the basis of this regulation. Nevertheless, the opportunity of removing this rule from the constitutional legislative procedure may, of course, arise. So much the more as the president of the Constitutional Court also recommended it. It must be seen, however, that in this government cycle this remained the principal instrument used by opposition parties and social and interest representation organisations against the government. The two-thirds majority in Parliament allowed the government to codify even the constitution without any opposition. However, capitalising on the opportunity provided by the *actio popularis*, numerous resolutions were adopted by the Constitutional Court to repeal statutes of major account. Since the entry into force of the new Fundamental Law, this opportunity is no longer available.

In addition, only those of numerous European examples were transposed that offer the currently most favourable solutions for the government. Merely one-fourth of the MP's were entitled to initiate ex post constitutional review proceeding. And only the larger governing party has the required number of representatives. The two democratic opposition parties do not have as many as required even if they are added up. This means that the Socialist Party and the radical left could apply to the Constitutional Court only if they joined forces. Two parties so hostile that one of them openly considers the other as anti-Semitic and anti-Democratic, while the other sees the first as its main enemy and a criminal organisation so much so that it wants to expel its representatives from Parliament, moreover, and has submitted several amending proposals to Parliament to this end. In all likelihood there is not chance for a joint motion by these two parties. In discretional cases, say in reference to a high priority national interest, a joint motion might perhaps be made, but regular cooperation is ruled out. Even if these two factions comprised a high number of pragmatic politicians, co-operation would certainly be unacceptable for the constituents of both parties and drastically reduce their support. The time that has passed since the entry into force of the Fundamental Law has proved the above assumption right: not a single joint motion has been made. The constitutional review of the acts passed by Parliament on the initiatives of opposition parties and interest representations has practically ceased to exist.

The draft triggered serious criticism. Perhaps, for the most part this was the reason – in addition to the opinion expressed by the Venice Commission – for the filing of an amending proposal that recommended the assignment of the right of motion to the ombudsman. Following this, practice took an interesting turn. Parties and civil society organisations apply to the ombudsman and request him to exercise his right of motion in certain cases. And in con-

trast to the previous practice, the ombudsman does indeed regularly exercise this right. Thus the ombudsman has become one of the most important protectors of constitutional operation. Although this practice is welcome, in a theoretical perspective and over the longer term it is unfortunate, as the ombudsman cannot assume the task of opposition parties.

Perhaps, the constitutional appeal is the only new solution approved in an interest other then the concentration of powers. Many say that this was also accepted merely as a concomitant of repealing the *actio popularis*. It is also inevitable that this new solution does not have a profound effect on the government's elbowroom. Not only because an appeal is only submitted in individual cases, but also because the judicial procedure must previously be followed, and except for a few exceptions, this usually takes much longer time than the government's term. However, it is interesting to see that in the early phase of constitutional legislation, the representatives of the governing parties did not support the opposition's motion at the extension of the constitutional appeal.

The headcount of the Constitutional Court was increased from 11 to 15 by the Fundamental Law. This is another change that does not leave any criticism if it is taken out of its legislative context. This was proposed by the president of the Constitutional Court as well as the Institute of Law of the Hungarian Academy of Sciences, and the workload expected to increase on account of the new power, the constitutional appeal, may also justify the change. However, the government's staffing policy is well-known, just as in the case of the above analysed change in the nomination system of constitutional judges. As a result of the change, during the term of the second Orbán cabinet the governing parties alone nominated only one person less than the total number previously in office. Thus proportions changed considerably within the Court. In view of the fact that as a result of the former consensual nomination rules, several of the constitutional judges currently in office had been also been nominated by Fidesz-KDNP, hardly any judge elected as a nominee of today's opposition have been left. This presents considerable opportunity for the Constitutional Court to adopt decisions to the government's liking. And if the past of the newly appointed five constitutional judges – analysed below – are taken into consideration, the previous assumption can certainly not be proved wrong. The fact that after all this their mandate is increased from 9 to 12 – and this change in itself cannot be criticised solely on a theoretical basis, if taken out of the social context – stabilises the altered composition over the longer term. Although for the reasons given above, I utterly agree with the exclusion of re-eligibility, in light of the above it has no relevance whatsoever for the separation of powers, as no government expects to stay in power for a term exceeding 12 years.

At this point it is worth recalling for a moment that agendas of the Ad-Hoc Commission sessions included several proposals, also supported by the governing parties, which did not fit the concept of curtailing the Constitutional Court's powers to control the government. Such included for instance the retention of the *action popularis,* or the proposal for the new Constitution to allow the Constitutional Court to temporarily suspend the applicability of a statute found to be in conflict with the constitution. Not a single proposal of this approach has been incorporated in the Fundamental Law.

Finally, maintenance of the October 2010 repeal of powers is the most obvious giveaway of all. The fact that it is not regulated in the article that discusses the Constitutional Court but 12 articles later does not change the essence. Neither does the fact that it was subjected to preconditions. The reason is that obviously for everyone, the condition will not materialise during the government's term of office, and consequently, the withdrawal of powers will remain effective.

A few months after the adoption of the Fundamental Law but still before its effective date Parliament approved a private member's bill filed by 10 Fidesz representatives on the Temporary Provisions of Hungary's Fundamental Law, which was then incorporated into the Fundamental Law.[52] Article 27 of the motion reads: *"Article 37 (4) of the Fundamental Law applicable to acts that are promulgated in a period when public debt exceeded half gross domestic product, shall remain applicable when public debt no longer exceeds halt gross domestic product."* The detailed justification of the provision merely quotes the regulation adding the words *"The temporary provision is about".* This supplementary rule further reduces the powers and practically means that many the financial and economic acts approved during the Orbán cabinet cannot be reviewed many years later in the framework of a subsequent review.

7 Election of constitutional judges – staffing issues

One of the simplest and undoubtedly most efficient method for the concentration of powers is the executive power's reduction of the number or perhaps powers of supervisory organisations or independent constitutional organisations overseeing the government, or the appointment of persons whose loyalty is unquestionable, or at least likely, to serve as their heads. If the latter is impossible, statutory amendments will pave the way for it. Although there were examples of the termination of independent powers and constitutional organisations or the curtailment of their competences in the case of the Constitutional Court and the Budget Council, membership in the European Union fortunately leaves relatively little room for their implementation, which has made up for the lack of self-control in Europe in several cases. However, a government supported by two-thirds of the votes has ample opportunities to appoint loyal leaders.

