Comparing courts: The accountability function of courts in Poland and Hungary

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COMPARING COURTS: THE ACCOUNTABILITY FUNCTION OF THE CONSTITUTIONAL COURTS OF POLAND AND HUNGARY

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1. INTRODUCTION

This article deals with two countries in Central Europe that both established constitutional courts during the later part of the eighties and early nineties, and which to a large extent share the same historical, political and legal tradition, namely Poland and Hungary.

Poland and Hungary share a range of histories, traditions and cultures, conceptually in terms of the form and content of their legal structures, and politically in terms of the basic structures of their social and political institutions. They also both partook in the transition that swept across Eastern and Central Europe in the late eighties from communism to liberal-political democracy based on a market economy.1 As a part of that transition they established, as most countries in the region did, constitutional courts for the purpose of monitoring the political process, so disdained by years of illegitimate practice. Yet, these courts developed very differently, both in institutional character and in strength. The key questions of this article are why, what can that difference can tell us and what does a comparative study of constitutional courts imply in terms of methodology.

It is an interesting feature that only the Constitutional Court of Hungary is known for its activism, one commentator calling it “the most active court in the world”.2 What remains in part to be explained in relation with the accountability function of courts, is the comparative status of the courts themselves, in light of their surroundings and traditions.3 What we will try to analyse, therefore, are the conditions leading to one of the courts taking on such an internationally exceptional role, and the other a more modest one with regard to what we can call the accountability function of courts, which is the specific aspect of the courts’ behaviour under scrutiny in this article.

1.1 The accountability function of courts

The study of these two courts is not a guide to the general substantial law decision-making of the constitutional courts of Poland and Hungary.4 Rather, the focus of this article is a specific function of a constitutional court that goes beyond the mere care-

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1 Using the label “transition” does not imply a stance in the theoretical debate about whether the political shift in Central and Eastern Europe was a “transition” as opposed to a “transformation” as opposed to a “revolution”. For a discussion of these concepts, see Andrew Arato, Civil Society, Constitution, and Legitimacy, Lanham, 2000.


3 This is not to say that comparative analyses have not been undertaken. The point is that we in this connection are trying to shed light on what has made this court so active, and whether that very activity can also be seen as exercising a high level of the accountability function.

4 For an excellent study of the rights adjudication of the constitutional courts in Central and Eastern Europe, see Wojciech Sadurski, Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe, Dordrecht, 2008. Sadurski’s focus is different from the study conducted in this article, in that it focuses on the broader issues of rights litigation in general, and not the accountability function of courts in particular. Moreover, his focus is on the question of democratic legitimacy of influential constitutional courts, a question permeating the legal philosophical constitutional debate for decades. Although this article also implies that question, it is not phrased in the terms of the “who’s guarding the guardians-questions”, and therefore differs from the Sadurski’s more rights-skeptical approach.
taking of the constitution as a legal document. The subject of this article is the \textit{accountability function of courts}. The accountability function of courts is the courts' willingness and ability to hold political power holders accountable for attempts to overstep their mandate and to structure the democratic process.\textsuperscript{5} We expect of courts in a liberal democratic state not only to interpret the laws that the political assembly produces, but to \textit{caretake the constitution}, broadly understood. That means we expect of courts to implement and have as an interpretive background the very ideas that informed the establishing of the constitution itself. And those ideas, although manifold and diverse, can be summed up as true representation, separation of powers, freedom of expression and power checking power.

More specifically, as to the values we expect courts to pay particular attention to within the context of liberal democracy, I follow Robert Dahl in expecting the attention to be drawn to the following attributes: 1) that officials are elected; 2) that elections are free and fair; 3) that suffrage is inclusive; 4) that all citizens have the right to run for office; 5) that there is freedom of expression; 6) that there is alternative information and that there is 7) associational autonomy. This leads up to a definition of democracy as a state in which all citizens are “equally qualified to participate in the process of making decisions about the policies the association will pursue”.\textsuperscript{6} These features are, to varying degrees, what a normative concept of democracy entails for the purposes of studying the accountability of courts as understood in this article, and it informs the selection of case material that we will look at.\textsuperscript{7}

In studying the accountability function of courts, I will select cases where the courts have made or not made decisions where issues of the control of state apparatus, the structuring of the democratic process and general issues of democratic legitimacy were of importance.\textsuperscript{8} This includes, but is not limited to, the concept of judicial review.\textsuperscript{9} It also

\textsuperscript{5}This article is an offspring of, and relies heavily, on a book project, \textit{Courts and Power in Latin America and Africa} by Siri Gloppen, Bruce M. Wilson, Roberto Gargarella, Ellen Skaar, and Morten Kinander. Palgrave Macmillan: New York 2010, where the authors develop a methodology for studying and comparing courts which aims at simultaneously recognizing courts as societal institutions represented by human beings as well as decision makers bound by law. For a full explanation of the concept of accountability function of courts, see especially chapter two, and the methodological framework developed therein.


\textsuperscript{7}I will not go through case material representing all seven features. For example, and most notably, the media cases in Hungary will not be covered, simply because the nature of the comparison makes it natural to focus on other cases, like the lustration cases.

\textsuperscript{8}A remark about the accountability function in this region might be of importance. In contrast to the accountability function of the courts in e.g. Latin America, the main concern – although not the exclusive concern – of the courts in Poland and Hungary in this period was not how to control the power holders as such, and to prevent political corruption and gerrymandering of elections in order to stay illegitimately in power. Rather, it was the structuring of the political system in itself, the erection of classical Rechtsstaats-ideals and the judicial solution to the political problem of how to deal with past political crimes and general political and democratic mismanagement. This poses a somewhat different question for the courts in this region as compared to e.g. Latin American and some African courts that underwent a transition and established constitutional courts in the sense that the accountability issue is more directly a horizontal one, and not so much concerned with the vertical question of popular access to fair elections and positions. Admittedly, the actio popularis in Hungary, as discussed later in this article, establishes one of the most profound vertical accountability mechanisms any modern court at this level has experienced. But this is more a trait of the institutional set up than the function and practice of the court itself in selecting cases for review.

