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Missed Constitutional Moments and Real Constitutional Conflicts in Hungary 1989 v. 2011

Keywords: Hungary, constitution-making, Constitutional Court, constitutional moment, constitutional review

Słowa kluczowe: Węgry, tworzenie konstytucji, Trybunał Konstytucyjny, moment konstytucyjny, kontrola konstytucyjności

Abstract

This paper, examining the Hungarian example argues that that the price is high if a constitutional moment to adopt a constitution based on wide societal compromise has been missed. The constitution-making process might then be completed either by activist courts or by activist political forces. Hungary experienced two major constitutional reforms, both missing a consensual constitutional momentum. The first transformation in 1989–90, which replaced the socialist authoritarian system by democracy, was brought about by political elites, lacking democratic legitimacy, keeping the formal legal framework of the socialist constitution. The second reform in 2011 brought a formally new constitution (Fundamental Law of Hungary), initiated and adopted solely by the governing party (FIDESZ) with a constitutional majority, without consensus. The Constitutional Court both times attempted to play an active, corrective role in the aftermath of the constitution-making.

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Streszczenie**Przeoczone momenty konstytucyjne i prawdziwe konflikty konstytucyjne na Węgrzech 1989 v. 2011**

Niniejszy artykuł, analizując przykład węgierski, dowodzi, że cena jest wysoka, jeśli przeoczono konstytucyjny moment przyjęcia konstytucji opartej na szerokim kompromisie społecznym. Proces tworzenia konstytucji może wtedy zostać zakończony albo przez sądy aktywistów, albo przez aktywistyczne siły polityczne. Węgry doświadczyły dwóch poważnych reform konstytucyjnych, przy czym obu brakowało konsensualnego rozmachu konstytucyjnego. Pierwszą transformację w latach 1989–1990, która zastąpiła socjalistyczny ustrój autorytarny demokracją, dokonały elity polityczne, pozbawione legitymacji demokratycznej, zachowujące formalne ramy prawne socjalistycznej konstytucji. Druga reforma z 2011 r. przyniosła formalnie nową konstytucję (Ustawę Zasadniczą Węgier), zainicjowaną i przyjętą wyłącznie przez partię rządzącą (FIDESZ) większością konstytucyjną, bez konsensusu. Trybunał Konstytucyjny za każdym razem próbował odgrywać aktywną, naprawczą rolę w stosunku do konstytucji.

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I. Introduction

In the past decades, Hungary experienced two major constitutional reforms. The first, 1989 transformation, which replaced the socialist authoritarian system by democracy, was a negotiated and compromised reform, brought about by political elites, lacking democratic legitimacy. This maintained the country's governance and the operability of the state organization. However, despite the significant amendments, the title of the previous constitution (Act no. 20 of 1949) was kept, as a symbol of continuity. The compromise included that this amended constitution, which consciously avoided any form of value-orientation², will serve for an undefined interim period.

The second reform in 2011 brought a completely new constitution (Fundamental Law of Hungary), which was initiated and adopted by the govern-

² F. Horkay Hörcher, *Az értékhianyos rendszerváltás*, "Fundamentum" 2003, no. 1, p. 62.

ing party (FIDESZ), winning the 2010 elections with a constitutional majority. FIDESZ did not hide its ideological orientation behind common principles and institutions: the Fundamental Law is based on a clear Christian-conservative agenda. The new constitution called heavy criticism from the opposition, but also from international actors (EU, NGOs)³, – while the 1989 reform was generally celebrated by the foreign elite.

Both reforms were equally peaceful, yet there are several differences between them: instead of elite pacts, the 2011 reform was rather based on democratic legitimacy, even if the reform package itself was not put on a referendum. Unlike 1989, 2011 did not see a consensus: the new constitution was adopted without participation of the opposition parties. However, the Fundamental Law heavily built upon the previous constitution, keeping its state organization structure and most fundamental freedoms and rights.