The two most important elements in Fidesz's staffing policy are gratitude and revenge. These are used predictably and consistently. It is publicly known that the governing party pays special attention to protecting the people who are faithful to them, and if the opportunity is given to bring them into high posi-

tions to reward them. This applies to politicians who are unconditionally loyal to the party president, as well as professional, artists, sportspersons and business people openly take up the cudgels for the party. Thousands of examples could be quoted here, and if one looks at the list of companies given preference in business life, whether at the level of local governments or the state, or the curriculum vitae of the heads appointed or elected to significant positions, or say, the list of those who have been awarded or granted the Kossuth Prize, can verify this assumption. On the other hand, those who are considered traitors meet with difficulties everywhere. This policy is not unreasonable: its message is that it is worth remaining loyal to the party, – and more importantly – even in hard times, however, it is perilous to oppose it, as the party leadership does not forget. This is why the governing party could have access to information and influence public administration or the police in several cases even in opposition. I know that many oppose this idea, but I think political "gratitude" is natural, and what is more, there is nothing to condemnable in it. Not because of a simple return of a favour, but because it is just natural and fitting that a political party prefers to have those people in high positions who it can rely on, who shares its ideas. The problem with the governing party's approach is that the professional background and suitability for a particular position are unimportant considerations in certain cases and are ranked behind loyalty to the extent that it results in decisions that are incomprehensible and displeasing for outsiders. Unfortunately, an overview of the lives of constitutional judges we must admit that they are no exceptions either.

The rules of nominating constitutional judges were changes as described above. As a result, right from the moment the second Orbán cabinet took up office, exclusively the nominees of the governing parties were granted the positions of constitutional judges. Altogether seven of the fifteen positions. This alone is sufficient for doubting the impartiality of the Constitutional court. However, it is worth inquiring into the past record, frame of mind and professional qualifications and achievements of the constitutional judges. Disregarding a few exceptions, so far the usual practice was that university professors and scholars of academic and scientific records are elected for this position.

Right after the altered regulation entered into force, Parliament elected two constitutional judges in the first round. One of them was the former minister of the head of government's office. Many thought that not even the statutory preconditions of his election were in place, as despite the fact that he was a well-known political scientist, he has never worked as a lawyer or solicitor. The person elected as the other judge is very interesting. Previously, he was a representative of the Socialist Party and after a few years he became a constitutional judge. Once his mandate was over, and the Hungarian Socialist Party, which originally nominated him refused to repeatedly nominate him – in an otherwise failed nomination procedure – because a significant part of the MPs considered him as a "traitor" on account of his previous decisions made as a constitutional judge. Moreover, many were convinced that he had agreed with Fidesz, a party in opposition at that time. In any case, in Socialist circles he was blamed for having convinced the Court, as a presenting judge, that the calling of the so-called social referendum was compliant with the Constitution, and this had a major part in the defeat of the Socialist government. Following such preliminaries, he was elected by Fidesz to act as a constitutional judge, and highlighting this example he gave voice to their commitment to democracy because they elected a former Socialist MP. Actually, everybody was well aware of the fact that this nomination was far from being a gesture towards the Socialists, rather it was the reverse.[53]

In the next round five constitutional judges were elected to increase the number on the board.[54] One of them was an MP representing Fidesz and the current chairman of the Constitutional Committee, former Minister of Justice in the first conservative cabinet. He has never done scientific research, only two publications of less than ten pages on the aggregate are known to have been written by him. Before he became a politician, he had worked as a lawyer. He is considered as one of the most radical adversaries of the former Socialist government. He is less absorbed in cases, rather pragmatic and practical. Based on his publication and his political statements, he has ideas similar to Béla Pokol, a simultaneously elected constitutional judge: he prefers a strong, united government operating without effective checks and balances.

The other constitutional court is known in professional circles as Fidesz's standing lawyer and legal representative. From the cases undertaken by a lawyer, no conclusion can be drawn on the lawyer's political affiliation, irrespectively of the customer. However, the standing representation of Fidesz's leaders (the current PM, President of the Republic and Parliament's spokesperson) for over a decade presumes personal confidential relationship. If the constitutional judge's rightist affiliation would not be widely known, his confidential relations with the three most influential participants of legislation assigned the right of direct motion to the Constitutional Court are not conducive to maintaining the appearance of independence. It is also known that Péter Szalay also assisted the governing party in the preparation of acts. As an ocular demonstration of this fact, both at the Committee meeting and at the plenary session during the conceptual discussion of the constitution, the chairman of the Ad-Hoc Committee mentioned him by name and thanked him for his contribution to the compilation of the material and concept development, made as an invited expert. It is interesting that one of those mentioned by the chairman by name in addition to the ex post constitutional judge was pretty soon appointed as rector of the National University of Public Service (with a university reader's title), and the other was appointed first deputy to the Prosecutor General.[55]

In the autumn of 2006 a series of demonstrations were made against the incumbent Socialist government on several occasions, at times changing over

into violence. Evaluations vary, but these events are of political prestige for both the previous and the current government. A high number of anti-government demonstrators were detained and put under arrest in the first instance. The investigating judge of the Court of Budapest who adopted the highest number of rulings overriding the orders of detainment on remand against anti-government demonstrators and terminated forceful measures was now appointed to act as a constitutional judge. The chairman of Parliament's Human Rights Committee and the sub-committee investigating the state's infringements on political rights between 2006 and 2010, and especially in the autumn of 2006, introduced the judge, who subsequently became a constitutional judge, on her hearing: *"Allow me to add that acting as head of the Board of Second Instance at the Court of Budapest, Madam President was one of those judges who, in contrast to those proceeding in the first instance, had a highly positive role primarily in the review and overriding of the rulings of first instance that ordered detainment on remand, and owing to the work of the council under her control a great many people could were released after a few weeks from the pretrial detention ordered without grounds."*[56] The constitutional judge's conservative commitment and open antipathy to Socialist governments is a fact I myself have personally experienced.

Béla Pokol, who was an MP representing and, for three years, faction leader of the Independent Small-Holders' Party, a coalition partner of Fidesz during the first Orbán cabinet, have been nominated for constitutional judge by various right-wing parties on numerous occasions. For reasons of his convictions unacceptable for the left, he was always flatly rejected. From among his ideas, the government probably definitely sympathised with Pokol's adherence to the unified state, his disbelief in the operation of the separation of powers, and his conviction that the opposition parties and the freedom of press were sufficient to control and counter-balance the government. In his opinion, the Constitutional Court is not a forum o exercising control over legislation in the interest of enforcing the fundamental rights, but rather as a kind of a dogmatic consultant and legislation preparatory assistant to Parliament. It is also commonly known that no constitutional judge nomination procedure can start without Béla Pokol. Now he has become a constitutional judge. Several MPs – including me – consider his nomination as a favour done to the radical right. This is confirmed among others by the fact that at a press conference the vice-president of Jobbik announced that they supported only Béla Pokol of all nominees, as his professional work "was in agreement with the ideology of Jobbik and the opinions of the party".[57] During the nomination procedure and his election, many people, including non-politician public figures voiced their indignation in public. This is because Béla Pokol published an idea of his in the open letter to the Hungarian Helsinki Committee, proposing that the effect of the act on equal treatment should be suspended for private persons e.g. restaurant owners) *"if based on preliminary experience in the particular settlement the chance of increased criminal activity has become a generally established custom among people belonging to the national or minority determined in public opinion […] In case someone belongs to this minority, during deliberation of the complaints, the Authority of Equal Treatment should always take the preliminary experience of the affected settlement as a basis."*[58] In practical terms this sentence means that he considers it a possible that the Roma are expelled from catering units in certain settlements, i.e. the discrimination of people on the basis of their ethnic origin. It must be admitted, that in European countries a person of such ideas is customarily not elected as a constitutional judge.