\textsuperscript{9}In this context, I make a distinction between accountability function and judicial activism. Judicial activism does not have any conceptual connection to the normative ideals informing the accountability concept as outlined here. For an excellent and interesting analysis of the activism of
includes a discussion of the institutional and contextual framework within which the courts operated. We will not look at the entire period of the courts, but specifically at how they functioned in the first ten or so crucial years of the construction of national, liberal democracy.

1.2 A methodological point about the study of courts

Studying and comparing two constitutional courts requires a robust methodology that neither reduces the study of courts to individual behaviour nor tries to draw concrete conclusions from general historical and political determinist theories. Therefore, this article studies these two courts from a threefold methodological perspective that steers clear of the methodological pitfalls of pure individualism and pure collectivism. Social behavior is too complex to be reduced to either a product of rational individuals or the mere reflection of great histories. This article therefore also makes a general methodological claim, namely that courts cannot be meaningfully studied according to methodological approaches of rational choice theory, or according to historico-deterministic theories. In short, it is the contention of this article that legal decision-making cannot be explained according to mono-causal theories. More specifically, studying courts as in this article implies a critique of so-called mono-causal explanations of court behavior that focus either exclusively on a) political and legal culture; b) institutional design and c) actor-based behavior. Arguments from a) political and legal culture obviously fail in the context of two similar, if not almost identical legal cultures to explain developmental differences. Arguments from b), institutional design, fail for a large part as mono-causal explanations for the same reasons, since identical communist institutional design cannot explain differences after the transitions, while actor-based theories, in particular rational choice theories, who endeavor to explain the outcome of legal decision-making by reference to the political preferences of the judges find little support in the practice of the Polish and Hungarian courts. The nominations of judges to the constitutional courts were extremely consensual and so politically uncontested that the personal political preferences cannot explain much. Rather, a comparative explanation of court behavior must undertake a multi-causal, hermeneutical approach, drawing on all three forms of explanations and allowing for their relative influence in different contexts.

The structure of this article is therefore divided into a study of the political and historical context (section 2), the institutional framework within which the courts operate (section...
3) and the individual operators and key individuals (section 4), as there always are in such crucial times.\textsuperscript{10}

With these introductory remarks, I return to the subject of the article.

2. POLAND AND HUNGARY

2.1 The political and legal context Central Eastern Europe

In a broad perspective, Hungary and Poland share the same legal and constitutional culture; they both subscribe to the general principles and ideals of western liberal democracy with a constitutional system containing a written constitution outlining the basic principles and framework of the political institutions.\textsuperscript{11} But they have also continued a continental tradition in which they have historically taken part, namely the civil law tradition with a structure involving independent career tracks for judges, independent council of magistrates, emphasis on written statutes and legal practice in conformity with such statutes, and promulgation, publication and announcement as the core values of democracy and the basis for predictability of the administration of justice. Moreover, it involves giving a great deal of competence and power to an independent constitutional court or tribunal, having vast powers in terms of review of ordinary political practice and legislation, but lesser competence in terms of concrete review of the decisions of other governmental bodies and courts. The function of judicial review is in both the Polish and the Hungarian constitutions written into the constitutional document itself. Given that the these constitutions are of a fairly recent date,\textsuperscript{12} and given that the nomination procedures for the justices of the constitutional courts are democratically based, the democratic problem of judicial review extensively debated in the Anglo-American literature is not equally prominent in this tradition. It means simply that judicial review is an integral part of the democratic system, both safeguarding and controlling the political bodies of government. Still, one could argue that an election of constitutional judges in Poland that depends exclusively on the absolute majority decision of the Lower Chamber (Sejm) is in fact a political choice. In Poland, candidates are nominated by 50 parliamentarians or the Presidium of Sejm, whereas in Hungary, they are nominated by the Nominating Committee consisting of one member of each political party represented in the Parliament. A two-thirds majority is required to elect a constitutional judge. In the

\textsuperscript{10} For a fuller and more robust explanation of the methodological debate surrounding this approach, see Gloppen et al. 2010: chapters two and three.

\textsuperscript{11} For a general, and excellent, account of the constitutional courts in Central and Eastern Europe, see Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe, University of Chicago Press: Chicago, 2000.

\textsuperscript{12} Although the Hungarian constitution is nominally the Stalinist constitution of 1957, it has been amended to such a degree that it is most appropriate to call it a new constitution.
first ten years after the transition, there was very little political contestation as to the
election of judges to the constitutional court.

Hungary and Poland share a common recent political history, in particular the history of
an all-encompassing communist structure with authoritarian underpinnings. The East and
Central European transition is of special interest since it not only led to the upheaval of a
political system; its transformation changed the integral part of the legal system as well
as the economic system, both as concerns the state’s budgetary plans and the type of
possible economic cooperation between the citizens directly. This inherent change of
social thinking in its broadest possible sense had legal implications in terms of posing
challenges to the constitutional structure when grappling with the past. This grappling
concerned moral, social and political issues: morally in terms of raising the question of
how to deal with the perpetrators of crimes against political dissidents of the old regime,
socially in terms of trying to protect the welfare rights of citizens who were abruptly left
unprotected in the market economy and politically in terms of understanding and
applying the recently arisen concepts of separation of powers, limited sovereignty, the
Rule of Law and general constitutional checks on legislative, governmental and
administrative decisions.

Poland and Hungary belonged to the same political scheme and societal arrangements. In
the early Stalinist stages of communism, most countries in the region subscribed to
virtually the same doctrine of communism. Moreover, both countries were among the
forerunners in the 1989 transitional process that swept across the communist world,
Poland in fact being the first country to break free of Soviet style communism. In both
countries, there was parity between the negotiating sides at the Round Table talks, and
both communist parties lost severely in the first free elections (Arato, 2000:199). In
addition, both countries met the transitional period with a Stalinist constitution, which
was heavily amended, but which met different destinies in the two countries. Poland
managed to substitute its amended Little Constitution in 1997 with a full new
constitution, while Hungary never formally replaced its 1949 Constitution, but developed
a thick constitutional court-made jurisprudence alongside the written constitutional
document.

