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Constitutional Justice in Credit Crises. The Hungarian Case

Abstract. The economic crisis of 2008 brought about a rapid depreciation in the exchange rate of the Hungarian forint (HUF). Debtors in Hungary had borrowed money in foreign currencies—especially the Swiss franc—and now found themselves in a significantly deteriorating situation. The consequences of increased indebtedness reached all levels of society. On various grounds, consumers took out numerous civil law proceedings to challenge consumer loan agreements. Questions raised by these lawsuits were, several times, brought to Hungary's Supreme Court, and were then taken to the legislature. The legislative acts and judicial decisions that ensued were subsequently reviewed by the Constitutional Court of Hungary. This article analyses the case law the Constitutional Court applied in this crisis situation, and brings out the lack of balancing capacity in the constitutional adjudication. Referring to the principles of basic Rule of Law, the author makes a critical assessment of the new constitutional ideas, measures and legal solutions that emerged.

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Introduction

In recent times, the new challenges posed by the world financial crises and their effects on national legal systems have been the subject of several publications, especially in academic journals;[1] and, over the last years, the first general

[1] The present study is based on a longer book chapter published in Hungarian: cf. Fruzsina Gárdos-Orosz, Rendhagyó alkotmányossági mércék az Alkotmánybíróság devizahiteles határozataiban, in: Fruzsina Gárdos-Orosz / Zoltán Szente, eds, Jog és politika határán. Alkotmánybíráskodás Magyarországon 2010 után, Budapest 2015, 373-409. For further literature cf., for example, Xenophon Contiades / Alkmene Fotiadou, Social Rights in the Age of Proportionality. Global Economic Crisis and Constitutional Litigation, *International Journal of Constitutional Law* 10, no. 3 (July 2012), 660-686, https://doi.org/10.1093/icon/mor080; and David Bilchitz, Socio-Economic Rights, Economic Crisis and Legal Doctrine, *Social Science Research*

or comparative books on the issues these raise have come to publication.[2] This study aims to contribute to the debate by describing a Hungarian case related to the foreign-currency loan crisis which, it argues, has triggered significant constitutional change. This change, raising Rule of Law concerns, was approved by the Hungarian Constitutional Court, contrary to expectations by law experts.

In the present analysis, the focus is on how the legal-constitutional arguments and solutions put forward to deal with the issue of foreign-currency loans have contributed to fundamental constitutional change in Hungary. The legal reasoning in this article focuses on Hungarian constitutional jurisprudence from a Rule of Law perspective and does not aim to offer specific descriptions or solutions to cases involving debts incurred during the crisis. The high number of those affected by recent constitutional decisions makes the whole topic one of general concern: people need to understand the consequences these decisions have on general Rule of Law matters. In recent years, Hungary's constitutional changes, realised through new legal instruments have been challenged by the European Union (EU) several times over.[3] This article focuses, therefore, on fundamental constitutional concepts and on how constitutional change has been brought about; and it points out what this means for Rule of Law in Hungary.

I argue that—even if the state's goal has been to help people in desperate and unexpected situations—the legislative measures that have been implemented[4] and the way the constitution has been adjusted to allow them have caused considerable harm to Hungary's constitutional system. This harm, I argue, was not caused by the financial crisis itself. Rather, it is due to the judicial politics practised by a government with a two-thirds majority in parliament—a government which has allowed a deviation from Rule of Law standards. As I show, the Hungarian Constitutional Court (*Alkotmánybíróság*) upheld a claim that exceptional times of crisis call for exceptional constitutional measures, even if those measures violate Rule of Law standards. New rules, aimed at resolving the social and financial problems caused by foreign-currency debts, were reconsidered only after measures had been passed that made the constitution

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Network, 4 September 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320432. All internet sources were accessed on 19 January 2018.

[2] Poul F. Kjaer / Gunther Teubner / Alberto Febbrajo, eds, The Financial Crisis in Constitutional Perspective, Oxford, Portland/OR 2010; Xenophon Contiades, ed, Constitutions in the Global Financial Crisis. A Comparative Analysis, London et al. 2013.

[3] Zoltán Szente, Challenging the Basic Values. The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them, in: András Jakab / Dimitry Kocherow, eds, The Enforcement of EU Law and Values. Ensuring Member States' Compliance, Oxford 2017.

[4] The legislative measures mentioned in this text are accessible at the national Hungarian website of legal instruments, http://www.njt.hu/. The decisions of the Hungarian Constitutional Court are accessible at the website of the Hungarian Constitutional Court, http://www.mkab.hu/kereso.

less restrictive on political decisions. But in a Rule of Law democracy, even the best political decisions must respect constitutional limits. Prior to 2013, the decisions made by Hungary's Constitutional Court regarding foreign-currency loan problems adhered to the Rule of Law standards of the period 1990-2012;[5] but, in subsequent decisions, several of the premises have been changed as regards *ex post* legislative amendments to contracts, the interpretation of legislative retroactivity, the separation of state powers, the right to human dignity, and other matters.[6]

The broader aim of this article is to draw attention to Hungarian constitutional politics and the justification the Constitutional Court has given for alterations the government has made.[7] I claim that the formerly existing system, based on the separation of powers and the idea of checks and balances, is being abandoned for a model based on amalgamation of power in the hands of the state.[8] The Hungarian Constitutional Court is no longer in a position to make fundamental decisions on the law together with the political branches, as, in practice, was the case in the early 1990s.[9] It is no longer in a position to enforce the constitutional limits of political decision, as it could up to 2010. The Fundamental Law (which came into force on 1 January 2012) and the new Act on the Constitutional Court,[10] along with the transformation, limitation of competence, and changed composition of the Court all serve to hinder this institution from being able to resist the majority political will. The Court has ceased to have complete independence as a judicial body.[11] I will back up my argument by examining a single, major

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[5] Hungary's new constitution, which came into force on 1 January 2012 and is called the 'Fundamental Law', is accessible at http://www.mkab.hu/. In English it is accessible at http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf.

[6] This change is in line with the constitutional change in Hungary. Cf., for example, Miklós Bánkuti et al., Amicus Brief to the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary, April 2013, https://docs.google.com/viewer?a=v&pid=sites&srcid=ZGVmYXVs dGRvbWFpbnxhbWljdXNicmllZmh1bmdhcnl8Z3g6N2QwZThmYWRkMjg5YWZlOA.

[7] As a starting point to appreciate this discussion, cf. Andrew Arato / Zoltán Miklósi, Constitution Making and Transitional Politics in Hungary, in: Laurel E. Miller, ed, Framing the State in Times of Transition. Case Studies in Constitution Making, Washington/DC 2010, 350-390, 369.

[8] About the effects of the two-thirds supermajority, cf. Attila Vincze, Wrestling with Constitutionalism. The Supermajority and the Hungarian Constitutional Court, *Vienna Journal on International Constitutional Law* 8, no. 1 (2014), 86-97, DOI:10.1515/icl-2014-0105.

[9] Cf. Georg Brunner / László Sólyom, Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court, Ann Arbor/MI 2000.

[10] Act CLI of 2011 on the Constitutional Court of Hungary, Strasbourg, 9 May 2012, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2012)017-e.