It seems that the chance to adopt a final constitution, based on wide societal compromise, was missed both times. None of the two moments were true constitutional moments, i.e. situations, when state power and constitutional order undergo or require a profound change, preceded by societal changes and wide democratic deliberation⁴. Neither of the two moments resulted in a political compromise backed by the whole society. The 1989 change was brought about by elites backed by the favorable international development (mainly the crisis of the Soviet Union). In 2011, the government adopted the constitution based mostly on its own political agenda.

The two historic moments, being very different in the outset, had also some similar implications for the constitutional adjudication: the Constitutional Court both times claimed an active role in completing the constitutional holes it deemed necessary – until 2013, when parliament put an end to the emerged conflict between itself and the Court.

Constitutional moments are not always utilized by political leaders in Hungarian history. Another missed opportunity in Hungarian history was in 1848, when the first Hungarian National Assembly, which was the result of a successful liberal revolution in March, did not pass a constitution in April,

³ L. Trócsányi, *Az alkotmányozás dilemmái – 10 év múltán*, “Acta Humana” 2021, no. 2, p. 142.

⁴ B. Ackerman, *We the People. Foundations*, Cambridge (MA), Harvard University Press, 1993, p. 17.

only fundamental laws to regulate constitutional relations (the so-called April Laws). Here, too, the willingness to compromise can be seen as the reason for the failed constitution: the victorious Hungarian political elite accepted the sovereignty of Austria and did not proclaim an independent state (only a year later, but again, without its own constitution).

This paper compares the two important moments of the past decades and their implications, especially its implications on the relationship between parliament and the judiciary, the conflict between popular and constitutional sovereignty, or legal and political constitutionalism. The latter distinction was described in its finest form by István Stumpf, who, both as former minister and later justice of the Court, witnessed these historical moments from different angles⁵.

II. The constitutional change of 1989–90: the emerging role of the Constitutional Court

The changes in 1989 were not results of a revolution, but a series of negotiations, which saved the country's resources and security, but resulted in a power bargain. Not even early parliamentary elections were necessary: the 5-years term of the last one-party parliament, elected in 1985, had just expired by the time of the reforms. The achievements (electoral laws, freedom of assembly and association, status of parties, establishment of a constitutional court) were, therefore, formally adopted by the parliament of the ancien régime in 1989, resulting in serious doubts of their legitimacy. Due to the negotiated transition, no formally new constitution was adopted: the former socialist constitution was re-written instead, changing almost its entire text. Act no. 31. of 1989, that incorporated the amendments, was almost as extensive as the amended text itself. This is how the continuous and the orderly manner transition was expressed⁶.

⁵ See for example I. Stumpf, *Alkotmányos hatalomgyakorlás és alkotmányos identitás*, Budapest 2020; idem, *Az Országgyűlés és az Alkotmánybíróság kapcsolata 2010 után*, "Parlamentari Szemle" 2019, no. 1, pp. 5–31.

⁶ I. Kukorelli, *Az alkotmányozás évtizede*, Korona 1995, p. 21.

The changes were immense: constitutional democracy, market economy were introduced. The first democratic parliament, elected in May 1990, became the center of state power, with a government on its side, elected by and responsible for it. The position of the head of state was created as a weightless position, based on parliaments' election. Another elites' compromise between the two major forces of the new parliament fine-tuned the constitutional structure with another set of amendments, introducing the constructive motion of no confidence, based on the German model. This structure was proved to be functional, therefore it was maintained also by the Fundamental Law in 2011.

An important institutional change was certainly the creation of a Constitutional Court in 1990, which was one of the first such "products" of the Eastern European political changes. Based on the German constitutional court model, a centralized court for normative review was established. Although the reforming opposition feared that the new court might be an institution for rescuing communists, they later welcomed the Court as a barrier to eventual party-state reorganization.