What is ventured as an explanation is that civil society and social movements have
played important, and perhaps decisive, roles in the transitional process of the
administration of justice. These roles played out differently in the two countries. As such,
the explanation I offer for the differing institutional elements, styles of reasoning and
legal competencies of the courts in the two countries – such as the finality of judgments,
access to court and willingness to engage in political decisions – can by and large be traced to the societal and political context, albeit influenced by key actors in the transitional process.

The history of constitutional politics in Poland diverges quite radically from the one we have witnessed in Hungary, both in terms of the constitution making process itself and in terms of the role that the courts played in the development of the governmental framework. As mentioned, whereas the constitutional court in Hungary is regarded by several authors as “the most powerful high court in the world”\(^\text{13}\), the Polish Constitutional Tribunal has been described as “extremely weak”.\(^\text{14}\) Partly what I will discuss is why and in what sense such statements can be descriptively accurate. Both Poland and Hungary experienced a softening of communist rule in the sixties, with Poland witnessing a relative independent judiciary.\(^\text{15}\) This marked a growing awareness of the capacities of the courts as dispute resolution institutions. Although the court system was a far cry away from independence in the sense associated with liberal democracy, neither Poland nor Hungary saw the full force of the “unity of state” doctrine from the Stalin period, which survived and even thrived in other Eastern European countries.

### 2.2 Poland

#### 2.2.1 The role of the judiciary during the Communist era

Polish constitutional politics has a rather remarkable history. Although the state of constitutional politics was not very impressive in the years after the transition, Poland can in some ways be seen as a forefront in constitutional politics during the communist era. This relates to the establishment of the Tribunal in the mid-eighties. After being exposed to joint pressure by democratic forces abroad, in particular Western Europe, and at home by the Solidarity, the communist party established the Constitutional Tribunal in 1985. The intention of this Tribunal on the part of the communist party was nothing more than window-dressing: an attempt to appease democratic forces. It quickly took on a more active role in Polish political life, in spite of initially being staffed with not disloyal members of the communist party and influential law professors during the communist regime. This surprising independence manifested itself rather instantly with the striking down of administrative decrees.


\(^{14}\) Andrew Arato, 2000:203.

The Constitutional Tribunal was created in the aftermath of the strike in Gdansk in the early eighties, and announced in 1982. Being accorded the power to review laws and administrative decisions, it was a unique invention in the Soviet bloc. Although Yugoslavia had enacted a constitution with a limited form of judicial review in 1963, the idea of a court nullifying parliamentary statutes was an anomaly in the region. Operating from 1985, the Tribunal had in effect scant legal resources with which to control legislation and in particular administrative decrees, the most actively used form of decision-making in communist systems. These scant legal grounds for control were meant to present the court outwardly as a Rule of Law instrument, simultaneously as they were assured not to challenge the system as such.

The first substantial result of the softening of original Stalinist doctrine can be claimed to be the creation of the High Administrative Court in 1980, whose task was to review “general administrative regulations for their conformity with statutes and the constitution, and review [...] administrative decisions to determine whether agencies properly applied parliamentary statutes in individual cases” (Brzezinski, 1993:171—72). This legal ground enabled the Court to assume a fairly active role in the protection of individual rights from arbitrary political and administrative decisions. The style of the reasoning often resembled that of well developed systems of justice with judicial review at their hearts. “Thus, by acting as a custodian of the 1952 Constitution, the High Administrative Court created a favorable atmosphere for further development of mechanisms of constitutional protection in communist Poland” (ibid.).

As 1956 was a decisive turning point for Hungarian society, as we shall see, 1980 was a landmark year for Polish constitutional politics. Being pushed by popular social movements, especially the Solidarity, the government conceded increased freedom of expression, in the form of legalizing trade unions. In particular, this legalized the Solidarity, resulting in the initiations of intensive talks with the government concerning, amongst other things, freedom of organization and association. An important consequence of this development was the creation of the Constitutional Tribunal.

Despite its slow start in 1985, the Tribunal increased its powers and competences to check how the state exercised its powers. It compelled the executive and legislative branches to respect Rule of Law clauses, clauses it developed by on the basis of concepts.

of justice, fairness and equality. Specifically, the Tribunal used the Rechtsstaats clause in the constitution to develop concepts which are at the heart of any Rule of Law state. The Tribunal had specific focus on administrative decision-making and decrees, and in 1989, it had issued 40 rulings concerning executive decision-making, 20 of which were declared null and void. Brzezinski and Garlicki sum up the development:

“By 1989, after almost forty decisions, the Tribunal had established several guidelines for judging the law-making powers of the executive branch. First, agencies could issue regulations only with explicit statutory authority and in conformity with the specific subject matter of the statute; they could not rely on implied delegations. Second, an agency could not delegate regulatory powers to other bodies absent explicit authorization in the statute’s delegation clause. Third, substatutory acts had to conform to all parliamentary statutes. . . . The Tribunal successfully limited the well-established law-making practices of state bureaucrats, while gaining the acceptance or tolerance of other political actors.” (1995:30).

The principle of legality which the Court established through these decisions is a robust and material one, and the limits on the competence to delegate power must be seen in light of the political circumstance. Executive decree with little or no reasoning was the far most influential form of political decision-making in communist regimes, and a restriction and check on that form would imply a pervasively influential mechanism in terms of checking the state. That said, however, the Tribunal, up to 1989, had very little to say in politically controversial issues, and no significant material decisions on specific issues emanated from the Tribunal in that period. Indeed, the whole raison d’être of the Tribunal was to protect parliamentary decision-making from administrative infringement (Brzezinski and Garlicki, 1995:27). What one could say, therefore, is that the Tribunal played a small and politically insignificant role during the years leading up to the Round Table talks, but made a substantial contribution in developing a robust principle of legality, a cornerstone in any Rule of Law state. The most important contribution of this Tribunal was therefore to demonstrate the legal ability and potential function of arguments generally considered to be connected with liberal democracy. Thus, the Tribunal ensured that crucial Rule of law concepts were in place before the transition, thus influencing and lightening the restructuring of the court system in the transitional process.