[11] The most detailed recent description of the transformation of the Hungarian Constitutional Court is one by its former president: László Sólyom, Das ungarische Verfassungsgericht, in: Armin von Bogdandy / Christoph Grabenwarter / Peter M. Huber, eds, Handbuch Ius Publicum Europaeum, vol. 6: Verfassungsgerichtsbarkeit in Europa. Institutionen, Heidelberg

case brought before the Constitutional Court, which stayed with it for years. This case merits in-depth analysis. But many other recent decisions made by the Constitutional Court could be cited to reinforce my argument.[12]

In what follows, I begin by putting such decisions into their social, economic, and political context. I then describe the stream of legislative measures that have been passed. Finally, I present the Constitutional Court's answers on these and show how they contradict Rule of Law standards. My conclusion is that the 'exceptional times call for exceptional measures' arguments deployed did not justify the modification of Rule of Law standards. Instead, they have been used as an eye-catching diversion, hiding what is really happening to the constitutional edifice.

The Economic and Social Environment, and the Adopted Legal Measures

The Challenge

Before the change of regime in 1989-90, the volume of consumer loans in Hungary was negligible.[13] Although the loans market started to grow in the 1990s, it was only at the end of the decade that there was a significant expansion. In June 2000, household debt had not yet reached 600 billion HUF; but by the end of 2004 this figure had mushroomed to 3,500 billion. This sudden spurt was the result of measures introduced by the government aimed at subsidising the purchase of new homes. Economists were quick to raise concerns.[14] In 2004, the Hungarian National Bank cautioned that a decrease in growth of real wages could lead to borrowers defaulting on the repayment obligations laid down in their loan agreements. This, in turn, might cause a decline in consumer demand.[15] The National Bank went on to warn that

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2016, 705-795. On the very strong counterbalancing position of the Constitutional Court, that is the outsourcing of fundamental political decision-making to the Constitutional Court in the early 1990s, cf. András Sajó, Reading the Invisible Constitution. Judicial Review in Hungary, *Oxford Journal of Legal Studies* 15, no. 2 (July 1995), 253-267, DOI: 10.1093/ojls/15.2.253.

[12] A novel multilayered example is Decision 22/2016 (XII. 5.) CC, on the relation of EU law and the Hungarian Fundamental Law. A similar argument was put forward by Imre Vörös, former judge of the Constitutional Court, cf. Imre Vörös, Hungary's Constitutional Evolution During the Last 25 Years, *Südosteuropa. Journal of Politics and Society* 63, no. 2 (2015), 173-200.

[13] András Bethlendi / Éva Nagyné Vas, Dynamic Expansion in the Hungarian Consumer Lending Market in the Light of International Trends, Report on Financial Stability, Hungarian National Bank, Budapest, December 2004.

[14] E.g. Péter Dobák / Judit Sági, Fogyasztási hitelek: növekvő eladósodottság, *Hitelintézeti Szemle* 4 (2005), 1-27, http://www.bankszovetseg.hu/Content/Hitelintezeti/51Dobak_Sagi.pdf.

[15] Financial Stability Department of the Hungarian National Bank, Report on Financial Stability, Budapest, December 2004, http://epa.oszk.hu/00300/00378/00010/pdf/00010.pdf.

> 'credit risk, the most important risk segment of consumer lending, is affected by the fact that some debtors are unable to accurately assess the reasonable limits of their financial capabilities regarding principal repayment, which can be partly attributed to deficiencies in the domestic financial culture.'[16]

According to leading economists, the world crisis in 2008 and the financial crisis in Hungary were caused by the banking sector. However, in the latter case, the financial illiteracy of the country's citizens also contributed considerably to the situation.[17] Furthermore, in Hungary, the supervisory state authorities failed to warn the banks or restrain them from selling certain risky products.[18]

Parallel to a general over-indebtedness, a further specific risk emerged in Hungary. While consumer loans did not reach 0.1% of GDP till mid-1999, by 2003 they were over 2%, and by mid-2004 they exceeded 3.7%.[19] This was a quite straightforward phenomenon, as the interest rate in Hungary was significantly higher than the average interest rates in the EU member states, or in Switzerland. Between 2004 and 2006, when the interest rate on the Swiss franc was below 1% and the average euro interest rate was around 2%, the HUF interest rate varied between 11% and 12%, decreasing slightly at the end of this time period.[20] Consequently, the use of foreign currency enabled consumers who would not previously have qualified for HUF loans—because of low income, lack of savings, and so on—to borrow freely.

The huge differences in interest rates were not so apparent in all countries in the region, as the gap between rates for foreign- and domestic-currency loans partly depended on domestic fiscal policies and rates of inflation. Significant differences could be seen in Romania, Bulgaria, and Hungary, but not so much

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[16] Financial Stability Department of the Hungarian National Bank, Report on Financial Stability, 12.

[17] László Urbán, Megfélemlített fejőstehenek. Bankrendszer a magyar államkapitalista rezsimben, in: András Jakab / László Urbán, eds, Hegymenet. Társadalmi és politikai kihívások Magyarországon, Budapest 2017, 284-308, 303.

[18] Urbán, Megfélemlített fejőstehenek, 303.

[19] Cf. Financial Stability Department of the Hungarian National Bank, Report on Financial Stability, Chart IV-7, 85.

[20] Data from the websites of the National Bank of Hungary, the European Central Bank, and the Swiss National Bank. On further reasons behind consumer loans in Poland, Romania, and Hungary, cf. András Hudecz, Párhuzamos történetek. A lakossági hitelezés kialakulása és kezelése Lengyelországban, Romániában és Magyarországon (Parallel stories. The emergence and treatment of consumer loans in Poland, Romania and Hungary), *Közgazdasági Szemle* 59, no. 4 (2012), 349-411, http://www.kszemle.hu/tartalom/cikk.php?id=1301. An abridged English version has been published as András Hudecz, Parallel Stories. FX Lending to Households in Poland, Romania and Hungary, 1997-2011, *Acta Oeconomica* 63, no. 3 (2013), 257-286, https://doi.org/10.1556/AOecon.63.2013.3.1. Cf. also Pál Péter Kolozsi / Ádám Banai / Balázs Vonnák, Phasing Out Household Foreign Currency Loans. Schedule and Framework, *Financial and Economic Review* 14, no. 3 (2015), 60-87, http://english.hitelintezetiszemle.hu/letoltes/3-kolozsi-banai-vonnak-en.pdf.

in the Czech Republic and Slovakia.[21] However, in Hungary, the National Bank was expressing concerns about the trend as early as 2001:

> 'The robust expansion of foreign currency lending reflects households' low risk awareness and/or risk sensitivity. The high interest rate differential reflects the risks arising from exchange rate uncertainty; and households are not willing to pay the price of this risk premium.'[22]

Before the 2008 crisis neither parliament nor the regulators thought to intervene in the affairs of the financial institutions. But the crisis brought a significant change of track. To give but two examples: in October 2009 the government issued a decree on prudent retail lending and examination of creditworthiness;[23] and in 2010, parliament enacted a ban on mortgage-backed loans in denominations other than HUF.[24] These provisions contributed to a decrease in loans made in Swiss francs (CHF) or in euros (EUR). However, it seemed inevitable that further steps would have to be taken to help debtors who were now unable to repay their loans.

By taking out loans in denominations other than HUF, Hungarian borrowers receiving an income in their native currency had taken a risk on the exchange rate. This problem was addressed in the earliest pieces of legislation. The CHF/HUF exchange rate in 2005 was around 160-165, and the EUR/HUF around 250. In 2009, the CHF/HUF rate moved to between 180 and 200 and the EUR/HUF rate reached 270-310. Calculated in Hungarian currency, this led to massively increased charges to debtors, which showed up very clearly in defaults on loans. Both individuals and legal entities found themselves unable to pay their debts. By the end of 2014, one in four mortgage loans could be counted as 'non-performing'—meaning that the debtors had failed to fulfil their payment obligation for more than 90 days. To put this in perspective, the scale of loss in non-performing loans now equalled 5% of Hungary's entire GDP.[25]

Initially, parliament introduced an opportunity to prepay loans at a preferential exchange rate, and resorted to freezing monthly payments for a certain period. Furthermore, the passing of two acts significantly reshaped the loan

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[21] Urbán, Megfélemlített fejőstehenek, 287.