The Court joined the political process from the beginning with a high degree of autonomy. It became a major political player of the changes, due to the instability caused by economic difficulties, internal tensions and mutual distrust within the new democratic coalition, inexperience of the new political elite, and the weakened confidence of the society in the multi-party system. In this political vacuum, the Court has become a key player with its conscious activism, establishing a way of legal constitutionalism. It made significant decisions, stating that a "rule of law revolution" had taken place within the change of regime – a notion that was not defined by the constitution at all. The Court intended to finish the incomplete constitutional moment by introducing the rule of law doctrine, without democratic legitimacy. The Court assumed that the entire legal system should be brought into line with the rule of law. It consistently demonstrated that law sets the boundaries for politics, and by its behavior sought to make the rule of law widely credible. In its decisions expanding the concept of the rule of law, it made clear that a violation of the fundamental value of the rule of law is enough to justify the unconstitutionality of a law.

III. Judicial activism v. parliamentary sovereignty after 2010

As a result of the 2010 elections, which put an end to the economic and moral crisis caused by the previous social-liberal coalitions, the conservative FIDESZ won more than two-thirds of the parliamentary seats. With this constitutional majority, it soon began to adopt a new constitution. For a very long time, FIDESZ's strategic decision-makers have been working to dismantle a system based on compromises negotiated by the political, intellectual elites in 1989, and to break the power of post-communist structures. It is therefore necessary to cut back the excesses of power-sharing, restore the supremacy of the elected parliament, build a strong state and efficient administration⁷ – in other words, replace the legal constitutionalism with a political one. A new political generation has announced its need for reservation, unaffected by the compromises of the past. The Charter of Fundamental Rights has been extended by community-based values and citizens' obligations. The new criteria for courts at legal interpretation included standards of public good and common sense, and the pursuit of a moral and economic purpose.

The basic dilemma of constitutional justice as a “counter-majoritarian” activity is the authority and the extent to which a non-representative body can override parliamentary decisions. According to the Court's self-interpretation, activism was, to some extent, unavoidable during the changes in 1989. Parliament, as a constitutional power, was not in a position to correct the contradictions of the constitution or make up for its shortcomings, so the Court remained the only institution to solve these problems through creative interpretation of law. This active role, however, became an obstacle against constitutional reforms based on a democratic footage.

After the 2010 victory of FIDESZ, the key concept of 1989–90, the rule of law became once again one of the most commonly used terms in legal language. The opposition of FIDESZ emphasized the danger of the rule of law being dismantled, the government argued in favor of restoring the sovereignty of the legislature in the spirit of political constitutionality.

In the following years, the functioning of the Court was characterized by constant conflicts with the parliament. The majority of the justices, after serious internal debates, came to the conclusion that the Court has to oper-

⁷ I. Stumpf, *Az Országgyűlés...*, p. 14.

ate as a real counterweight to majority rule. The lively debate, whether parliamentary supremacy or sovereignty of the constitution (guarded by the Court) is the decisive governing principle, found the parliament and the Court on opposite sides.

As in 1989, the most significant constitutional changes of 2011 were those touching on the competences of the Court. The government gave itself a dominant role in the selection of constitutional judges, restricted the Courts's powers in the area of economic constitutionality, placed the election of the president of the political body within the parliamentary competence and raised the number of constitutional judges to 15.

However, all these steps did not prevent the Constitutional Court from making decisions in politically sensitive cases according to the previous understanding of rule of law: it repealed important legal provisions (Media Act, retirement age of judges, criminalization of homelessness)⁸. Furthermore, the Court allowed to itself to use of arguments from previous decisions, made before the entry into force of the Fundamental Law. The Court intended to demonstrate the functioning of the rule of law, and to exercise constitutional control over legislation and government. The tensions between Parliament and the Constitutional Court escalated in the turn of 2012–2013, when the Court partially annulled the transitional provisions of the Fundamental Law and subsequently, subject to the *ex ante* normative control of the president, declared several provisions of the Electoral Procedure Act unconstitutional⁹.

The Court stated that “the Court may, where appropriate, also examine the constitutional requirements, guarantees and values of a democratic state under the rule of law”. This could have created a kind of balance in the power-sharing system between the followers of political constitutionalism and legal constitutionalism. However, the constitutional majority in parliament deemed that the Court had gone too far, violating its fundamental political interests with a majority of the electoral authority¹⁰.