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2.2.2 The Tribunal after 1989

In a constitutional sense, the transition resulted in a series of amendments to the 1952 Stalinist constitution, especially in the domain of the provisions regulating the Tribunal. Most significantly, the Tribunal was granted so-called “universal interpretation of laws”, and preventive review of parliamentary legislation before being signed by the President. Also, the composition of the Tribunal changed, being filled with six Solidarity members in 1989, when half the bench completed their terms. This enabled the Tribunal to place itself more actively at the center of the transitional scene. This had, according to Brzezinski and Garlicki, three manifestations (1995:32).

The first and most obvious manifestation was that the Tribunal became more aggressive in its review of parliamentary statutes. Indeed, seven out of eight statutes reviewed in 1989 were declared unconstitutional. Although the first year of newly formed democratic regime might not be the best indicator of a constitutional court’s activeness, the trend continued. In 1990-91, over two-thirds of reviewed statutes did not meet the constitutional test directly or were modified by Parliament in order to avoid non-conformity with the Constitution. Secondly, the issues addressed were increasingly controversial, constitutionally speaking. This included issues of teaching religion in public schools, the question of prohibiting doctors from performing abortions, a highly sensitive subject in a country with a very strong Catholic church, the legality of investigating the past of employees to find out whether they were high ranking communist officials or collaborated with the secret police during the communist era, etc. Thirdly, the scope of review broadened, and stretched to include reviews of international law, an area formerly without the reach of the Tribunal’s power. Nevertheless, the negative decisions of the Tribunal with regard to the constitutionality of normative acts were until 1999 subject to parliamentary approval. As such, it functioned as a remnant of the unlimited sovereignty concept that ruled in the communist era, a remnant, nevertheless, with substantial appeal to power politicians also after the transition.

2.2.3 The institutional and constitutional framework regarding judges

The 15 judges of the Constitutional Tribunal are elected by the members of the Sejm, “for a term of office of 9 years from amongst persons distinguished by their knowledge of the law” (Art 194). Their salaries are determined in the Constitution to be “consistent with the dignity of their office and scope of their duties” (Art 195 (2)), a principle introduced in 1989 on constitutional level intended to guarantee that judges are sufficiently compensated. This principle of remuneration applies not only to the Constitutional Tribunal justices, but to judges in all courts, and has generated a host of legal complaints and court cases, where judges have protested that their salaries have
not been in accordance with “the dignity of the office” of judging, and demanded that they at least should be compensated on par with the salaries of members of the Sejm. It should be noted, however, that judges are not particularly badly paid compared to other professionals in Poland, and there have not been indications of corruption with regard to the judges.

2.2.4 The structure and function of the Constitution

Much of the explanation why the Polish Tribunal can be described as institutionally “extremely weak” in the eight years following the transition can be found in the constitutional structure itself. It is a well-known fact that communism favored the complete subordination of law to politics, and the legal execution of justice or the profession of judging was ultimately seen as a low status line of work, compared more or less to low rank administrative decision-making. This did not change as much as one could have expected after the transition, and as much as the neighboring countries changed their conception of the relationship between law and politics. The most poignant expression of this is the fact that the decisions of the Tribunal were subject to political review by the Polish national assembly, the Sejm (!). The Tribunal’s decisions were not final until the interim Constitution of the transitional years, the so-called Little Constitution, was replaced by the full Constitution of 1997. Henceforth, both the discussions in the Sejm whether or not to accept the decisions, and the decisions themselves, were always subject to this fact. This does not imply that the constitutional jurisprudence of Poland in the first post-transitional years developed against the backdrop of party politics, since the decisions of the Tribunal enjoyed a high degree of respect, and few decisions were in fact overturned. However, the discussions in the Sejm, on the one hand, were marked by decidedly non-constitutional discussions concerning the desirability of the various decisions, and the Tribunal itself, on the other hand, had to take the political aspect into account.

This was especially true in the debate over the decisions concerning the Pension Act, with the Minister of Finance threatening to resign and the Prime Minister promising that his entire Government would step down if the Sejm did not reject the Tribunal’s decision. The decision was, nevertheless, in the end left intact, with the Minister of Finance resigning as he promised. In other cases, for example in the decision rejecting certain elements of the Tax Act of 1993, the Sejm overturned the decision by the necessary two-thirds vote required in order to do so. Similarly, the unconstitutional Budgetary Act that retroactively increased income tax rate for individuals was overturned in April 1995 solely for political and economic reasons. Such authority of the Sejm clearly contradicted the
principle of separation of powers and Rule of Law that the Constitutional Tribunal wanted to strengthen.

On the other hand, the Tribunal has repeatedly and firmly ruled in favor of judicial independence in politically controversial cases.\(^{18}\)

The Little Constitution also contained a strong presidentialist system with substantial powers to the leader of the Senate. However, after the communists’ severe loss in the first elections, this did not change. While the communists maintained the President for a short period of time, neither Lech Walesa nor the democrats who succeeded the communists showed any willingness to reduce the stronghold of the President in Polish politics. Coupled with the possibility of overturning the Tribunal by a two-thirds vote in the Sejm, this creates a condition where judicial review of political and administrative issues is especially important, but where it can hardly function according to its usual normative legitimacy.\(^{19}\)

Even the discussions concerning whether or not to make the decisions of the Tribunal final were marked by fierce political debate, with Walesa strongly wishing to maintain the possibility to overturn decisions. This can be explained by referring to Walesa’s general hyperbole political ambition, at times exceeding the boundaries of legality. Although Walesa’s personality is an important factor in post-communist Polish politics, it needs to be explained why the Little Constitution of the Round table talks did not opt for the finality of the Tribunal’s decisions.

The candidates for an explanation of why the Little Constitution did not go for a structure wherein the Tribunal had finality of judgement are several, but certain alternatives can be pointed out. First of all, although the Solidarity was in favor of overturning communist rule completely, its attention was not on the legal framework. Rather, a genuine and popular political rule was the goal and the foundation, and a structure where a non-democratic Tribunal has the final say, is not exactly where to look in such circumstances.