[22] Financial Stability Department of the Hungarian National Bank, Report on Financial Stability, 115.

[23] Government Decree on 361/2009 (XII. 30.) on the terms of prudent retail lending and the assessment of creditworthiness, 30 December 2009.

[24] Act CVI of 2010 on the amendment of certain financial acts for the protection of real estate creditors in a difficult situation.

[25] Bálint Dancsik et al., A nemteljesítő lakossági jelzáloghitel-portfólió átfogó elemzése mikroszintű adatok segítségével, Hungarian National Bank, Budapest, October 2015, https://www.mnb.hu/letoltes/mnb-tanulmanyok-kulonszam-a-nemteljesito-lakossagi-jelzaloghitel-portfolio-atfogo-elemzese.pdf.

market. These new laws on fair banking were enacted so as to give further protection to the consumer by increasing the transparency of loans.

Enacted Legal Measures

From 2008, the Hungarian legislature, together with the Supreme Court, the *Kúria*, made several efforts to resolve the debt problem foreign-currency loans had inflicted on society. In the course of these efforts, questions arose that had constitutional relevance. They were later reviewed by the Constitutional Court, which gave its confirmation to three major rules:

1. The uniformity decision no. 2/2014 of the Uniformity Panel of the *Kúria*—the body providing interpretation of law that is binding for all courts in Hungary. This decision determined that clauses of foreign exchange loan contracts stipulating that the risk of foreign exchange should be taken without restriction by the consumer were not unfair.[26] This ruling has been largely applied by financial institutions in consumer loan contracts in order to avoid risk. In addition, the *Kúria* laid down principles of what was required in the contract provisions, and pronounced that non-compliance with these principles by banks when stipulating a right to unilateral amendment of a contract would render that provision unfair. In such a case, the amendment provision contained in a contract would not have binding force. Furthermore, the uniformity decision also deemed unfair any provision on exchange rate margins—the banks' practice of applying different rates to buying and selling.

2. Act 38 of 2014 on the Resolution of Questions Relating to the Uniformity Decision of the *Kúria* Regarding Consumer Loan Agreements of Financial Institutions was passed by the National Assembly in order to enforce the requirements of the uniformity decision just described. The Act declared the exchange rate margins void, and it ruled on the presumption of unfairness of the contract terms that allowed financial institutions to alter the terms of a contract unilaterally. The burden was on the financial institutions to prove that their contract was in conformity with all the seven requirements set up by the *Kúria* to ensure that a contract was fair. In this way, the Act introduced a retroactive presumption of unfairness where a contractual term had not been negotiated individually. Requirements of this kind had not existed before the Act came into force (though unilateral contract amendments had been regulated by a number of rules between 2004 and 2014).[27] By linking unfairness to the consequence of nullity, the

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[26] Decision no. 2/2014 PJE the Operative Part of Unifomity, Budapest, 16 June 2014, http://kuria-birosag.hu/hu/joghat/22014-szamu-pje-hatarozat.

[27] Act CXII of 1996 on credit institutions and financial enterprises, Section 210, http://gss.unicreditgroup.eu/sites/default/files/markets/documents/Act%20on%20Credit%20Institutions%20and%20Financial%20Enterprises_0.pdf.

law displaced the rule of the Civil Code that had been in force between 2004 and 2006 whereby an unfair clause could be challenged by consumers on a case-by-case basis. The Act thus amended the rule of force defined by the Civil Code, making it possible to pursue time-barred claims again. Despite their not being in a private legal relationship, financial institutions could, according to the law, now take out legal proceedings against the Hungarian State if they wanted to challenge a presumption of invalidity.

3. In a third step, a 'Settlement Act' modified certain provisions of the Act just described. The Settlement Act was titled, in full, Act 40 on the Rules of Settlement Provided for in Act 38 of 2014 on the Resolution of Questions Relating to the Uniformity Decision of the *Kúria* Regarding Consumer Loan Agreements of Financial Institutions and on Other Related Provisions. It set out rules for financial institutions and their financial settlements with consumers.

The Constitutional Court examined the constitutionality of these legal instruments several times. I will present its decisions in outline before going on to analyse them. It is, however, clear that the Constitutional Court was not eager to intervene, and that, later, it was not willing to advise the government on how to tackle the financial crisis constitutionally. Instead, after a turning point in 2014, when concrete legislation was enacted, the Constitutional Court legitimised the breach of Rule of Law standards by judging the laws newly passed to be constitutional.

Overview of Related Constitutional Court Decisions

I will now trace five Constitutional Court decisions.

1. The first occasion when the Hungarian Constitutional Court dealt with problems relating to the foreign-currency loan crisis was when it made its decision no. 73/2011 (X. 19.). The Court reviewed the constitutionality of a decision made by the National Electoral Commission (*Nemzeti Választási Bizottság*) on a popular demand for a referendum. The question concerning the referendum read as follows:

> 'Do you agree that parliament intervene by way of legislation in foreign-currency loan agreements and change them so that 50% of the volume of debt and changes of instalments generated due to the fluctuations of forint should be borne by the banks that provided the loans?'

The National Electoral Commission refused to validate this question because, in its opinion, it did not have the required clarity: among other weaknesses, it was not foreseeable what legislative obligation would fall on the National As-

sembly should the referendum result be positive.[28] In its first decision 73/2011 (X. 19.) on this issue, the Constitutional Court, considered an objection against the decision of the National Electoral Commission inadmissible. Thus, the idea of holding referenda aimed at solving the problem of indebtedness did not have much success.

2. The first substantive decision made by the Constitutional Court regarding foreign-currency consumer loan agreements was the Constitutional Court decision 3048/2013 (II. 28.). Primarily the petitioners challenged the 'Repayment Act' on fixed-rate early repayment of foreign currency loans.[29] In addition, they considered unconstitutional some of the sub-paragraphs of Act 112 of 1996 on Credit Institutions and Financial Enterprises. The sub-paragraphs they objected to allowed the debtor, under certain preconditions, to make a lump-sum payment on an exchange rate, different to that prescribed in the contract, as had been fixed by regulation up to 1 April 2012. The Constitutional Court did not consider these last legal regulations unconstitutional.

3. In November 2013, for the first time since the adoption of the Fundamental Law of Hungary, the government requested an abstract interpretation of the constitution from the Constitutional Court.[30] This request suggested that the unexpected, large-scale changes in foreign exchange rates and the growth of instalments of foreign-currency loans was causing such serious challenges to such a large section of society that regulation had become inevitable. The government asked for the Constitutional Court's interpretation on two questions: 'Does Article M) (2) of the Fundamental Law on consumer protection mean that foreign currency-denominated loans are against the Fundamental Law of Hungary?'; and 'Does the adoption of the Fundamental Law lead to changes with regard to the conditions under which the legislature can modify existing contracts?'[31]

In its reply—decision 8/2014 (III. 20.) interpreting the Fundamental Law—the Constitutional Court relied on the related field of applicable constitutional concepts that had been expressed several times before 2012. The Court noted that, in Hungary, several pieces of law had set out measures to bolster consumer

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[28] National Electoral Commission Decision 25/2011 (III. 9), cf. http://www.valasztas.hu/web/national-election-office/act-cciii-of-2011-on-the-elections-of-members-of-parliament.