Finally, Egon Dienes-Oehm was elected as the fifth constitutional judge as a favour done to KDNP. The smaller governing party had made numerous attempts at his nomination. He is a definitely conservative person, but at least he is an indisputably recognised professional.

The president of the Constitutional Court, previously nominated to the Court by the conservative parties, was re-elected.[59]

After the number of judges had been increased, the Constitutional Court adopted several resolutions. According to the experience after the election of the first two judges it was impossible to evidence if party preferences eventually influenced the decisions of any constitutional judge. However, in the case of the five constitutional judges elected in the second round, both the content and the arguments included in the justification of dissenting opinions are clearly indicative of sympathy with the legislator.[60] When the resolution declaring the reduction of pensionable age of judges to be in conflict with the Constitution was adopted, the outcome was really interesting. The constitutional judge elected before the Orbán cabinet was formed took a stand against this regulation's compliance with the Constitution, all constitutional judges elected after the cabinet formation thought it was in agreement with the Constitution. Thus the act that constitutes a matter of prestige personally for the Prime Minister was declared to conflict the Constitution by a single vote.[61] Naturally, the time that has passed up to now is still very little to allow us draw sufficiently grounded conclusions. In my opinion, the new situation and composition implies the opportunity of deciding matters on the basis of party preferences – especially after an eventual change of government – but there is an equal chance for the development of the two poles on the basis of considerations other than ideology – and there have been numerous promising examples of this so far –, in a situation when constitutional judges sensitive and indifferent to their professional reputation oppose one another.

Developments in this issue are of particular account because according to the Fundamental Law the Constitutional Court must interpret the Fundamental Law in agreement with the achievements of our historical constitution.[62] As the law historians are not in agreement with one another in picking which historical laws form the basis of the historical constitution, this regulation provides the Court with a scope of inter-

pretation that is unusual in a state under the rule of law. I think there is no need to further detail that if a government of a different ideological basis comes to power, what elbowroom is provided by all this to a Constitutional Court of this composition.

8 Cardinal law about the Constitutional Court

The cardinal law on the Constitutional Court was filed by the Constitutional Committee to the president of Parliament.[63] The most important provisions of the bill in terms of checks and balances are determined in the Fundamental Law. The conceptual changes formulated there are also reflected in the cardinal law. This was emphasised on several occasions during the parliamentary discussion by the representatives of both the governing and the opposition parties. The criticism voiced by the opposition parties was also directed to a significant extent at the provisions of the Fundamental Law. Moreover, the MPs inserted the cardinal law in the 15-month legislative procedure left that preceded the filing of the bill and was left for removing the checks and balances. Several MPs explained that although the proposal was not bad on professional terms, the transposition of the provisions from the Fundamental Law and the legislative purpose made it unacceptable. An act cannot be interpreted out of context. During the discussion the MPs of the governing parties stressed that the statute was based on broad consensus, supported by the president of the Constitutional Court, and the solutions criticised by the oppositions were actually in place in numerous countries. They endeavoured to disprove the assumption that the weight of the Constitutional Court had reduced and the opportunities of checking the work performed by the government and Parliament have narrowed down. Disregarding the criticism of the general provisions and those that necessarily followed from the Fundamental Law, the opposition-party criticisms directed at the specific sections of the cardinal law could be classified into some 8-10 topics, and recommendations were also received for the reformulation of changes made previously but adopted during the Orbán government – including the regulation of nominating constitutional judges. The analysis is worth continuing on the basis of the parts that are relevant for our subject matter (six topics). I agree that these are the effective provisions that bear relevant for the separation of powers in the act, and do not follow from the Fundamental Law.[64]

The most important change is that in its closing provisions the act cancelled the ongoing proceedings aimed at ex post constitutional review and initiated in order to eliminate unconstitutionality, manifest in default.[65] Those that pursuant to the new provision of the fundamental law do not originate from the beneficiary, in other words, practically all of them. This concerned about 1600 cases. Undoubtedly, professional reasons do support the claim that nobody could act in the future in powers that have been terminated, but this concern could have been fended off by a clause of the opposite content. During the hearing of a parliamentary committee the president of the Constitutional Court admitted and also made reference to it at a plenary session that – although he agreed with the recommended solution – – it was a political decision.[66] I also agree that it was. A significant number of cases pending before the Constitutional Court were aimed at the review of statutes that were of pivotal for the government. Several motions attacking regulations of the media, private pension funds, welfare and social matters or labour and employment relations, filed by MPs, interest representations, trade chambers, trade unions and legal aid organisations before they were judged, by virtue of the law. Thus the risk of decisions unfavourable for the government being adopted was eliminated. Although the next provision in the temporary regulation allows the party who submits the motion to maintain the motion if personally affected, in the most important cases this was hardly viable. In my case none of the three motions I moved as an MP were allowed to be maintained.

The opposition parties disapproved that the act failed to set specific procedural deadlines. As a matter of fact, without deadlines in the past the Constitutional Court did use the opportunity to delay the evaluation of motions on sensitive issues for years in numerous cases. Such was, for instance, the motion on the constitutional review of actual life imprisonment. However, it is also undeniable that in most European countries no specific deadlines are set. I think it is better to set them. Especially when the agenda, the schedule of placing cases on the agenda and the fixing of discussion dates are set by the president pursuant to the new act.[67] And for the subject-matter of our topic this is the most important element in the president's increased powers. If there is no specific procedural deadline, the commencement of discussion and decision-making can be delayed at the discretion of a person, and is a personal decision-making competence. If the resolution ruling the forcible retirement of judges unconstitutional was adopted before nearly 200 judges were dismissed, the situation would be completely different. Those judges would have remained in office. But as the decision was adopted subsequently, they can probably claim no more but indemnification. Delays in placing motions on the agenda may have nearly as significant results in some cases as the establishment of unconstitutionality. This provision may have a serious effect on developments in the system of checks and balances within the Constitutional Court.