The Fourth Amendment to the Fundamental Law, adopted in 2013, not only incorporated the majority of the transitional provisions, annulled previously on formal grounds, into the Fundamental Law, but it also introduced a number of

⁸ *Ibidem*, p. 20.

⁹ *Ibidem*.

¹⁰ *Ibidem*, p. 21.

provisions that the Court had already found unconstitutional on the merits in its previous decisions. It indirectly prohibited the Court from reviewing the content of the Fundamental Law, but explicitly allowed for the review of constitutional amendments from procedural aspects. The Fourth Amendment was accompanied by sharp political debates, with many calling for the end of the separation of powers. However, it reinforced democratic legitimacy by emphasizing constitution-making by an elected parliament, instead of elites or courts. After 2013, the political agenda was no longer dominated by constitutional conflicts. The government, backed by parliamentary supermajority, for its part, considered the first phase of constitutionalization to be closed and intended to consolidate the achievements of the second constitutional “revolution”.

The Fourth Amendment has the constitutional affirmation that the only constitutional power is the parliament, which exercises this right by means of its elected representatives and recognizes no restriction on the exercise of this right. If the supreme custodian of popular sovereignty – the parliament with a constitutional majority – considers that the Court has made a “wrong” decision, it may “use” its constitutional power to “override” its decision by amending the Fundamental Law. Proponents of political constitutionalism believe that democratically empowered lawmakers are much better suited and have greater legitimacy to solve “reasonable differences of opinion”. The justices, in an anti-democratic manner, disregard minority opinions which are not widely supported in the political community. In their view, the essence of the constitution is not the constraints, imposed by constitutional regulation on political decision-makers through the human rights catalogue, rather the democratic decision-making that holds the final decision-making powers in the hands of elected politicians. The Court is always obliged to respect the provisions of the Fundamental Law, whatever changes parliament, based on popular sovereignty, makes in it. On the other hand, parliament needs to respect the Fundamental Law, and maintain the level of constitutionality. If the constitutional majority regularly overrules constitutional court decisions, “over-constitutionalization” happens. It breaks the unity of the constitution and the absence of contradictions bringing the accusation of “abusive constitutionalism”¹¹.

¹¹ L. Landau, *Abusive Constitutionalism*, “Davis Law Review” 2013, vol. 47, pp. 189–260.

IV. Conclusions

The constitutional development in Hungary since 1989 has been marked by varying degrees of intensity of modernization and tradition. In 1989, radical changes took place under the unchanged surface of legal continuity. On the contrary, in 2011 there was little change in the state organization, “dressed” in a legal-constitutional “revolution” on the surface.

The Hungarian Constitutional Court reacted to the changes both times with considerable activism. The formally more legitimate change, in 2011 was concluded by the victory of the concept of political constitutionalism, with some important lessons learned. Neither can the political elite transfer the responsibility for their decisions to the Court, nor can the Court question political decisions. By a constituent parliamentary majority, the only real counterweight, the Constitutional Court is particularly important.

It seems that the price is high if a constitutional moment to adopt a constitution based on wide societal compromise has been missed. The constitution-making process might then be completed either by activist courts or by activist political forces. A peaceful transition, based on wide societal compromise, might to be a win-win situation, but as a result of revolution or war, the contrary happens: winners and losers are created. The constitutional moment during the 1989–90 regime change, which intended to make everyone winner, was missed. The parliamentary majority after 2010 attempted to create its own constitutional moment, based on its subsequent victories at general elections, attempting to prevail even over the guardian of the constitution, the Court. Instead of a real constitutional moment, a real constitutional conflict took place, with the attempt to consolidate and reinforce popular democracy.

Glorious moments only have winners, while conflicts have both winners and losers. Glorious moments have many parents, while conflicts are usually orphans. However, no historical moment can be considered glorious if the people is left out of it. The lack of democratic legitimacy overshadows the peaceful compromises of 1989–1990. On the other hand, the democratic legitimacy of the government since 2010 beautifies the partisan way of adopting the constitution in 2011. History and time will tell, which of these moments and conflicts were glorious, and which not.

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