[29] Act CXXI of 2011 on the Amendment of Certain Laws Related to Home Protection, Budapest, 26 September 2011, http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK11110.pdf.

[30] This procedure, in which the government may ask the Constitutional Court to interpret the provisions of the Fundamental Law, is regulated in Act CLI of 2011 on the Constitutional Court, Section 38.

[31] Article M) paragraph (2) of the Fundamental Law: 'Hungary shall ensure the conditions of fair economic competition. Hungary shall act against any abuse of a dominant position and protect the rights of consumers.'

protection in these contractual relations. It interpreted that, in private contractual relations, consumer rights—and in particular the right to access good quality products and services, and information, the right to health, security and protection of economic interests, and the right to reimbursement—were not directly enforceable by the Fundamental Law. Hence, intermediate legal regulations were needed. The Constitutional Court noted that defining the rights of consumers and acting against any abuse made by those in a dominant position could be executed by way of ordinary legislation. Many concepts could be considered constitutional, and it was not in the competence of the Constitutional Court to choose among these concepts.[32]

The second question posed by the government was: 'Under what constitutional conditions may the existing contracts be amended by law?' Referring particularly to its decision no. 32/1991 (VI. 6.), the Constitutional Court insisted on upholding its previous decisions, stating that any legislation to amend the contents of a contract that had entered into force before its own (the new law's) effective date could only be exceptional, and based on the 'fundamentally changing circumstances' principle. In this decision, the Court was maintaining its previous line, also enshrined in the Civil Code.

4. The turning point in the jurisprudence of the Constitutional Court was its next decision. In its decision no. 34/2014 (XI. 14.), which examined the unconstitutionality of Act 38 of 2014, the Court started to apply different standards. The Act, outlined above in the section 'Adopted Legal Measures', had declared that: exchange rate margins were null and void (§ 3); and unilateral amendments to contracts were unfair (§ 4). The acting judges of the Regional Court at the capital, Budapest, had questioned the constitutionality of these rules. But, according to the Constitutional Court, the concerns raised by these petitioners did not attain the level of unconstitutionality, either in their details or as a whole. The new rules did have a restrictive effect on the fundamental rights in question but, in the Court's view, the restriction itself could not be considered unconstitutional.[33]

5. Finally, I should mention the Constitutional Court's decision no. 2/2015 (II. 2.). This was triggered by the judges of the Metropolitan Court of Appeal, acting as the next higher tier in cases related to foreign-currency loan problems. The judicial councils referred to the unconstitutionality of paragraphs 7-15 of

[32] Constitutional Court of Hungary, Decision 3175/2013 (X. 9.) AB, Reasoning [10], http://public.mkab.hu/dev/dontesek.nsf/0/6E5A61C351A5EE37C1257BAB001B9FDD?OpenDocument.

[33] Cf. article I paragraph (3) of the Fundamental Law: 'The rules relating to fundamental rights and obligations shall be laid down in Acts. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right.' http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf.

Act 38 of 2014, claiming that the principle of the separation of powers, the right to a fair lawsuit, Rule of Law, and the principle of legal certainty were breached in what they contained. The Constitutional Court rejected the judicial referrals in this decision as well.

Later, the Constitutional Court made hundreds more decisions on the legislation surrounding the foreign-currency loan crises in 2015 and 2016. Mostly these were in very similar constitutional complaint procedures. But all claims were rejected on the basis of former jurisprudence. This situation will now be analysed.[34]

Changing Constitutional Standards

The General Institutional Environment of the New Jurisprudence

The Hungarian Fundamental Law has been in effect since 1 January 2012 and has significantly modified the competences of the Constitutional Court, as well as the role of private and legal persons and different state institutions in initiating any constitutional review. The general assessments of constitutional adjudication conclude that judicial referral—that is the initiation of a constitutional review by the judge presiding over an individual case—becomes very important in the new system, as the number of successful cases has decreased in other types of procedure.[35] In the given circumstances of the credit crisis legislation, judicial referral would have been a most effective way of initiating a substantive review of the laws being implemented. Not many judges turned to the Constitutional Court, however—which says a lot about the political situation. I now turn to an analysis of the most important cases that *have* been judicially reviewed.

Among several changes, the Fundamental Law introduced three types of constitutional complaint. It also abolished the former *actio popularis* by which anyone claiming that a law, legal provision, or regulation went against a constitutional provision could turn to the Constitutional Court and could request that that piece of law be annulled. In constitutional jurisprudence, this had been the most easily applicable procedure up to 2012, when the Fundamental Law came into force. Until that time, a constitutional complaint could be lodged only in a case of personal injury caused by the application of an unconstitutional norm. By changing the competences of the Constitutional Court, now governed by a new cardinal act,[36] Article 24 of the Fundamental Law effected a change in the

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[34] See the statistics of the Hungarian Constitutional Court at http://mkab.hu/letoltesek/ab_ugyforgalom_2015.pdf.

[35] Cf. Fruzsina Gárdos-Orosz, Alkotmánybíróság (The Constitutional Court), in: András Jakab / György Gajduschek, eds, A magyar jogrendszer állapota 2015, Budapest 2016, 345-390.

[36] Act CLI of 2011 on the Constitutional Court.

composition of cases; and this became apparent in a very short period of time.[37] While abstract review of legislative acts diminished significantly, becoming almost irrelevant in Hungarian jurisprudence, constitutional complaints and judicial referrals increased in importance. However, while the Constitutional Court can mostly treat judicial referrals on their merits, it often finds that constitutional complaints fail to meet the admissibility criteria.[38] In the new system of constitutional adjudication in Hungary, the competence of the Constitutional Court is uniquely limited because budgetary and tax laws can only be subject to constitutional review if the petition refers exclusively to a violation of one of the following rights: the right to life and human dignity; the right to the protection of personal data; the right to freedom of thought, conscience and religion; or the right connected to Hungarian citizenship. The Fourth Amendment to the Fundamental Law (2013) created an even more restricted environment for constitutional adjudication, with many of its provisions overruling former Constitutional Court decisions, for example with regard to state recognition of churches, to limiting political advertisements in private media, and to regulating occurrences of hate speech. The liberty of constitutional interpretation has been further narrowed by a statement that decisions of the Constitutional Court made before 2010 (the precedents) have lost their legal force.[39]

Furthermore, the composition of the Constitutional Court has been completely changed. In 2012, Article 24 of the Fundamental Law introduced a new design with fifteen judges instead of the former eleven. This was seen as court-packing by some Hungarian commentators,[40] as newly elected members of the Court were all elected by the two-thirds majority in parliament enjoyed by the governing party coalition of Fidesz and the Christian Democratic People's Party (*Kereszténydemokrata Néppárt*, KDNP). Later, in 2016, consent from the green-liberal party 'Politics Can Be Different' (*Lehet Más a Politika*, LMP) had to be obtained, so that four new judges could be elected. By 2016, all the judges of the Constitutional Court were ones elected for twelve years (instead of the former nine-year term) and all of them had been confirmed in office by the ruling government. These circumstances need to be taken into consideration whenever

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[37] Fruzsina Gárdos-Orosz, Citizen's Rights to Constitutional Adjudication in Hungary, in: Péter Smuk, ed, The Transformation of the Hungarian Legal System, Budapest 2014, 216-245.