The cardinal act introduced the mandatory use of a lawyer for moving a constitutionality motion.[68] I agree with the president of the Constitutional Court who pointed out during the parliamentary discussion that the introduction of the mandatory use of lawyers was questionable. As he stressed: *"It must be ensured that no one is prevented from exercising his rights for reasons of financial difficulties. Therefore it is extremely important to allow legal protection and legal aid organisations acting free of charge to attend to the legal representation required in the act."*[69] The original motion included the provision allowing the performance of legal representation in the framework of the act on legal aid, however, an amending pro-

posal made by a government MP removed this provision from the act making reference to *"budgetary limits"*.[70] In an analysis of checks and balances this may seem to be a marginal question, however, the trend that in several amending proposals the state places the relations between state and citizen on a different footing is noticeable: the citizen – whether acting as a businessperson, a complainant, an accused or an employee etc. – is increasingly at the mercy of the state.[71] This change is certainly worth mentioning as part of this trend.

For the very same reason it is worth having a closer look at two special rules of the constitutional appeal. In the original version of the motion the so-called genuine constitutional appeal, which is based on court ruling, was allowed in the case of each decision, however, an amending proposal filed by a government MP limited its scope to decisions effectively-adopted in the subject-matter of the case. In addition to the fact that this resulted in the exclusion of the constitutional appeal in one of the most important issues, namely, the application of forcible measures, it was also ensured that the constitutional appeal is not applicable in the overwhelming majority of the highly sensitive political cases started during the term of the Orbán cabinet on the basis of reports by the government commissioner for holding public servants to account. If lawful rights are infringed directly by the application or entry into force of statutory regulations that are in conflict with the Constitution, without court decision, and if there is no legal remedy in place for the infringement, or the party moving a motion has already used all of the legal remedies available for him, in an exceptional case the act allows initiating a constitutional appeal. However, no objective, lawful conditions have been established for such "exceptional cases". This allows room for the rejection of the proceedings in any given case on the basis of subjective decisions, at best in reference to a decision outlined in the procedural rules.[72]

No one has objected to the fact, and I also agree that – albeit not the Fundamental Law, – at least the cardinal law assigns the suspension of statutes that have not yet entered into force to the competence of the Constitutional Court.[73]

The act introduces the provision already applied to the Prosecutor General to constitutional judged: when their mandates are over or when they turn 70, elected constitutional judges can remain in office until their successor is elected by Parliament.[74] Thus, the current governing majority can retain at least one-third of the votes in Parliament by keeping the elected constitutional judges in office. I think it is a mere illusion to hope that each officer placed in these highly significant public law status by the current government will perform his or her work with unbroken loyalty for as long as 12 years, nevertheless, the effort made at retaining the officers considered loyal in power is clearly traceable. This regulation was adopted in each single public law position where the work of the government can be assisted or efficiently delayed, if so required.

Every opposition party raised objections against the fact that the act failed to exclude the election of MPs as constitutional judges. It is a logical point, as both the previous and the new acts on the constitutional court excluded those who have been members of the government, heads of state or the senior executive of a party within the past four years.[75] Essentially, the Constitutional Court revises the decisions of Parliament, and therefore conflict of interest in time should have been justified in the case of Members of Parliament as well. In order to enforce the general legal principle that no one should participate in the review of his or her own previous decision, the cardinal law excluded constitutional judges from the evaluation of the motion *"if he or she has participated in the preparatory work, submission, drafting or elaboration of a statute constituting the subject-matter of a constitutional proceeding through his or her effective personal work."*[76] I think this should not have been sufficient, as the prohibition should not have been applied to an MP who "merely" voted for the act, but an amending proposal by a governing party cancelled this limit too. All what is said in the justification is that this case will be sufficiently regulated in the procedural rules.[77] However, the MP does not have any authorisations to influence the procedural rules, as they are approved by the Constitutional Court. Once again, the genuine reason differs from the official justification. Not much earlier an MP from a governing party had been elected as constitutional judge, and several of his bills had been contested before the Constitutional Court. Therefore this is another fine example of custom-tailored legislation.

The cardinal law was one of the few statutes that were effectively prepared and discussed in Parliament. Prior to moving the motion, the Constitutional Committee discussed the bill filed by Fidesz, heard the president of the Constitutional Court and requested the factions, the president of the Constitutional Court, and the Minister of Administration and Justice to submit written proposals for the purpose of the draft.[78] This opportunity was used by the Constitutional Court, the minister and two of the three opposition parties: MSZP and Jobbik.[79] According to the chairman of the Constitutional Committee, 71 comments made by the president of the Constitutional Court, 53 by the Minister of Administration and Justice , 7 by MSZP and 8 by Jobbik were approved.[80] Although I have not checked these figures in an itemised manner, I accept them as a fact. Not a single conceptual or effective proposal filed by the opposition was approved, all of those adopted are more precise statements of the draft. For this reason the proposal may in no way be termed as consensual or even as a text seeking consensus. But as in the framework of its evaluation of the Fundamental Law the European Council's Venice Commission proposed that cardinal laws must be adopted with effort at arriving at consensus, this formality could not be dispensed with. And that was all. It stands to reason that assistance in codification is not exactly the role of opposition parties in legislation, and the Venice Commission is highly unlikely to think of this task when they recommended seeking consensus. The president of the Constitutional Court mainly made textual modifications to make the draft more accurate rather than

conceptual proposals. Thus despite their large number their incorporation into the draft did not result in any change worth mentioning.[81] The minister's package of comments, including recommendations significant for operation but having no effect whatsoever on the public law status of the Constitutional Court or the system of checks and balances for the on nearly 20 pages, cannot be evaluated as a result of consensus seeking, whether the comments were approved or refused. Although it may be praised and criticised for many reasons, disregarding a few provision outlined above, the cardinal law has not brought about major changes in checks and balances. Weakening, or more pronouncedly the intention to weaken them is clearly traceable, however, the real change in the Constitutional Court's status was caused by the described amendments of the Constitution and the passing of the Fundamental Law.