What is perhaps more significant in explaining this feature, is the order of the transitions in Central and Eastern Europe. Poland was the first to successfully arrange Round Table

\(^{18}\) See for example, the Tribunal’s ruling of November 9, 1993 (OTK 1993/2/37), and the EU report cited in the previous note, p. 320, with further references to cases.

\(^{19}\) The strong position of the presidency in the first years after the transition must be seen in light of the bargaining position in the transitional process itself, where the communists feared that the Solidarity would become too powerful in the Parliament, but felt confident in maintaining the Presidency. It must be emphasized that this is valid only for the state of the President during the regime under the Little Constitution. The 1997 Constitution substantially weakened the presidentialist regime, with counter-signatures to laws by the Government and limitations of the right to dissolve Parliament. For more on this, see Leszek Garlicki, “The Presidency in the New Polish Constitution”, in East European Constitutional Review, Spring/Summer 1997, vol. 6, nos. 2 and 3:81—89.
talks with the purpose of reforming the whole political structure. But no one knew the extent of the negotiating will of the communists, and the possibility of the use of force was a very real and significant one. Therefore, the Solidarity probably did not want to go too far and ask for more than the communists could possibly agree to. Also, the communists, by agreeing to popular and free elections, had hopes of maintaining some control of the Sejm and henceforth the Tribunal.

In an uncertain situation, it was perceived as wiser to focus on demands that could be met and which were at the heart of the movement, rather than making demands for a complete change of the whole structure. In such a situation, the idea of constitutional finality of the Tribunal would be tantamount to asking for a revolution, a risky project in the face of an alerted army. In other words, no one knew how far the communist party was willing to go or how far it could be pushed. Hence, countries following Poland could see what was possible and learn from the Polish experience and consequently make staurcher demands.

Although hard to demonstrate, what could explain why the final review was not bargained for in the talks, is the general popular support of the Solidarity as a political movement from the point of view of civil society. With this pervasive and popular legitimacy, the Solidarity could not be expected to bargain for broad constitutional limitations on state power, and the judicial system is seldom of central interest to popular social movements. This is in contrast to for example Hungary, to which we will now turn.

2.3 Hungary

2.3.1 The 1956 uproar, “the art of glossing over conflicts”, and ‘the second economy’

As in every country’s political and civil history, there are decisive moments producing changes in conceptions and operations of the administration of constitutional justice. In Hungarian circumstances, it is important to highlight the 1956 uproar. Until 1956, the Hungarian system had been staunchly Stalinist, with totalitarian traits. Largely unpopular by the mid fifties, this regime was subject to pervasive civil protest, which was struck down harshly with, amongst other things, Soviet tanks, killing more than 2500 directly, and instigating a grand scale abduction of oppositional activists.

Although the uproar itself did not result in a regime shift, the form of communism in Hungary changed, as concerned the ordinary, non-activist citizen, in a liberal direction with the instigation of Janós Kádár as Prime Minister. Kádár was to maintain the role as leader of the communist party until 1988. For example, the basic attitude of the
Government shifted from the totalitarian dictator Rakosi’s “whoever is not a follower is our enemy” to Kadar’s “whoever is not against us is with us”, a substantial change of a foundational principle. The leading idea behind the Kadar regime from 1956 was the administration of Hungarian society according to what was called “national unity and social consensus”, developed mainly as a direct response to the crisis of 1956. This aim of political organisation and administration implied the so-called doctrine of “the art of glossing over conflicts”. This meant that political criticism and social disagreement with the state or administration were to a considerable extent quietly accepted, as long as it did not involve an active critique of the fundamentals or the basic principles of the system, hence the principle of “whoever is not against us, is with us”. In other words, the shift of the basic principle involved considerable freedom of expression and conscience, as compared to the other countries and regimes in the region. More importantly, it involved a partial restructuring of the economic system, where ordinary citizens were allowed to run businesses according to semi-market economic principles.

In this restructuring of Hungarian society, the regime gave privileges to a large part of the population such as privileges of enterprise in addition to ordinary jobs that the state provided. Travel opportunities were also greater in Hungary. These privileges, which were actively distributed, were largely motivated by the implementation of the doctrine of “the art of glossing over conflicts” and the achievement of “national unity and social consensus” that the regime sought in the aftermath of the 1956 uproar. The consequence was the creation of a fairly vast middle class, with little or no interest in voicing criticism, and fear of loss of private and political privileges if critique was voiced.

This phenomenon of extra privileges, creating a form of market economy within the Hungarian society, had two main consequences and features. Firstly, it pacified the protests of civil society and effectively reduced the working conditions of social movements. Secondly, and equally important, it created an immense governmental regulatory system. The attempt to regulate a market economy within the frames of a communist, authoritarian apparatus, is evidently a demanding task for the state, since for every freedom and privilege that was distributed, a corresponding set of surveillance and control mechanism had to be effectuated. The active side of this regulatory practice was, as in all communist countries, an extensive use of administrative decree and delegation of discretionary competence to the bureaucracy. We will return to this aspect later when discussing the post-transitional reaction to this regulatory practice of “government by decree”, but for now it is important to note the special character and reason for the bureaucratic arrangement in Hungarian society, with the combination of communist economy and authoritarianism with a version of market economy. The result
of such a combination is the creation of a passive and content middle class, few social movements and little political activity amongst the citizens.

An important effect of this second economy in Hungary was that it kept Hungarian citizens content with the state of affairs in ordinary life. The huge communist spending on welfare effectively contributed to a lukewarm popular desire for transition from Hungarian style communism to market economy. In other words, the general citizenry was not so exposed to the more dire aspects of communism that it longed for trading in secured benefits for the uncertainties of the market economy included in western style democracy. In this sense, the transitional movement can be said to be elite-driven, or top-down organised, in contrast to the experience in Poland.