[38] See the statistics of the Hungarian Constitutional Court at http://www.alkotmanybirosag.hu/statistics/2016.

[39] Cf. Pál Sonnevend / András Jakab / Loránt Csink, The Constitution as an Instrument of Everyday Party Politics. The Basic Law of Hungary, in: Armin von Bogdandy / Pál Sonnevend, eds, Constitutional Crises in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania, Oxford 2015, 33-110, esp. 60-61.

[40] Cf., for example, Zoltán Szente, The Political Orientation of Constitutional Judges in Hungary between 2010 and 2014, *Constitutional Studies* 1, no. 1 (2016), 123-149, https://uwpress.wisc.edu/journals/pdfs/CSv01n01_06Szente_FINAL_web.pdf.

certain individual decisions of the Constitutional Court are discussed, since the composition and competence of the court fundamentally influence its orientation in such politically sensitive questions as those raised by foreign-currency loan cases. In this changed institutional environment, the cases examined have been regarded as test cases to measure the capacity of the Constitutional Court—and this not only by legal scholars, but also by the general public, who have followed its decisions closely.

The First Judicial Referrals to the Constitutional Court in Credit Crunch Cases

As explained above, parliament passed Act 38 of 2014 to put an end to the deepest credit crunch crisis in Hungary's history, and it regulated two main areas: it declared that exchange rate margins are null and void (§ 3) and that unilateral amendments to contracts are unfair (§ 4). If a financial institution wanted to rebut a presumption of unfairness, the Act created a very specific and rigorous order of procedure it would have to follow.[41] A brief analysis of the Constitutional Court's decision no. 34/2014, assessing the constitutionality of the legal solutions provided by the Act, is presented below. Special attention is drawn to this because it was the first decision in which the Constitutional Court admitted significantly novel, unconventional, and unusual standards into Hungarian constitutional law, in reaction to the government's 'crisis' argument.

Judges dealing with lawsuits about foreign-currency loan disputes turned to the Constitutional Court with a number of petitions in the judicial referral procedure.[42] Some petitions suggested that several provisions of the Act failed to comply with the principle of legal certainty stemming from the Rule of Law, that is from Article B) (1) of the Fundamental Law. This needs some explanation. On the one hand, in a retroactive manner, the Act introduced a presumption of unfairness with regard to certain terms of the foreign-currency loan contracts. This presumption had not existed before the Act came into force, though unilateral contract amendments were also regulated by a number of rules between 2004 and 2014. Moreover, the judges pointed out, the legislation was designed to address the economic crisis of 2008 and so, logically, could not retroactively legitimate regulations valid for the period 2004-2008. Thirdly, according to the

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[41] Cf., for details, Fruzsina Gárdos-Orosz / Péter Gárdos, Az Alkotmánybíróság első határozata a pénzügyi intézmények fogyasztói kölcsönszerződéseiben alkalmazott egyoldalú szerződésmódosítási jogra vonatkozó törvényi szabályozásról. A fogyasztók védelme és a jogbiztonság, *Jogesetek Magyarázata* 6, no. 2 (2015), 3-15, https://jema.hu/article.php?c=385.

[42] Budapest-Capital Regional Court, Decisions 52.G.43.484/2014, 4.G.43.571/2014, and 3.G.43.590/2014. The procedure of judicial referral is regulated in the Act CLI of 2011 on the Constitutional Court, Section 25, http://www.mkab.hu/rules/act-on-the-cc; cf. http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2012)017-e.

claim, a number of provisions of the Act did not comply with the principle of clarity of standards. For example, it was not clear which contract schemes came under the Act and which did not; nor was it clear what should be considered a contractual term that had not been individually negotiated. Fifthly, by linking unfairness to the consequence of the nullity of the term, the Act overwrote the rule of the Civil Code that had been in force between 2004 and 2006, stipulating that an unfair clause could be appealed against by consumers, but that it was not automatically null and void. Also, the Act amended the rule on the limitation of the enforcement period which was defined by the Civil Code, thereby making claims that had been time-barred now enforceable. The judges claimed, furthermore, that the provisions giving effect to the Act had not granted sufficient preparation time for financial institutions and courts to go through the procedures. Neither was it clear who, in a case where the applicant was unsuccessful, fell under the scope of the judgement, and how it would affect consumers, since they were not parties to the court procedures. As it was, applicant financial institutions had to decide whether to sue or not without knowing the legal implications of invalidity. This was so because the Settlement Act which regulated the details of repayments (described above) was passed only in the autumn of 2014, after the time limit for starting the principal litigation on the validity of the contractual terms had expired. And a final snag was this: despite the fact that the Hungarian state was not a party in private legal relationships, applicants could take legal proceedings against the Hungarian State itself.

According to the judge petitioners, the Act violated Article C) (1) of the Fundamental Law—the principle of the separation of powers—as it did not leave room for judges to consider the cases independently. Accordingly, they claimed, it therefore took away not only their independence but even their competences. Furthermore, the Act was in breach of Article E) and Q) of the Fundamental Law, because its provisions were not in line with EU law and international law, the binding force of which was stipulated in the provisions. The petitioners did not finish there. The Act, they said, violated the principle of freedom to conduct a business—Article M) of the Fundamental Law. And the Act violated the right to a fair trial (Article 28 of the Fundamental Law), because it allowed only extremely tight time limits in which to take out legal proceedings, making the situation of the parties very difficult. Moreover, it abused the principle of equality of arms, and therefore prevented the court from making a well-founded decision. On account of all these aspects, the petitioner judges claimed, the Act prevented the enforcement of justice. The judges also claimed violation of the right to effective remedy, and violation of fair trial rights, as stipulated in Article 28 of the Fundamental Law, because of the very high filing fee laid down by the Act. Finally, the petitioner judges claimed that the Act violated the principle of the independence of judges—Article 26 (1) of the Fundamental Law.

Reacting to this petition, the Constitutional Court published its decision 34/2014 on 14 November 2014, some days before the Hungarian Supreme Court, the *Kúria*, itself decided, in the first review procedures based on the Act. The Constitutional Court rejected the claims the referring judges had made. The next section exposes the elements that show how the Constitutional Court was changing previous constitutional standards through its decision.

Consumer Protection. A Constitutional Responsibility of the State or a Fundamental Right with Stronger Position?

As its starting point, the decision of the Constitutional Court 34/2014 (XI. 14) declared that, as a consequence of the economic crisis of 2008, a huge number of households had been put in a vulnerable situation through foreign-currency loans. Tens of thousands of families were threatened with eviction. Negative effects of the problem were being borne by society and by the entire national economy. The situation could not be resolved by way of individual judicial actions (as part of the individual legal protection system). Therefore, the Court deemed, the legislation had a legitimate aim: to alleviate the situation of a great many people who were suffering from the consequences of their credit agreements.

The Constitutional Court stated that the Fundamental Law did protect the principle of legal certainty. With regard to Article R) (3) of the Fundamental Law on the new rules of constitutional interpretation,[43] and in the light of Article M) (2) on consumer protection in case of the violation of fundamental rights of weaker parties, it drew attention to the fact that the protection of consumers had become a primary obligation of the state. Without 'this kind of intervention by the government', the fundamental rights of the people in the vulnerable situation they were now in would have been irreversibly violated, as would their right to dignity. According to the Constitutional Court, the courts should have interpreted the applicable legal rules in conformity with their duty of respecting the constitution, as stipulated by Article 28 of the Fundamental Law.[44] In the Court's interpretation, this required that the dignity of the suffering party and consumer protection must be balanced against the procedural Rule of Law,

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[43] Section R) paragraph 3) of the Fundamental Law: 'The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, with the Avowal of National Faith contained therein, and with the achievements of our historical constitution.'