9 Reports by the European Council's Venice Commission

a) Opinion on three questions asked by the Hungarian government

The Venice Commission passed three resolutions affecting the Constitutional Court. The first was adopted on request from the Hungarian government.[82] The main point in the thing is that the government had applied to the Commission with the intention of making a kind of a "pre-emptive strike", since the international sentiment suggested that other forums would have requested the Venice Commission to undertake an analysis of a far wider scope. However, subsequently it turned out that the more detailed analysis could only be delayed but not avoided. The government asked three questions from the Commission in relation to the constitutional legislation. Two of them expressly related to the Constitutional Court: on regarded ex ante constitutional review, namely, seeking the Commission's position on the extension of the scope of persons eligible for moving a motion. The Commission replied that the extension of the scope would unjustifiably politicize the Constitutional Court, and make it a kind of arbitration tribunal in cases between rival Parliamentary groups. And this may undermine the authenticity of the Constitutional Court and the institution of constitutional review altogether. The other question concerned the abolition of the *action popularis.* Citing various European examples the Commission did not raise objections to this governmental opportunity. However, the significance of Hungary's constitutional tradition and legal culture was stressed and they considered it important to have a person who can use this opportunity. After the opinion was published, in an amending proposal moved by the governing parties the ombudsman was assigned the right of ex post constitutional review. Not long after this, in a study several legal scientists thought that this would have no significance whatsoever, as the ombudsman, elected by the governing majority alone would certainly not exercise this right.[83] Based on the activities of the other constitutional organisation, there was a major chance for this, but fortunately, they were mistaken.

b) Opinion on the Fundamental Law

The Venice Commission also analysed the Fundamental Law.[84] In their analysis they made numerous comments on the Constitutional Court. It was pointed out that the Court has had a key role in developing checks and balances ever since 1990. They criticised that Article 24 did not regulate the operation and composition of the Constitutional Court in detail. They disagreed with the changes in the rules of electing the president of the Constitutional Court, namely that in the future the president will be elected by Parliament with two-thirds of the majority instead of the constitutional judges from among themselves. In the Commissions opinion, the latter model represents higher security for the independence of the Constitutional Court. Regarding the extension of the constitutional judges' mandate, the Commission recommended the exclusion of re-election. In relation to with the previous curtailment of the Constitutional Court's powers, – which include the abolition of the review of financial and economic statutes – the Commission gave voice to its sharp criticism.

c) Opinion on the act on the Constitutional Court

In their third analysis the Venice Commission gave their opinion on the cardinal law regulating the Constitutional Court. Overall, the statute was found *"in general well drafted and coherent"* statute.[85] They welcomed the budgetary guarantees, the provision ruling out the re-election the constitutional judges, the ombudsman's right to move motions for ex post constitutional reviews, the introduction of the constitutional appeal to offset the effects of the removal of the *actio popularis*, the mandatory applicability of the Constitutional Court's awards to courts of justice, the fact that the proceedings held before the Constitutional Court are free of charge, and the extension of the mandate of a member of the Constitutional Court up to the election of his or her successor. In addition to the abolition of the *actio popularis* perhaps this was the only constituent praised by the Commission but strongly disagreed by the opposition – for the aforementioned reasons. The Commission welcomed this provision because *"the ability of the Constitutional Court to act is not endangered, even if no new member is elected yet*" . However, just four sentences later – in reference to one of their previous evaluations – the Commission adds: *"Of course, the Venice Commission recalls that prolonging the term of office "should be seen as an exception, so as to prevent it from becoming an institution."*[86] In addition it was highlighted that due to the two-thirds majority they recommended a "mixed" composition of the Constitutional Court, in other words, that only part of the members should be elected by Parliament, and the others should be appointed by other participants of public life, for instance,

the president of the Supreme Court and the President of the Republic. They called the attention to the fact that this required the amendment of the Fundamental Law and unless it is amended any such provision would be in conflict with the constitution – just as the 12-year mandate set out in the Fundamental Law without the opportunity of its extension, and a lower-level statutory regulation cannot include a conflicting rule.

The Commission also made numerous critical comments. In their opinion the provisions regulating the independence of the Constitutional Court and the legal status of its members should have been provided in the Fundamental Law, but at least de act on the Constitutional Court should clearly set out the independence of the Constitutional Court. In order to establish "unworthiness" they considered the incorporation of additional guarantees in the act necessary. They thought the two individual appeals procedures need to be worded more accurately, without narrowing the scope of their application. If the risk of irreparable damage to a person is involved, they an exception for the exhaustion of legal remedies should be provided for. In the Commission's opinion, the ombudsman should be authorised rather than the Prosecutor General to apply to the Constitutional Court seeking harmony between a statute and the Fundamental Law, if the beneficiary is unable to defend his or her rights or the violation of rights affects a larger group of people. The personal remuneration of the president should be regulated, according to the commission, in an act in order to guarantee independence. The regulation of the dissolution of the body of representatives operating in conflict with the Fundamental Law is considered to be inaccurate and insufficient. It was pointed out that free legal aid must also be available in the constitutional legislative procedures, if this is not so, access to constitutional jurisdiction may become completely impossible. Finally, they once again expressed their sharp criticism of the curtailment of the Constitutional Court's powers, adding that the Commission *"regrets and notes with serious concern"* that the curtailment has been maintained. Some of the criticisms do not have any impact whatsoever on the balancing role of the Constitutional Court, and I have given my position on the other part. At this point allow me to highlight tow critical comments not analysed so far but considered as significant.

The Venice Commission thought that the election of the president of the Constitutional Court by the qualified majority of Parliament instead of the constitutional judges pursuant to the new act would reduce independence. Theoretically, this is a legitimate criticism. However, in view of the current composition of the Constitutional Court, even if the president is elected on the basis of the former rules, the election of a nominee of the governing parties would be hardly indisputable. And if the constitutional judges, and more specifically, the constitutional judges nominated by the right wing are considered, the president cannot be considered as a wrong choice either in terms of his professional background or his commitment. I may put it in a way that if the judges picked a president from among themselves, they could hardly select a president who is more suitable for ensuring the appearance of impartiality and having more appropriate professional qualities.

The other comment goes beyond the act on the Constitutional Court. The Commission is of the opinion that the cardinal elements of the act should have been limited to fundamental principles and the important rules related to the subject, while the remaining matters should have been regulated in an act adopted by a simple majority of the votes. The Commission referred to the European Convention of Human Rights, quoting that *"When not only the fundamental principles but also very specific and "detailed rules" on certain issues will be enacted in cardinal laws, the principle of democracy is itself at risk."* The quoted sentence has genuine relevance in a context other than the analysed act. It can be considered as a general problem that the government endeavours to codify the structural reforms and other governmental measures it considers most important in acts requiring two thirds of the votes in order to ensure that the next cabinet cannot change them. The most striking examples of this practice include tax regulations, like the single-rate income tax, which has also been regulated in an act requiring qualified majority. Tax policy is a field traditionally assigned to the competence and responsibility of the elected government. However, the current Prime Minister clearly endeavours to limit the elbowroom of the next government. Although – seeing the trend in his popularity – he might perhaps no longer plan to remain in power for several cycles, by cementing the rules to required two-thirds of the votes and filling all positions with loyal leaders and members who are suitable for slowing and even completely blocking the government and the legislation in a way overarching cycles to have subsequent influence on government. These efforts – far from being new or unprecedented in history – also include everything criticised by the Venice Commission regarding the Constitutional Court in reference to the European Convention of Human Rights.