2.3.2 The popular legitimacy of the transition

Although Hungary was an early transitional country, the civil society movement for transition in Hungary consisted largely of members of the democratic movement, youth groups, ecological movements, etc. Although such groups mushroomed in the late eighties and became an influential feature in Hungarian society, one had to actively seek out such groups in order to be a participant in the democratic movement. This is of course in contrast with Poland, where the democratisation of society was also related to the labour movement, thereby engaging different levels of society more directly. One can therefore say that the transition itself in Hungary was not one of massive popular mobilisation, but rather one where certain pressure groups contributed to the system change.

2.3.3 The constitution making process: lacking democratic legitimation

When discussing the constitution and the constitution-making process in Hungary, it is important to keep in mind that the constitutional document itself is a remnant of the Stalinist constitution of 1949. Being heavily amended during the Round Table talks between the opposition and the communist leaders in 1989 – one of the main themes being the construction of a constitutional court – it was intended to function as an interim constitution, in the anticipation of a completely new and in essence fully liberal constitution. For various political reasons, which we will not go into here, this did not happen, leaving the Constitutional Court in this highly important transitional period with a patchwork-ridden, vague and internally contradictory document. While it is unfair to characterise the constitution as essentially a Stalinist document, the fact is that the constitution itself is ridden with ambiguities, vagueness and piece-by-piece amendments.
due to maintaining of Stalinist clauses and structure. Although it has been amended by ordinary constitutional politics, the most pervasive process of amendment happened during the Round Table talks in 1989, where the whole constitution was given a decisively elitist trait. The constitution of Hungary is therefore rightly considered to be a weak and democratically elitist document, giving it a problematic status, both legally and normatively.

The ambiguity and incompleteness of the constitution itself, particularly its vague description of the relationship between parliament and the President, leave a host of issues to be decided by the interpreting institution, namely the constitutional court. The court is therefore a major premise for the development of constitutional institutions.

The Court was created and came into effect before the first free elections in Hungary, and consequently had the opportunity to supervise the first election process, the constitutional status of political parties and the important question of the relationship between the parliament and the President. Its significance as a governmental institution is also indicated by its place in the constitution, coming directly after the chapters on the President (chapter II) and the Parliament (chapter III), but way before and separated from the chapter on the general judiciary (chapter X). Henceforth, the constitutional court is apparently more conceived as a function in the political institutional agenda than as an ordinary appeal court at the top of the ordinary judiciary. In addition, it draws up its own draft budget, and sends it to Parliament for approval as a part of the state budget, and it has special nomination and election procedures for the judges. These more concrete competences of the court are described in chapter IV of the constitution, and the corresponding Act of the Constitutional Court.

2.3.4 The constitutional status of the Constitutional Court

The Hungarian Constitutional Court was created at the Round Table discussions and came into effect already before the first free elections.

Article 32/A (1) of the Constitution determines that the Court has the capacity and the duty to “review the constitutionality of laws and perform the tasks assigned to its jurisdiction by statute”, referring to the Act of the Constitutional Court. This competence of review includes both preventive and retroactive review, but is limited to so-called “abstract norm control”, i.e., the court does not have competence to review concrete decisions. The powers of review are limited to reviewing the norm on which other

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20 It must be noted, however, that it is not the content of the remaining clauses from the Stalinist area which creates this problem; it is more a problem of two different and conflicting ideologies being molded into one and the same document.
decisions rest (retroactive review), or whether the proposed, but not yet promulgated, set of legislation or administrative decree is in conformity with the constitution (preventive review).

A judge of the Court is elected for a nine-year period, with the possibility of being re-elected once. The Court consists in the period discussed in this chapter of 11 members who are elected with a two-thirds majority of all representatives in Parliament, which requires that the parties must agree in advance on the vote. A Constitutional Court judge must have completed a legal education, which for theoreticians means being either university professors or having earned the academic degree of "Doctor of Government and Legal Sciences". For the practitioners, on the other hand, the requirement is at least 20 years of professional experience in a specialized field requiring a legal education. Until 2000, at least, there was a decisive preference for academic theoreticians on the Court, giving it decisively academic gravity and style of argumentation. As Brunner importantly notes: "This unusual makeup of the court can be explained by the fact that in Hungary legal scholars were the driving force behind the liberal-democratic reforms and within legal scholarship civil law was the field in which one could work relatively undisturbed by political pressure" (2001:73).

The Constitutional Court judge is remunerated at the level of ministers, while enjoying the same privileges as such ministers.

2.3.5 The actio popularis

Article 32 (3) in the Constitution is of special importance and is responsible for the fact that the judges, in the Court’s first years, were overworked and struggled severely with striking a balance between thorough and principled legal argumentation and merely working through the caseload. The article states that "[e]veryone has the right to initiate proceedings of the Constitutional Court in the cases specified by statute", which is the so-called institute of actio popularis. "Everyone" must in principle be taken literally. It does not contain a requirement that the case is of legal interest or involves a conflict with another party in order to be brought before the court. It goes without saying that this institute leads to a huge workload for a court in a country having transitioned to liberal democracy, where the concept of Rule of Law was to be so decisive.

The concept of Rule of Law played a significant part in defining the legal character of the transition process itself. Due to a necessity to deal with issues of transitional justice, the

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21 In this presentation, we follow "Structure and Proceedings of the Hungarian Constitutional Judiciary" by Georg Brunner, in Solyom and Brunner, 2000:65—103.
Court insisted, in accordance with popular understanding, on conceiving the transition in terms of continuity and development, instead of break, revolution and total change.\footnote{As Arato says: "There is a remarkable consensus in Hungary according to which the change of systems did not take a revolutionary party". (2000:106).}

The best example of the difficult position that the Court was in with regard to whether it should break totally free from its inherited framework and consequently establish a revolution or whether it should seek continuity and hence a radical stance, is the argument and justification for finding a proposed set of legislation that had wide public support unconstitutional. This is the decision to apply the statute of limitations to political crimes committed during the communist era.

In this connection, the accountability function itself displays the Court’s regulation of what legislators can do within their self-proclaimed boundaries, meaning that the Rule of Law adherence that was so insisted upon initially is taken to task.