[44] Article 28 of the Fundamental Law: 'In the course of the application of law, courts shall interpret the text of rules of law primarily in accordance with their purposes and with the Fundamental Law. When interpreting the Fundamental Law or rules of law, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good.'

even in the absence of the Act in question.[45] This amounts to a declaration of *Drittwirkung* (effect on a third party) in Hungarian constitutional law, which means that legal provisions should be interpreted in the light of the constitution. The rule on consumer protection set out in the Fundamental Law, however, was formally interpreted as a clear governmental intent by the Constitutional Court, and it was not a fundamental right more important than legal certainty. The conclusion of the decision is therefore not clear for the long term, as the scope of the protection provided by the Fundamental Law is far from evident.

The decision also suggests that courts, even in the absence of the Act, should have acted *beforehand* on what was set out later in the Act. This expectation raises serious concerns, because it suggests that all previous decisions made in courts of law examining the possible unfairness of contract terms brought up in lawsuits are not in accordance with the provisions set out in the Act. Based on the obligation created by *Drittwirkung*, they could be considered unconstitutional. This example illustrates the direction constitutional development in Hungary has taken. It has departed from consequent enforcement of procedural Rule of Law standards and has moved toward enforcement of some version of justice interpreted by the courts in every individual case. The problem is that if the Constitutional Court applies new standards to its interpretation of the rights of the people, and if it alters the content of these rights on individual, problem-oriented bases (as has happened in this case), Rule of Law is lost when an individual decision from an authority comes into force.

The Problem of Retroactive Effect

In the very same decision 34/2014, the Constitutional Court also examined whether the law violated the principle of non-retroactivity or not. In other words, it sought to determine whether the substantive provisions of the Act created a regulatory environment also applicable to the past. The Constitutional Court argued that certain general provisions of the Civil Code had always been present to influence the interpretation of other provisions related to credit contracts. Therefore, in review, the Act did not impose new requirements, but merely codified and detailed already existing ones such as good faith, a ban on the abuse of power, and the nullity consequence in the section declaring that contracts failing to conform to a legal regulation should be deemed null and void.

[45] See the opinion of Barnabás Lenkovics, president of the Constitutional Court, in Decision 8/2014 (III. 20.) AB, and in 2/2015 (II. 2.) AB. For a more detailed discussion of these cases, cf. András Téglási, A devizahitelezés problémája és kezelésének alkotmányos kérdései az Alkotmánybíróság gyakorlatának fényében, in: Lenter Csaba, ed, A devizahitelezés nagy kézikönyve, Budapest 2015, 315-334; also Tímea Drinóczi, Az Alkotmánybíróság határozata a devizahitelekről. A szerződési szabadság régi-új korlátai, *Jogesetek Magyarázata* 6, no. 2 (2014), 3-12.

These rules were regarded as having constitutional status in civil law,[46] and the Constitutional Court argued that formally the provisions made in the sectoral regulations of the financial market could not and did not overrule the Civil Code. The Civil Code was to be applied as the underlying law in litigation concerning foreign-currency loans. Hence, in the Court's opinion, the Act they were examining did not create a new legal regulatory framework different from the previous one. According to this—mistaken—interpretation, the Act simply set out the presumption of unfairness attached to those contract agreements that did not anyway conform to the general principles of the Civil Code. The problem is that, in the actual practice of financial institutions, state authorities, and the ordinary courts, no actor has ever applied this interpretation of the Civil Code's general principles. Nevertheless, in this decision 34/2014 (XI. 14., [196]), the Constitutional Court declared the content of the Act to be the legislators' authentic interpretation of the Civil Code based on good practice in the application of law.

One major concern that can be raised about the reasoning of the Constitutional Court here is that it did not address the question of how the general clauses of the Civil Code were interpreted and applied *in practice*. Nor did the Court review how these interpretations and applications had affected the results of previous administrative and court proceedings. Giving an 'authentic interpretation' meant, then, that the Court gave a different interpretation of the Civil Code and other rules when related to foreign-currency loan cases with a retroactive effect. The Constitutional Court stated that this is how the rules of the Civil Code should always have been interpreted by the financial institutions, by the state authorities, and by the courts. Yet, the provisions had *not*, up to this time, been interpreted in this way by the ordinary courts. In its decision 34/2014, the Constitutional Court failed to examine any of the related judgements of the ordinary courts of law. The dissenting, separate opinion of Judge László Kiss [293-297] listed a high number of court rulings that brought out this discrepancy. According to Judge Kiss's convincing separate opinion, by ignoring how the related legal provisions applied in effect in cases of loan agreement disputes, and by ruling differently, the Act and the Hungarian Constitutional Court clearly breached the principle of Rule of Law that requires the non-retroactivity of both law and legal decisions.

What is more, the problematic interpretation delivered by the Constitutional Court conveys how the Act and the justification made for it—to find a solution to relieve a particular instance of crisis—was made to rely on a new interpretation on the issue of retroactivity. The notion of 'authentic interpretation' had not

[46] Gábor Halmai, The Third Party Effect in Hungarian Constitutional Adjudication, in: András Sajó / Renáta Uitz, eds, Expanding Constitutionalism. The Constitution in Private Relation, Utrecht 2003, 99-114, 99.

been mentioned or acknowledged in the earlier practice of the Constitutional Court. This new feature creates dangerous room of manoeuvre for the legislative power to change the law with a retroactive effect by providing and enforcing *ex post facto* some new interpretation of prior existing and operating rules.

The Principle of the Independence of Judges

In its decision 34/2014 (XI. 14.), the Constitutional Court returned to the interpretation of judicial independence. It referred to decision no. 19/1999 (VI. 25) in detail, and pointed out that the essence of judicial independence is that the judge is subject only to legal rules, and that judges may not be instructed otherwise. The duty of the judge is to develop his or her 'own opinion in connection with the case on the table' based on pure facts, 'which makes him [or her] capable of concluding a decision in light of the related legal rules'.[47]

Judge Miklós Lévay provided a detailed dissenting opinion on this issue, with which I fully agree. He stated that the Act violates the principle of the independence of judges. This is because, according to its provisions, judges have only a very limited time to prepare and decide in cases that have extensive documentation, while, at the same time, the Act has restricted their tools for consideration and reduced judicial and decision-making procedures to purely formal actions. Judge Miklós Lévay thus highlighted how, in effect, the Act violates the principle of the separation of powers by violating the principle of the independence of judges.[48] If the law does not allow consideration by the judge, because the procedural framework prevents facts and circumstances from being taken into account, not only is judicial independence violated, but, ultimately, the principle of the separation of powers—as set out in Article C) of the Fundamental Law—as well. In these cases, as an upshot, it is the legislator who makes the decision, rather than the judge: judicial consideration has been withdrawn from the judge's constitutional duty.

According to those who hold a dissenting opinion, the Constitutional Court's decision implies that the judge should blindly follow the legislator's will, no matter what the circumstances. The judge's freedom of interpretation, stemming from his judicial independence, has been cut down to a simple obligation to act

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[47] Constitutional Court Decision (ABH), Hungarian Official Journal Publisher, Budapest 1999, 150, 153, mentioned in Decision 34/2014 (XI. 14.) of the Constitutional Court, Reasoning [208].