In its response the Hungarian government rejected every single criticism, in many cases responding to the constitutional issues by budgetary arguments, and did not amend the act on the Constitutional Court.[87]

The Commission's position differs from mine in two conceptual issues. One is the termination of the *actio popularis*, and the other is the extendibility of the constitutional judges' mandates. Theoretically, I would not have a contrasting opinion in any of these two issues. But practice is different. Although the Commission made reference to the fact that their opinions must be interpreted in with other opinions taken into consideration, in contrast to their analyses of other areas, during the analysis of this model of the Constitutional Court, they were thinking in models and standards irrespectively of countries and specific political situations. Although several of their resolutions related to Hungary, just as their consultations performed during their visit of the site, clearly reveal that the rapporteurs and experts of the Commission had precise information on the conditions prevailing in Hungary, their official evaluations are

not always realistic. The protection of democracy in the Member States, a perhaps the most important objective of the Commission, cannot be separated and made irrespective of the currently prevailing political conditions in a country. Certain elements of the opinion expressed by the Venice Commission are indisputable in an ideal governmental model, but are untenable in the case of Hungary. In a country where the appointment of the constitutional judges requires the consensus of the governing and the opposition parties, the extension of the constitutional judges' mandate to the date of his or her successor's appointment does help – along the argumentation of the Commission – the operation of the Constitutional Court. However, in a state where the governing party changes the rules of the nomination procedure and without consensus elects only its own nominees to – in particular, the above described 7 persons – act as constitutional judges, and then retains them in power after 12 years with a one-third majority of the votes, – with knowledge of the government's staffing principles, – the adoption of this rule will not result in the outcome described by the Venice Commission, as the change itself was not motivated by the reason presumed by the Commission. While the altered ruled of electing the president of the Constitutional Court would result in a decision less dependent on politics, in Hungary in view of the changed composition of the Court, it has no impact whatsoever on the current situation. The raison d'être of the *actio popularis* should also be evaluated completely differently in a state where checks and balances work than in a country where half the world calls for demolishing them.

10 Summary

I think an overview of the chronology has not left doubt in the reader in one issue: namely that as a result of the analysed legislative process, the role of the Constitutional Court as a counter-balance has considerably weakened. The conclusion included in the previous sentence – which I believe can be drawn on the basis of this study – is supported by a few assumptions highlighted below to sum up the outcome of my analysis:

Change in the status of the Constitutional Court is part of a process – implemented by the methods detailed in this study – aimed at weakening the checks and balances of governmental work in every field.

At the end of the legislative procedure, numerous conceptually different solutions were born than recommended by the policy makers of the governing party at the beginning of the constitutional legislation. Part of them was clearly modified on the basis of the professional recommendations submitted in the course of legislation. However, it is also clear that with one single exception, – being the ombudsman's right of motion – only those of the great many proposals made for conceptual changes were approved by the government which do not strengthen or increase the Constitutional Court's counter-balancing role relative to the effective regulation. Another part of the changes, however, can be clearly evidenced to aim at reducing the balancing power of the Constitutional Court.

Although the most important international organisations and their officers recommended the adoption of the Fundamental Law and the cardinal law by consensus, none of the opposition parties' conceptual proposals were given support by the governing majority. For this reason none of the opposition parties supported the adoption of the acts aimed at the transformation of constitutional legislation.

Part of the Court's most significant powers – I primarily mean the limitation of the ex post constitutional review of financial and economic statutes – have been altered in a way favourable for the legislator and the government.

The scope of persons entitled to move motions for subsequent abstract constitutional review. With this the opposition parties and interest representations meant to counter-balance the government have been deprived of one of their most efficient means. Although the introduction of a genuine constitutional appeal is a sensible step, in terms of the fundamentals of the separation of powers, it fails to offset the effects of terminating the *action popularis.*

As a result of the extension of the scope of persons allowed to move motions for ex ante constitutional review, the Constitutional Court moved closer to political decision-makers than they used to be, thus providing new powers and competences, unseen so far, for the government and the governing parties to initiate constitutional court procedures.

By changing the nomination system of constitutional judges, the governing parties have removed the compulsion to broker a compromise with the opposition parties from the nomination procedure, and practice has verified that all the vacant or newly created positions of constitutional judges have been filled by their own nominees and none of the opposition nominees were supported. Thus, – as the headcount of the Constitutional Court has also been increased – half of its members were elected during the term of the incumbent government.

In my opinion the strong ties between the new constitutional judges presented in this study, and the governing parties as well as the Prime Minister – and not merely to conservative values – is proved. As a result, the balance of powers within the Court has undergone fundamental changes, and in the decision-making process professional considerations are unlikely to be the strongest motivation for several judges.

Although the legislator took the advice of the Venice Commission at several points, numerous comments considered significant by the Commission for democratic operation were declined and insufficient replies. •