We will now look at some of the most important constitutional decisions in the first years after the transition in Poland and Hungary and see the structure of legal argument in politically controversial issues.

3. JUDICIAL DECISIONS

3.1 Poland

3.1.1 The decisions developing the Rechtsstaats-clause

The most interesting feature of Polish constitutional jurisprudence revolves around the introduction of the so-called Rechtsstaat clause. Since the amendments and the constitutional culture by which the whole transition was informed contained the concept of a democratic Rule of Law state at its very core, the Tribunal was able to draw upon the basic principles of constitutional jurisprudence in Western Europe. The constitutional amendment of 1989, which introduced the clause in Polish constitutional jurisprudence, stated that “the Republic of Poland is a democratic state, ruled by law and implementing principles of social justice” (art. 1). This was a direct model of the similar clause in Basic German Law, and from now on, the Tribunal felt it could draw directly on Western European constitutions. This was done in a series of decisions which we shall take a brief look at shortly.
3.1.2 The Pension Act decisions

The first of these decisions was the landmark 1990 decision concerning “retroactivity of laws” and the concept of “vested rights”. A prevalent feature in all post-communist societies was the question whether the state after the transition had any obligation to fulfil basic standards of welfare. Therefore, this concerned both the principle of retroactivity and the concept of vested rights, since a cut-back in welfare would apply to pensions that were promised during communism and that could be legitimately relied upon. This was enjoined with another prevalent feature of post communist law: the question of how to deal with the communists.

The case arose after President Jaruzelski challenged the 1990 Pension Act, intending to reduce the pensions of former leading officials in the communist regime. The *ratio decidenti* of the Landmark 1990 decision is that the idea that laws are not to apply retroactively “is one of the basic components of the principle of a state based on the rule of law”. This premise was coupled with another aspect of the Rule of Law idea, namely the “citizens’ confidence in the State, which requires that vested rights be protected” (the decision, quoted from Brzezinski and Garlicki, 1995:36) from such retroactivity. Therefore, the stronger a citizen’s legitimate expectation to receive benefits from the State, the stronger the protection against retroactivity. Although the Pension Act was found to be in conformity with the constitution, the importance of the decision is uncontested. According to the Tribunal, these concepts functioned as specifications of the *Rechtstaats* clause in the constitution, thereby establishing them as parts of the constitutional structure of Poland.

The twin concepts of retroactivity and vested rights were further developed in a series of important decisions. The concept of non-retroactivity was developed in cases dealing with political crimes committed during the communist era. Dealing with historical justice and so-called *Vergangenheitsbewältigung* (dealing with the past) is a prevalent feature of all post-communist countries. In contradistinction to the Hungarian stance on non-retroactivity of laws in connection with the statute of limitations, which we shall take a look at later, the Polish Tribunal made exceptions to the statute of limitations, and defined the communist crimes as “crimes against humanity”. With this definition, the Tribunal could therefore allow the lifting of the statute of limitations clause for such crimes.

The Tribunal also used Article 1 of the Constitution to ground a substantial concept of due process and expand the right to equal treatment. This related more directly to the concept of vested rights as such, and proved to be especially important in the context of
post-communism, and – due to the expansive welfare programs of communism – a common feature of all the transitional countries. Cutbacks in welfare, therefore, concerned directly a vast majority of the citizens who were catapulted into market economy. Questions of cutting back on welfare programs were from this point not just a turn to the right end of politics, but a necessary feature in order to obtain liberal democracy with a capitalist economic framework.

3.1.3 Nationalisation of communist property

As in other communist countries, the question of what to do with the property and wealth of the Communist Party arose in relation to the question of nationalisation of former party property. The most publicised case of the early nineties concerned the validity of a statute transferring all Communist Party assets of 24 August 1989, to the State Treasury, adding that all transactions after that date were to be declared null and void if the intention was to avoid nationalisation. The statute was challenged on the grounds that the uncompensated nationalisation of the Party’s assets violated the Rechtsstaats clause of the Constitution, since the assets were acquired in good faith under valid legal rules at the time. This ground was rejected, however, and the statute was found to be in conformity with the Constitution. This was initially a flat rejection of the argument raised in previous decisions, claiming that the concept of vested rights was a pervasive and broad concept. The argument rested on both formal and moral grounds. First, the Tribunal claimed that the Party had no legal capacity to acquire the rights that it claimed were acquired, since it lacked the legal grounds that supposedly protected the acquisitions. The conclusion was that the concept of vested rights could only be applied with constitutional force “with regard to those rights that were acquired in a lawful and morally unquestionable manner” (the decision, Brzezinski and Garlicki, 1995:41). This resulted in the nationalisation of 70 percent of the Party’s assets, since approximately 30 percent of the assets were derivative from membership fees and therefore legitimate investments.

This formed the groundwork for the erection of standards of due process on the basis of the principle of vested rights, and incorporation of a material concept of equality in the constitutional jurisprudence of Poland. We shall now take a quick look at how the court substantiated the concept of equality before we turn to the larger significance of the Tribunal’s decisions and functions in the Polish constitutional framework.

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23 For a closer presentation of this expansion, see Brzezinski and Garlicki, 1995:42.
3.1.4 The equality decisions

Article 67, Section 2 of the Polish Constitution stating that Polish citizens have “equal rights irrespective of birth, education, profession, nationality, race, religion, origin and social status” is one of the most cited articles in Polish constitutional jurisprudence. According to the Tribunal’s jurisprudence, this principle of equality was violated in one in every three cases. Interestingly, this concept was already an inherent feature of the Tribunal’s concept before the transition. The Tribunal has stated that the conditions contained in Article 67 are fundamental, but insufficient as justifications of a constitutional conception of equality. This has given rise to both a negative and a positive principle of equality and consequently applied to setting up the boundaries of political decision-making. According to the Tribunal, the negative principle of equality was in development already in 1989, and “forbid[ded] unfair discrimination between classes equal before the law and thus … require[d] that laws be applied equally”. The positive version of equality “require[d] different treatment of socially different classes in order to create equality in the law.” (Brzezinski and Garlicki, 1995:43). This applied more specifically to all “situations where we address the rights of individuals belonging in the same category” (the decision, Brzezinski and Garlick, 1995:43). As an example of the pervasiveness of the application of the concept of equality, Brzezinski and Garlicki mention the invalidation of “unfairly discriminatory laws and regulations, explaining, for instance, that they created differential pension rights for pre- and post-1945 … employment, disadvantaged owners of apartment houses occupied by the employees of the Ministry of Interior, and imposed regionally disparate tax burdens”. (ibid.).