[48] Miklós Lévay's dissenting opinion to the case 34/2014 (XI 14.) of the Constitutional Court. On constitutional change in Hungary, with a focus on the separation (or not) of powers, cf. Miklós Bánkuti / Gábor Halmai / Kim Lane Scheppele, From Separation of Powers to a Government without Checks, in: Gábor Attila Tóth, ed, Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law, Budapest / New York 2012, 138-146.

in accordance with the law. The nature of this change indicates a new perception of the status that judicial independence has in the constitution.

Constitutional Justice in Transformation – Second Round

New Judicial Referrals

In its decision no. 2/2015 (II. 2.), the Constitutional Court examined some further provisions of the Act on the basis of certain subsequent judicial referrals. Again, these referrals had been filed by judges of courts acting at second instance in cases involving foreign-currency loans. Quite apart from the concerns raised at the first instance, new constitutional questions came up. According to these petitions, too, the Act violated the Rule of Law. It violated Article B) (1) of the Fundamental Law, as well as Article C) (1), the principle of the separation of powers. The petitioning judicial councils suggested that the state should differentiate its power, and should do so because of its duty to protect the public interest and its right to be the direct subject of civil legal obligations. Only those state institutions selected according to their tasks—for example, the public prosecutor and the consumer protection authority—should be in a position to implement measures affecting the individual legal relationships of private parties. The Hungarian state itself cannot claim to be such an actor. But in the foreign-currency loan disputes, the Act enabled applicant financial institutions to launch legal proceedings against the Hungarian State nevertheless.

One referring judge, alluded to in the Constitutional Court's decision 2/2015, argued that the role of a defendant Hungarian State was not comprehensible in proceedings, because the state did not have rights that could be conferred to the consumers after a final judgement. This itself led to an infringement of the principle of Rule of Law. Petitioners also claimed that it was unclear who came under the effect of the judgement required by the Act, and whose rights and obligations were affected by the judgement of an ordinary court of law. It was not possible, they claimed, to solve this fundamental uncertainty of the Act by judicial interpretation.

In the first part of the Court's decision 2/2015, the part where by tradition the petitions considered are summarised, yet another claim from referring judges appears. This is that the Act ignored the legal force of decisions made in previous judicial proceedings. The constitutional requirements of breaking the legal force of former court decisions had not been fulfilled between 2004 and 2014. Under the temporal scope of the Act, Hungary was a democracy with Rule of Law and independent courts, and therefore no reason existed for these final decisions to be reopened. The requesting judges referred to previous jurisprudence of the Constitutional Court, and pointed out that breaking the legal

force and the finality of a decision without justification, as now licensed by the constitution, undermined faith in the existence of individual rights protected by civil proceedings.

With regard to fair proceedings, arguing on [7] of the decision 2/2015 (II. 5.), the judges added that in a case where the legislator had failed to secure the 'legal procedural conditions required to prove the fact that should be supported by evidence and to make a well-founded decision based on the inner conviction of the judge', the constitutional principle of the independence of the judge had been breached. The Constitutional Court rejected and refused these petitions, just as it had in its decision 34/2014 (XI. 14.), and justified the legislative concept with 'constitutional reasoning'. This, once again, was a significant step towards a new constitutionalism in Hungary. A new rule had been initiated by the legislative power and been justified by the Constitutional Court. Bringing new standards into constitutionalism is the paramount strategy being used to build a majoritarian and declaredly illiberal democracy in Hungary. The process is not unlike the new constitution-building programmes some other EU member states, such as Poland, are now undertaking. The credit crisis and the need for state measures to help ordinary people in the difficult situations it has caused have served as a good pretext to change established standards.

The Principles of the Separation of Powers and of Non-Discrimination

The Constitutional Court's decision 2/2015 (II. 5.) complemented its decision no. 34/2014 (XI 14.) on several other conceptual questions concerning the constitutional evaluation of Act 38 of 2014. These questions concerned the validity of certain terms appearing in credit contracts, and matters of settlement between the banks and other contractual parties. In this decision 2/2015, the Court declared that the areas of private entity and of public entity within the state are not mixed unconstitutionally in the Act. Even though the legislative solution reviewed was unprecedented in its procedure, 'unconstitutionality' could not be established. The Court found that breaking the legal force of former decisions was constitutionally necessary—and therefore justified—because, if the Act had not been made applicable to definitely closed cases, it would have discriminated against parties who were in similar situations. In the case of the credit crisis legislation, contrary to what the petitions suggested, the state would have to differentiate between parties in similar situations, if those whose judicial proceedings had started earlier and who had been granted a final decision by the courts could not be put on an equal footing with people whose financial situation had become intolerable only later. On grounds of this, the Court maintained, the regulation was not inappropriate. What must be brought out in considering this argument is that, once more, individual judgement on a case is allowed to overrule the

guarantees of procedural justice. Non-discrimination is argued on the basis of concrete justice practice—justice in this specific credit crunch case. The decision does not take into account either the procedural consequences or Rule of Law claims. Legal certainty stemming from the Rule of Law gets lost, against a conceptually blurred understanding of material justice.

A procedure abiding by Rule of Law would not appear this way. If, in its review of the credit crisis and credit crunch legislation, the Constitutional Court had focused on legal certainty and on protection of the separation of powers, it would have recognised that the definitely closed cases were only small in number. They might have been closed by a non-preferential decision for the creditors, but at least the most important Rule of Law values had not been declared to be at stake. As for the act on early repayment schemes, in 2015 the Constitutional Court took into account the grave social problem the legislators aimed to remedy, but it did not consider the exact number of closed legal proceedings that were affected by its decision. Nor did it consider, in these cases, how many decisions were made in favour of the consumers who were to be protected. In his concurring opinion, Judge Tamás Sulyok, now head of the Constitutional Court, drew attention to this argument. Changing the interpretation of the constitutional principle of non-discrimination in order to bring certain people into a better situation is not an acceptable approach in a Rule of Law democracy.

Another curious feature of the Constitutional Court's argument in its decision 2/2015 on the rule not differentiating between creditors was this: the Court emphasised that, if the legislators had made a distinction between persons and entities affected by closed cases, this would not have been unconstitutional either. The critics who claim that the Constitutional Court's reasoning is weak here, and is contradictory to former constitutional concepts, have a very valid point.[49]

The New Context of the Right to Human Dignity

In addition to what has been discussed up to this point with regard to the Constitutional Court's decision 2/2015 (XII. 5.), the Court referred back to its decision no. 8/1990 (IV. 23.) that human dignity, as the general right of personhood, included rights to the free development of the personality, to self-determination, to general freedom of action, and to privacy.[50] Three years later, in its decision no. 64/1993 (XII. 22.), the Court concluded that the right to property,

[49] On the theory and doctrine of discrimination in Hungarian constitutional law. cf., for example, Krisztina Kovács, Equality. The Missing Link, in: Tóth, ed, Constitution for a Disunited Nation, 171-196.