[1] For more information on the process see: Gergely Bárándy: Checks and Balances? 2010 – The year of concentration of power (*Egyenlít* social critique and cultural journal – annex, Vol. IX. April 2011)
[2] Motion No. H/2057 for a resolution of Parliament
[3] 8/2011. (II. 18.) ABH, 1149/C/2011. ABH, 1279/B/2011. ABH
[4] Bill T/189 and supplement T/190
[5] Also see the following speeches from MPs: speech by El d Novák (Jobbik) (speech 264), and speech by Péter Szilágyi (LMP) (speech 266)
[6] Resolution of Parliament No. H/814
[7] According to document T/189/5 in the records of the Government Control Office: II-1/02151-2/2010
[8] Amending proposal before final vote No. T/189/6
[9] Amending proposal before final vote No. T/189/7
[10] Minutes of the Parliament's plenary sessions: 28/06/2010 (session 18) speeches 223-261
[11] See, for example: minutes of the Parliament's plenary sessions: 08/06/2010 (session day 13) speeches 57 and 59
[12] See, for example: Justification of amending motion No T/189/1, speech by Katalin Szili (MSZP) (speech 262), speech by El d Novák (Jobbik) (speech 264), speech by Tamás Gaudi-Nagy (Jobbik) (speech 276): minutes of the Parliament's plenary sessions: 06/07/2010 (session day 12) Speech by Tamás Gaudi-Nagy (Jobbik) (speech 53), speech by Mónika Lamperth (MSZP) (speech 55), speech by Dávid Dorosz (LMP) (speech 61): minutes of the Parliament's plenary sessions: 08/06/2010 (session day 13)
[1] Regarding the debate see, for example: speech by El d Novák (Jobbik) (speech 264), speech by Tamás Heged s (Jobbik) (speech 268), speeches by Gergely Gulyás (Fidesz) (speeches 270 and 274): minutes of the Parliament's plenary sessions: 07/06/2010 (session day 12) speech by El d Novák (Jobbik) (speech 64), speech by László Salamon (KDNP) (speech 65): minutes of the Parliament's plenary sessions: 08/06/2010 (session day 13) minutes of the Parliament's plenary sessions: 28/06/2010 (session day 18) speeches 240-252
[1] Speech by El d Novák (Jobbik): minutes of the Parliament's plenary sessions: 08/06/2010 (session day 13) speech 64
[15] AEB/135/2010. downloaded from: www.parlament.hu/biz/aeb/info/ab.pdf
[16] The minutes of the task forces are not public pursuant to the decision of the Ad-Hoc Committee. Therefore, I am using my own copy of the draft, the original of which was submitted to the committee.
[17] ABH 184/ 2010. (X.28)
[18] Bill No. T/581. After proclamation, known as: Act XC of 2010
[19] See, for example: speech by Péter Szíjjártó (Fidesz): minutes of the Parliament's plenary sessions: 02/11/2010 (session day 41) speech 207
[20] Bills T/1445 and T/1446
[21] Bills T/1445 and T/1446
[22] See, for example: Stumpf, István (Heti Válasz – 29 October 2010); Elek, István: *Open letter to Fidesz Faction Leader* (hvg.hu 27 October 2010); Elek, István: *Erre nem adtunk felhatalmazást* (We Did Not Authorise This) (hvg.hu 4 November 2010), Ákos Péter Bod (nol.hu 2 November 2010, glamus.hu 5 November 2010), *Tölgyessy az Alkotmánybíróság korlátozásáról* (Tölgyessy on the Limitations of the Constitutional Court) (Zipp.hu 2 November 2010)
[23] Speech by János Lázár (Fidesz): minutes of the Parliament's plenary sessions: 02/11/2010 (session day 41) speech 199
[24] Speech by Péter Szíjjártó (Fidesz): minutes of the Parliament's plenary sessions: 02/11/2010 (session day 41) speech 207
[25] Minutes of the Parliament's plenary sessions: 02/11/2010 (session day 41) speeches 198-328
[26] I am making a reference to all opposition speeches in the general debate for their use of similar arguments: minutes of the Parliament's plenary sessions: 02/11/2010 (session day 41) speeches 209-328
[27] Bills T/1445/5 and amending proposal T/1446/4
[28] Minutes of the Parliament's Constitutional, Justice and General Committee: 16 November 2010.
[29] Speech by Tibor Navracsics, Minister of Administration and Justice of Hungary: minutes of the Parliament's plenary sessions: 16/11/2010 (session day 47) speech 49
[30] Speeches by János Lázár (Fidesz): minutes of the Parliament's plenary sessions: 16/11/2010 (session day 47) speeches 57-69
[31] Speech by György Rubovszky (KDNP): minutes of the Parliament's Ad-Hoc Committee in charge of the drafting of the Constitution: 10 November 2010 (AEB-7/2010.)
[32] Speech by László Salamon (KDNP): minutes of the Parliament's Ad-Hoc Committee in charge of drafting the Constitution: 10 November 2010 (AEB-7/2010.)
[33] Motion No. H/2057 for a resolution of Parliament
[34] Speech by László Salamon (KDNP): minutes of the Parliament's plenary sessions: 15/02/2011 (session day 65) speech 18
[35] Speech by György Rubovszky (KDNP): minutes of the Parliament's plenary sessions: 15/02/2011 (session day 65) speech 34
[36] Speech by Imre Vas (Fidesz): minutes of the Parliament's plenary sessions: 16/02/2011 (session day 66) speech 40
[37] Speech by Zoltán Balczó (Jobbik): minutes of the Parliament's plenary sessions: 16/02/2011 (session day 66) speech 56
[38] Speech by Gergely Gulyás (Fidesz) (speech 58) and speech by László Salamon (KDNP) (speech 60): minutes of the Parliament's plenary sessions: 16/02/2011 (session day 66)
[39] Speech by Csaba Gyüre (Jobbik): minutes of the Parliament's plenary sessions: 17/02/2011 (session day 67) speech 118
[40] Amending proposal No. H/2057/2
[41] Of the original proposal see: Article 24 of bill No. T/2627
[42] Amending proposal No. T/2627/64
[43] Amending proposal No. T/2627/59
[44] Amending proposal No. T/2627/64
[45] Amending proposal No. T/2627/63
[46] Speech by Péter Paczolay (president of the Constitutional Court): minutes of the Parliament's plenary sessions: 22/03/2011 (session day 76) speech 31
[47] Speech by János Lázár (Fidesz): minutes of the Parliament's plenary sessions: 22/03/2011 (session day 76) speech 19
[48] See, for example: minutes of the Parliament's plenary sessions: 22/03/2011 (session day 76) speeches 12-100; 23/03/2011 (session day 77) speeches 1-177; 24/03/2011 (session day 78) speeches 1-147; 25/03/2011 (session day 79) speeches 1-139; 28/03/2011 (session day 80) speeches 39-41; 01/04/2011 (81. session day) speeches 19-181; 04/04/2011 (session day 82) speeches 41-105; 11/04/2011 (session day 83) speeches 27-37; 18/04/2011 (session day 84) speeches 135-161
[49] Speech by Imre Vas (Fidesz): minutes of the Parliament's plenary sessions: 22/03/2011 (session day 76) speech 93. Speech by Sándor Farkas (Fidesz): minutes of the Parliament's plenary sessions: 25/03/2011 (session day 79) speech 62. Speech by Csaba Nagy (Fidesz): minutes of the Parliament's plenary sessions: 01/04/2011 (session day 81) speech 78
[50] Speech by Zoltán Balczó (Jobbik) (speech 23), speech by Tamás Gaudi-Nagy (Jobbik) (speech 25): minutes of the Parliament's plenary sessions: 22/03/2011 03 22 (session day 76). Speech by Dóra Dúró (Jobbik): minutes of the Parliament's plenary sessions: 23/03/2011 (session day 77) speech 20. Speech by El d Novák (Jobbik): minutes of the Parliament's plenary sessions: 24/03/2011 (78. session day) speech by 92. Speech by Csaba Gyüre (Jobbik): minutes of the Parliament's plenary sessions: 25/03/2011 (session day 78) speech by 112. Speech by Gábor Staudt (Jobbik) (speech 68), speech by Tamás Gaudi-Nagy (Jobbik) (speech 108), speech by László Nyikos (Jobbik) (speech 172): minutes of the Parliament's plenary sessions: 01/04/2011 (session day 81). Speech by Csaba Gyüre (Jobbik): minutes of the Parliament's plenary sessions: 02/04/2011 (session day 82) speech 88
[51] Speech by László Salamon (KDNP) (speeches 8-10), speech by Béla Túri-Kovács (Fidesz) (speech 34): minutes of the Parliament's plenary sessions: 23/03/2011 (session day 77). Speech by Márton Braun (Fidesz): minutes of the Parliament's plenary sessions: 01/04/2011 (session day 81) speech 152
[52] Bill No. T/5005
[53] Resolution of Parliament No. H/814 and the enclosed curricula vitae of István Stumpf and Mihály Bihari, submitted for the purpose of their election
[54] Resolution of Parliament No. H/3612 and the enclosed curricula vitae of Egon Dienes-Oehm, István Balsai, Béla Pokol, Péter Szalay and Mária Szívós for the purpose of their election. On the professional and political evaluation of these candidates' past, see also: Public report of FIDESZ-KDNP's five nominees for candidate constitutional judges.. www.ekint.org/ekint_files/File/nyilv%E1nos%20jelent%E9s_ekint_tasz_final.pdf
[55] Speech by László Salamon (KDNP): minutes of the Parliament's Ad-Hoc Committee in charge of the drafting of the Constitution: 14 December 2010 (AEB-8/2010.). Speech by László Salamon (Fidesz): minutes of the Parliament's plenary sessions: 2011 02 15 (session day 65) speech 18
[56] Human, Minority, Civil and Religious Rights Committee of Parliament, minutes of the sub-committee investigating violations of political rights by the government between 2006 and 2010, with special focus on the autumn of 2006: 1 September 2010
[57]www.hvg.hu/itthon/20110627_pokol_bela_jobbik
[58]www.atv.hu/belfold/20110624_kitiltana_az_ettermekbol_a_ciganyokat_a_fedesz_alkotmanybiro_jeloltje,
www.hvg.hu/itthon/20110623_pokol_bela_helsinki_bizottsag

