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KEEPING THE GUARDIAN UNDER CONTROL: THE CASE OF HUNGARY

REPORT
by

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The topic of the conference is the unconstitutional constitutional amendment. In this report I give an overview on how the Hungarian legal system has been handling this doctrine since the transition. First, I will focus on the 1989 Constitution and the relevant Constitutional Court case-law that was built on it. Later, I will turn to the new constitution, called the Fundamental Law, and its further amendments.

The 1989 Constitution of Hungary was easy to amend. The amendment process did not render any constitutional provision or principle unamendable. It did not contain a so-called „eternity clause" [1]. Only two-thirds of Members of Parliament were needed to ratify amendments.[2] Therefore, the constitution was relatively flexible. Only one legislative body had the sole power to change the constitutional text. Neither a referendum, nor any form of ratification (for example approval by the subsequent parliament) was allowed to ratify a new constitution or a constitutional amendment.

The 1989 Constitution expressly recognised judicial review of laws that violate the Constitution, and it established the Constitutional Court to perform this task. Some courts[3] are even constitutionally authorised to review the constitutionality of constitutional amendments.[4] The Hungarian Constitutional Court is not among those courts.

Most of the courts do not have this competence, either. However, there are some who argue that, the lack of express constitutional provisions to the contrary, courts can review constitutional amendments. Using this, they create themselves the authority for extended judicial review.[5] They recognise their power to review the constitutional amendment that has been made in accordance with the formal requirements of the constitution, but that deviates from its basic structure. Under the basic structure of the Constitution, the courts usually have jurisdiction over the core elements of the constitution, such as the fundamental principles, the form of government, and the framework of the state.

Now, let me give a short description on the position of the Hungarian Court, concerning the judicial review of an amendment to the constitution. As you will see, the position of the Court was basically determined by Parliament and the Court, reacting to each other's activity.

For a long time, the Court did not recognise its power to determine that an amendment to the Constitution was unconstitutional.[6] The Court held that it may not annul certain provisions of Acts of Parliament that amended the Constitution, because „if a provision became a part of

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1 Like for example Article 79(3) of the German GG, under which human dignity and the separation of powers are immutable, or the Article 139 of the Italian Constitution, which makes unamendable the republican form of government. However, András Bragyova argued that the 1989 Hungarian constitution contained an "eternity clause" by declaring in Article 8(1) that "the Republic of Hungary recognises the inviolable and inalienable fundamental rights of man". András Bragyova: Vannak-e megváltoztathatatlan normák az alkotmányban? (Are there Unamendable Norms in the Constitution?) 82 and ff.

2 258 members of Hungary's 386-seat parliament. Article 24(3) of the 1989 Constitution.

3 For example South Africa, Turkey, and concerning the bill on the constitutional amendment, Romania.

4 As Walter F. Murphy rightly pointed out „the word amend, which comes from the Latin emendere, means to correct or improve; amend does not mean 'to deconstitute and reconstitute'". Walter F. Murphy: Merlin's Memory. The Past and Future Imperfect of the Once and Future Polity. In *Responding to Imperfection. The Theory and Practice of Constitutional Amendment.* Sanford Levinson, ed., Princeton UP, 1995, 163, 177. However, since the term „constitutional amendment" is widely accepted to include constitutional revisions and transformations, I also use the term in this broader sense.

5 The Supreme Court of India is a good example. The Indian concept was followed in Pakistan, and more recently in Bangladesh. See Claude Klein – András Sajó: Constitution-making: Process and Substance in eds. Michel Rosenfeld – András Sajó: *The Oxford Handbook of Comparative Constitutional Law.* Oxford UP, 2012, 440.

6 Although the majority of the Court recognised its power to resolve the assumed or real contradiction between constitutional provisions (Decision 23/1990. (X. 31.), a Presidential Order argued that "the resolution of the assumed or actual contradictions of the Constitution" is outside the competence of the Constitutional Court. Presidential Order no. 1125/I/1996.

the Constitution as supported by the vote of two-thirds of the members of Parliament, it is *per definitionem* impossible to establish its unconstitutionality."[7]

However, the Constitutional Court recognised its authority to determine the constitutionality of an amendment to the Constitution from a procedural point of view. That is, whether the mechanism, by which the amendment was enacted in Parliament, was authorised to do so. In addition, a decision made it clear that an Act of Parliament, on the entering into force of a constitutional amendment, could be subject of judicial review.[8]

In Hungary's general election of 2010, Fidesz had gained a majority[9] that was sufficient to amend or rewrite the Constitution. Both were to happen.[10] First, a wide range of constitutional amendments were adopted. One such amendment curtailed the Constitutional Court's competence. When the Court declared the 98 percent tax on public sector severance pay unconstitutional, the ruling majority responded by adopting a constitutional amendment that withdrew financial and budgetary issues from the Court's jurisdiction.[11] Several petitions reached the Court, asking for the annulment of this constitutional amendment. The question had thus arisen, as to whether the Court can review the constitutionality of the amendment; and, if yes, what can be the scope of this review?