[50] Decision 8/1990 (IV. 23.) of the Constitutional Court.

as the material basis for general freedom of action, must be protected.[51] Later, in its decision of 2/2015 (XII. 5.) in [64], the Court highlighted that the global financial crisis of 2008-2009 rendered debtors' rights to freedom of action and to self-determination meaningless, which in consequence 'undermined their right to human dignity as well'. However, human dignity should be inviolable according to Article 2 of the Fundamental Law, and it should be the primary obligation of the State to protect it.[52]

This surprising interpretation of the material basis of general freedom of action and human dignity was challenged by many judges within the Constitutional Court. In her concurring opinion, Judge Ágnes Czine wrote that it was unacceptable to refer to the right to human dignity when violation of the right to equality was the issue being examined. Violation of the right to equality would not render the general right of freedom of action meaningless and therefore would not violate property rights and human dignity. Almost all of the concurring and dissenting opinions challenged this idea in the Constitutional Court's majority decision. Such an unconventional and disputed interpretation may result in the precedent being set aside in the future. Although interpretation of the notion of human dignity may be undergoing change in Hungarian constitutional development, it appears to have relevance in the evaluation of constitutional conflicts. According to the Fundamental Law and its interpretation by the Constitutional Court, the notion of human dignity could serve as a new basic standard. However, such ideas have so far remained rather underdeveloped. To be sure, the 2015 decision on the credit crisis illustrates that in the case of a major societal problem to be solved by judicial measures, the notion of human dignity might gain an important, but contested role, in the evaluation of the legal measures proposed. In credit crunch conflicts it is essentially the human dignity of people that calls for state protection. And yet, this 'human dignity' might not be the same as what the constitutional right to human dignity meant in the past.[53]

In its 2015 decision, the Hungarian Constitutional Court elevated the right to human dignity in relation to other rights. This is not necessarily in line with international or EU law developments.[54] The approach the Hungarian state

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[51] Decision 64/1993 (XII. 22.) of the Constitutional Court. On the former interpretation of human dignity by the Hungarian Constitutional Court, cf. Catherine Dupré, Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity Oxford / Portland/OR 2003.

[52] Cf. Article 1 (1) of the Fundamental Law.

[53] Catherine Dupré, The Age of Dignity. Human Rights and Constitutionalism in Europe, Oxford 2015.

[54] Cf. Gergely Deli / István Kukorelli, Az emberi méltóság alapjoga Magyarországon, *Jogtudományi Közlöny* 70, no. 7-8 (2015), 337-347, http://real-j.mtak.hu/1901/32/jk1578.pdf; Dupré, The Age of Dignity, 82-112.

is taking is, in reality, a paternalistic one: the state claims that its utmost duty is to protect the human dignity of individuals, the personhood rights of legal persons, and, in some cases, even its own dignity and that of its institutions. Although highly debated, this aspect of the decision serves as an important and interesting pointer in understanding the changing concept of human dignity in Hungarian constitutional law.

The changing interpretation of discrimination and human dignity is a theme already hinted at above in connection with the constitutional position of Article M) of the Fundamental Law on consumer protection. It seems that a 'crisis situation' (when a large number of people have faced a challenging situation) has been used in Hungary to push state intervention beyond its previous constitutional limits by way of legislation change. Constitutional principles and constitutional positions on rights have gained a new context, and this inevitably leads one to ask how long this challenge to Rule of Law in Hungarian constitutionalism will persist. The practice of the Hungarian Constitutional Court shows how constitutional standards have changed in Hungary since the financial crises began. Some authors believe that the engine of these changes was the financial crisis itself and the serious credit crises that followed.[55] Others believe that the financial crisis was just a pretext for the government to undermine formerly established constitutional standards and move towards an illiberal democratic order with a different understanding of constitutional provisions.[56] And indeed, changes in constitutional standards have undoubtedly featured in the decisions on credit crisis cases made by the Hungarian Constitutional Court.

Conclusion

The aim of this study has been to show the nature of the change that has occurred in Rule of Law constitutionalism in Hungary. As in Poland, a new constitutionalism has been built up, partly by a transformation in the understanding of law and legal standards. The first step was the adoption of a new constitution in Hungary in 2012, and the following step has been to give a new interpretation to constitutional provisions, even if they are similar to the old ones, and even if they seem to be in line with EU law or international law. The financial crisis and the desperate situation so many parties to foreign-currency

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[55] Nóra Chronowski / Márton Varju, The Hungarian Rule of Law Crisis and Its European Context, in: Andreas Kellerhals / Tobias Baumgartner, eds, Rule of Law in Europe. Current Challenges, Zürich 2017, 149-168.

[56] Zoltán Szente, Breaking and Making Constitutional Rules. The Constitutional Effects of the World Financial and Economic Crises in Hungary, in: Xenophon Contiades, ed, Constitutions in the Global Financial Crisis, 245-262; Zoltán Szente / Fruzsina Gárdos-Orosz, Hungary, in: Zoltán Szente / Fruzsina Gárdos-Orosz, eds, New Challenges to Constitutional Adjudication in Europe. A Comparative Perspective, Oxford 2018 (forthcoming).

loan contracts had fallen into served the Constitutional Court as a good pretext to introduce and make acceptable new constitutional ideas. The legitimate aim of the state and of legislation—to help people in a truly problematic situation—has provoked extraordinary legal measures that have led to a decline in the protection of Rule of Law standards. The Constitutional Court has often referred to the economic crisis in its argumentation, yet these references have mainly been ornamental. From a legal point of view, they have not been sufficient to justify the alteration of constitutional standards. On the contrary, it could well be argued that Rule of Law solutions should be enforced and strengthened in situations of social crisis.

Following the economic crisis of 2008, the case law practised in the Constitutional Court underwent a significant transition. Barnabás Lenkovics, president of the Court at that time, maintained that the extensive and deep political, economic, financial, social and moral crisis that hit the country seriously affected fundamental rights. He emphasised that, to preserve democratic governability, large-scale legislative interventions could be justified.[57] Contrary to this view, I argue that, in recent years, the interpretations of the Constitutional Court have created a real danger that the successive application of a new, adoptive standard and a justification of exceptional governmental measures may persistently contribute to the decline of the constitutional order and its predictability.[58] Discussion on the decline of Hungarian constitutional culture has become quite strident in recent years.[59] The long-term effects of the decisions analysed in this article are as yet unforeseeable. The record of the decisions made in foreign-currency loan cases, however, certainly shows that the 'crisis situation' and the deferential approach of the majority of the Constitutional Court has been enough to weaken some of the standards that were believed to be normative in the Fundamental Law. These normative standards include the principle of the separation of powers, judicial independence, the non-retroactivity of legislation, and the right to a fair trial. The level of protection provided by these principles and rights has altered significantly in recent years. Some rights, such as the

[57] Decision 45/2012 (XII. 29.) AB of the Hungarian Constitutional Court, http://public.mkab.hu/dev/dontesek.nsf/0/B139EF59DD213D0BC1257ADA00524EC0?OpenDocument, dissenting opinion point 4. and 7.

[58] Cf., with analogous arguments, Nóra Chronowski / Attila Vincze, Alkotmánybíráskodás (gazdasági) válságban, *Alkotmánybírósági Szemle* 4, no. 2 (2014), 104-112, http://real.mtak.hu/27421/1/VA-CN_AB_es_valsag.pdf; Gábor Attila Tóth / Kriszta Kovács, Aufstieg und Krise. Wirkung der Deutschen Verfassungsgerichtsbarkeit auf Ungarn, in: Michael Wrase / Christian Boulanger, eds, Die Politik des Verfassungsrechts. Interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten, Baden Baden 2013, 317-342.

[59] Here I will only mention László Sólyom, The Rise and Decline of Constitutional Culture in Hungary, in: Armin von Bogdandy / Pál Sonnevend, eds, Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania, Oxford, Portland/OR 2015, 13.

right to human dignity, and some responsibilities of the state, such as consumer protection, have been gaining new constitutional positions and novel meanings. The decisions examined above imply legal uncertainty. This does not bode well for firm constitutional rule that wishes to be in tune, and in interactive practice, with international and EU law standards.

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