[59] Resolution of Parliament No. H/3686 and the enclosed curriculum vitae of Péter Paczolay for the purpose of his election

[60] On an analysis of these matters and decisions see, for example: Dóra Ónody-Molnár: Things you can get away with? and Károly Lencsés: Still learning the rules. *Népszabadság* Vol. LXX. No. 157/2, 6 June 2012, Friday. On the rhetoric of dissenting opinions see, for example: ABH 166/2011. (XII. 20.) – the dissenting opinion of Mária Szívós

[61] ABH 33/2012 (VII. 17.)

[62] The Fundamental Law of Hungary, Article R paragraph (3)

[63]Bill No. T/4424

[64] See: minutes of the Parliament's plenary sessions: 11/10/2011 (session day 118) speeches 21-165; minutes of the Parliament's plenary sessions: 27/10/2011 (session day 125) speeches 197-209, minutes of the Parliament's plenary sessions: 14/11/2011 (session day 133) speeches 234-242, minutes of the Parliament's plenary sessions: 15/02/2011 (session day 65) speech 18, minutes of the Parliament's Constitutional, Justice and General Committee: 27 September 2011, 3 October 2011, 24 October 2011, 2 November 2011, 14 November 2011, minutes of the Parliament's Human, Minority, Civil and Religious Rights Committee: 5 October 2011, 25 October 2011. Amending proposals No.T/4424/6, T/4424/19, T/4424/21, T/4424/23, T/4424/31, T/4424/33, T/4424/34, T/4424/44, T/4424/45, T/4424/47, T/4424/50, T/4424/51, T/4424/54, T/4424/61, T/4424/63, T/4424/116, associated amending proposals No. T/4424/130, T/4424/134, T/4424/136, T/4424/137 and amending proposal before final vote No. T/4424/158

[65] Act CLI of 2011 on the Constitutional Court, Article 71 (1) and (2)

[66] Speech by Péter Paczolay (president of the Constitutional Court): minutes of the Parliament's plenary sessions: 11/10/2011 (session day 118) speech 26

[67] Act CLI of 2011 on the Constitutional Court, Article 17 (1)

[68] Act CLI of 2011 on the Constitutional Court, Article 51 (2)

[69] Speech by Péter Paczolay (president of the Constitutional Court): minutes of the Parliament's plenary sessions: 2011 10 11 (session day 118) speech 26

[70] Amending proposal T/4424/126

[71] For more details see: Bárándy, Gergely and Bárándy, Aliz: Paradigm change in criminal law? On the reasons for the impairment of defence rights and increase in prosecutors' rights. In: Studies in honour of Prof. Mihály Tóth on his 60th birthday. Pécs, 2011.

[72] Act CLI of 2011 on the Constitutional Court, Article 26 and 27, amending proposal No. T/4424/116

[73] Act CLI of 2011 on the Constitutional Court, Article 61 (1) and (2)

[74] Act CLI of 2011 on the Constitutional Court, Article 15 (3)

[75] Act CLI of 2011 on the Constitutional Court. Article 6 (4)

[76] Bill No. T/4424, Article 62 (2)

[77]Amending proposal No. T/4424/41

[78]See: minutes of the Parliament's Constitutional, Justice and General Committee: 27 September 2011

[79] Written opinions are not public. Some of them were assigned file numbers while others were not. The proposals of the two parties were assigned file numbers: AIB/108-1/2011 (proposal by MSZP), AIB/108-3/2011 (proposal by Jobbik) and proposal No. AIB/108-2/2011 of the Constitutional Court. No file number was assigned, however, to the proposal submitted by the Minister of Administration and Justice. As a basis of my assumptions I used those copies of the opinions that were forwarded to me as a member of the Constitutional Committee during my work in Parliament.

[80] Speech by László Salamon (KDNP): minutes of Parliament's Human, Minority, Civil and Religious Rights Committee: 5 October 2011

[81] AIB/108-2/2011 (proposal by the president of the Constitutional Court)

[82] Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary CDL-AD (2011)001. (opinion No.:614/2011)

[83]Seed: Fleck, Zoltán – Gadó, Gábor – Halmai, Gábor – Hegyi, Szabolcs – Juhász, Gábor – Kis, János – Körtvélyesi, Zsolt – Majtényi, Balázs – Tóth, Gábor Attila: Opinion on Hungary's fundamental law. in: *Fundamentum,* 2011, No. 1. p. 71

[84] Opinion on the new Constitution of Hungary CDL-AD (2011)016.

[85] Opinion Act CLI of 2011 on the Constitutional Court CDL-AD(2012)009

[86] CDL-STD(1997)020

[87] Remarks of the Hungarian Government on the Draft Opinion on Act CLI of 2011 on the Constitutional Court CDL(2012)045. On the detailed analysis of the reply, see: Comment on the Government's response to the Venice Commission regarding its opinion on Act CLI of 2011 on the Constitutional Court. Download at: www.helsinki.hu/wp-content/uploads/Kommentar_Kormany_valasza_Abtv_VB_20120713.pdf