In Decision 61/2011, the Court denied itself the authority to perform a review of the substance of the amendment. A key question of the decision was whether there were superior standards which could have invalidating primacy over constitutional provisions. The Court held that invalidating primacy might only be attributed to those standards, which had been explicitly determined by the constitutional author in the constitutional text, as superior to other constitutional norms. At that time, such standards had not been found by the Court for the purposes of review.[12]
Consequently, there was no hurdle to transform the constitutional system, and the ruling parliamentary majority then proceeded to replace the entire constitution.[13] The Parliament adopted a new constitution, called the Fundamental Law, which entered into force in January 2012. Although the Fundamental Law substantially altered the characteristics of Hungarian constitutionalism,[14] the provision on amending the constitution remained unchanged. Like the

7 Order no. 23/1994. (IV. 29.) Marta Dezso: Constitutional Law in Hungary. Kluwer, 2010, 191. But see Andrew Andrew Arato: Constitution Making in Hungary and the 4/5 Rule, *Int'l J Const. L. Blog*, April 6, 2011. According to Arato, it could easily have been said that an amendment is not fully part of the constitution until it has been tested and validated.

8 "In certain cases, in principle, the Constitutional Court may have a competence hearing, regarding specific provisions of the Act that put into force an amendment of the Constitution, on the condition that the potential annulment of the provision of putting the amendment into force would not result in any change to the Constitution." Decision 1260/B/1997.

9 68 per cent of the parliamentary seats.

10 Consequently, as Scheppele rightly pointed out, the power to change the constitutional order was in the hands of one political bloc. Kim Lane Scheppele: On the Unconstitutionality of Constitutional Change. An Essay in Honor of László Sólyom in *Viva Vox Iuris Civilis*, Xenia-Liber Amicorum, Szent István Társulat, 2012, 310.

11 More on this - see Kriszta Kovács and Gábor Attila Tóth: Hungary's Constitutional Transformation, *European Constitutional Law Review*, 7: 183-203, 2011.

12 "In the opinion of the Constitutional Court, the scope of competence of the Constitutional Court cannot be excluded, with regard to reviewing the Constitution's provisions concerning their invalidity under public law, as any legal regulation adopted in a manner contrary to an Act of Parliament or to the Constitution, is deemed to suffer from invalidity under public law, which makes it null and void, i.e. it has to be regarded as if it has not been adopted at all." Decision 61/2011. (VII. 13.) The justices, for the very first time, undertook an investigation into the constitutional validity of the amendment in terms of the procedure that led to the adoption, even though they did not find the petitions well-grounded in this regard. More on this see Gábor Halmai: Unconstitutional Constitutional Amendments. Constitutional Courts as Guardians of the Constitution? *Constellations*, 2: 182-203, 2012.

13 The Venice Commission provided eight opinions on the Hungarian constitutional and legislative texts since 2011. The exceptionally dense nature of the opinions stems from the fact that the Commission had many requests for opinions relating to Hungary from the Government, from the Secretary General of the Council of Europe, and from the Monitoring Committee of the Parliamentary Assembly of the Council of Europe.

14 See Gábor Attila Tóth ed.: *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*. CEU Press, 2012.

1989 Constitution, the Fundamental Law also lacked provisions to authorise the Court to review amendments. In addition, the Parliament adopted Transitional Provisions to the Fundamental Law.

In this legal environment, the Court again faced the problem of examining a constitutional amendment. Several scholars questioned the normative and hierarchical status of the Transitional Provisions, because only the Transitional Provisions themselves declared their own constitutional character. Consequently, the Ombudsman initiated the constitutional review of the Transitional Provisions. After this move, the Parliament adopted the First Amendment of the Fundamental Law, declaring that the Transitional Provisions form a part of the Fundamental Law. This was the situation where the Transitional Provisions reached the Court.

In Decision 45/2012, the Court examined the constitutionality of the Transitional Provisions for two reasons.[15] First, the Court took into account the new political situation regarding the amendment of the constitution. The 1989 Constitution had been amended ten times in the year 2011, mostly on the basis of motions by individual members of Parliament that induced serious changes to the Constitution. This resulted in developing a new practice of constitutional amendments that fundamentally differed from the established legal practice, and it jeopardised the stability and the endurance of the Constitution. In a short period of time, numerous provisions, that otherwise fell outside the regulatory scope of the Constitution, had been incorporated into the Constitution, and the frequent amendments had made it difficult to follow and identify the Constitution's normative text in force.

Second, following its precedents, the Court undertook an investigation into the constitutional validity of the amendment, in terms of the procedure that led to its adoption. Moreover, this was the decision in which the Court indicated a possible competence to review constitutional amendments from the perspective of substantive constitutionality. The Court seemed to have cautiously suggested an inner hierarchy within the Fundamental Law[16], so that its amendments may not result in any unresolvable conflict within the Fundamental Law. As the Venice Commission rightly pointed out in its opinion, the Court even found a hierarchy stemming from the *ius cogens* part of international law.[17] So, one can argue that the Court recognised, *de facto*, the existence of an implied eternity clause that protects the basic structure of the Constitution.

Taking into account all of this, the Court found itself justified to review the constitutionality of the Transitional Provisions. The examination resulted in the annulment of a large part of the Transitional Provisions. The reasons for the annulment were the following: First, by the adoption of the Fundamental Law, the constitutional author laid down the text of the Fundamental Law with the aim of making it a stable and lasting Fundamental Law with a unified system and coherent content. This aim was broken by the Transitional Provisions, which contained mixed subjects and regulated non-transitional rules either from the aspect of their subject, or from a temporal point of view.

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15 Decision 45/2012. (XII. 29.). The English translation is available at http://www.mkab.hu/letoltesek/en_0045_2012.pdf

16 "... the constitution-maker may only incorporate into the Fundamental Law subjects of constitutional importance that fall into the subjective regulatory scope of the Fundamental Law." Ibid.

17 "Constitutional legality has not only procedural, formal, and public law validity requirements; but also substantial ones. The constitutional criteria, of a democratic State under the rule of law, are at the same time constitutional values, principles, and fundamental democratic freedoms enshrined in international treaties; and accepted and acknowledged by communities of democratic States under the rule of law, as well as the ius cogens, which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalisation of the substantial requirements, guarantees and values of democratic States under the rule of law." Ibid.

Moreover, its rules were not incorporated into the text of the Fundamental Law. The Transitional Provisions had been amended several times after it had entered into force, so it had become an Act substituting the Fundamental Law. Instead of amending the Fundamental Law, it had become sufficient to amend the Transitional Provisions to make a regulation become "part" of the Fundamental Law, without incorporation.

The Court argued that in the course of adopting the Transitional Provisions, the Parliament stepped beyond the limits of its authorisation to act as a constitutional author, both with regard to the contents of the regulation, and concerning its temporal frame. As a consequence, the Transitional Provisions were in part – regarding the non-transitional provisions extending beyond the limits of the authorisation – invalid under public law, and which were required to be annulled by the Court.

If it is easy to amend the constitution, the stakes of constitutional court decisions are lowered, for an unfavourable judicial decision can be overridden. That is exactly what happened with the just-mentioned decision.

In April 2013, the Fourth Amendment to the Fundamental Law entered into force. It confirmed the case-law of the Constitutional Court in the domain of procedural review, while negating further developments in the above-mentioned Decision 45/2012. The Fundamental Law, as amended by the Fourth Amendment, authorises the Court to examine *a priori*, whether the formal requirements for constitutional amendments have been fulfilled, but the judicial review may not extend to the content of the constitutional amendment, or its relation to the rest of the Fundamental Law.[18] As the Venice Commission aptly put it, a consistent pattern of reacting with constitutional amendments to the decisions of the Constitutional Court may be observed in Hungary in recent times, and the Fourth Amendment followed this pattern.[19]

The Fourth Amendment revoked the authority from the Court to review the constitutional amendments on the merits. To the extent that a constitutional amendment revokes judicial review, it may encounter the claim that this constitutional amendment is itself unconstitutional.[20] The Ombudsman found the Fourth Amendment problematic, and turned to the Constitutional Court and requested an *ex post facto* review.

In Decision 12/2013, the Court emphasised that the Fundamental Law restricted the criteria of review previously defined by the Court. The Court seemed to have accepted this development by saying that it lacked the competence to compare the amendment – with regard to their content – to other provisions of the Fundamental Law and to the Constitutional Court precedents.

The Decision suggested, however, that the Court could analyse the new provisions incorporated by the Fourth Amendment, once its details are outlined in further Acts to ensure that they "make up a system with international and European Union commitments free of any inconsistencies".

So, the Court apparently accepted that there are restrictions on the authority to amend the constitution, but the Court did not apply those principles in the very case to examine the constitutionality of the Fourth Amendment.

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18 "The Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation." Article 24(5) of the Fundamental Law.

19 *Opinion 720/2013 on the Fourth Amendment to the Fundamental Law of Hungary*, CDL-AD(2013)012, para 81.

20 This issue has already arisen, for example in India. More on this - see Aharon Barak: Unconstitutional Constitutional Amendments, *Israel Law Review* 44 (2011) 321, 333.

One can conclude that the Fundamental Law does not authorise the Court to review the substance of constitutional amendments. Although the Constitutional Court tried to create itself the authority for extended judicial review, Decision 45/2012 in that regard was overridden by the Fourth Amendment of the Fundamental Law.