What is remarkable is the degree to which this is substantially developed and carved out from the doctrine of the Rechtsstaats clause on the basis of a short reference in the Constitution. This clause was a contribution by the Tribunal to form the tools needed to check the State and to exercise its accountability function, both in terms of legislation and in terms of administrative decisions and decrees.

An interesting and clarifying point in this connection is that the statement concerning the Tribunal as “extremely weak” does not refer to its deferential attitude towards political authorities on the part of the judges as individuals; it refers to its constitutional powers in Polish political life. Hence, there was nothing wrong with the accountability function of the Tribunal as such in its first years after the transition, but it did not enjoy a constitutional and institutional surrounding which enabled it fully to manifest its accountability function.
We shall now take a look at how the Hungarian Constitutional Court exercised its accountability through some influential and much discussed decisions.

3.2 Hungary:

3.2.1 The prosecution of communist crimes

In its dealing with the crimes of the past political regime, the Hungarian Constitutional Court had to steer carefully between both political and popular opportunism on the one hand, and strict “blind” Rule of Law justice on the other hand. The first and one of the most discussed cases involving this opportunity was the act passed by Parliament in November 1991, the so-called Zetenyi-Takacs Act, suspending the statute of limitations for all crimes of murder, treason, and aggravated assault leading to death that were committed during the past 45 years, and which for political reasons had not been prosecuted. Although this was a legally dubious manoeuvre, there are a variety of arguments for dealing with such crimes, especially since political crimes were rarely dealt with in communist states. One of the best arguments is that many of the crimes committed during the communist era were illegal even when they were committed, which is also why the qualifier “for political reasons” was added to the legislative text.

Drawing on a variety of legal considerations, the Court struck down the statute in the face of popular and strong political demands of historical justice. The decision was one of the first to indicate the kind of active role that the Court would later play in Hungarian political and societal life. What paved for its activism was not applying a prohibition against retroactivity, since the relevant provision in the Constitution did not literally ban such a law. Therefore, the decision had to be based on different grounds, including a principled and broad interpretation of the general ideas of the Constitution and reliance on international fundamental human rights norms. The major part of the opinion is based on the joint principles of Rule of Law and the inviolability of the rights of man. From these two broad and undetermined constitutional provisions, the Court elucidated a fundamental concept of legal security, based on the idea, not explicitly reflected anywhere in the Constitution, of human dignity. This idea was to serve an important function in the constitutional politics of the Court and is a concept obviously imported from Article 1 of the German Grundgesetz, stating that “The dignity of man is inviolable”, and adding that this provision is unchangeable by any parliamentary or legal decision, cf. GG Article 3. As the Court states in an especially significant phrase: “The constitutionality of penal laws is not to be evaluated merely by reference to the criminal law guarantees

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24 For discussion of the decision, see "Dilemmas of justice", Stephen J. Schulhofer, Michel Rosenfeld, Ruti Teitel and Roger Errera, in East European Constitutional Review, vol 1., no.2. 1992:17—22.
expressly detailed in the Constitution... Thus, there is no specific provision of the Constitution prohibiting the imposition of strict liability in criminal cases, and yet the right to human dignity dictates that mens rea be a constitutional requirement for holding a person criminally liable”.

As pointed out by Schulhofer et.al., three features of the decision seem especially important in light of the Court’s future development.\(^\text{25}\) Firstly, the Court developed a substantive due process rule. Secondly, the method for this approach was based upon a thorough study of comparative constitutional jurisprudence, especially, as mentioned, the German use of the concept of human dignity.\(^\text{26}\) Thirdly, and highly relevant in contexts of accountability, the Court ignored the common and quite understandable conception of Eastern European constitutional law, that it is first and foremost the executive branch of government that needs to be controlled, while the legislature, duly and democratically elected, will almost always be in no need for control. As Schulhofer states, “the Court stressed that duly enacted legislation may also violate fundamental rights, even rights that have no explicit basis in constitutional text” (1992:18).\(^\text{27}\)

Schulhofer was correct in his 1992 prognosis that this marked the beginning of a constitutional court with activist ambitions in developing a strong fundamental rights stance, as well as the willingness to use its powers, on the basis of hints in the Constitution and international rights norms, to control and review the legislature.

This position was deduced from the principle of continuity, coupled with the firm belief that a Rule of Law state can only be created through Rule of Law. The formalistic deduction of the solution to the complex legal issue can be characterised as a strong belief in universal formalities over against the locality and subjectivity of feelings and senses of justice. Through this approach, the Court tries to elevate itself above the plateau of ordinary political discourse, and thereby strengthen its own place in Hungarian society. As Jiří Přibáň says of this reasoning: “The formalistic and legalistic understanding of the Rule of Law adopted by the Hungarian Constitutional Court has a strong symbolic role because it excludes the demands of historical justice from the present state of the Rule of Law. History is described as only a partial and subjective matter while the present

\(^\text{25}\) It is important to note that Schulhofer’s article is written right after the case was decided, but his prognosis seems to hit the mark fairly nicely. Nevertheless, the features highlighted are normatively important as an expression of the Court’s method of argumentation.

\(^\text{26}\) For a detailed study of the role of the concept of human dignity in Hungarian constitutional law, see Catherine Dupré, Importing the Law in Post-communist Transitions: the Hungarian Constitutional Court and the Right to Human Dignity, Oxford 2003.

\(^\text{27}\) The correctness of Schulhofer’s prognosis is vindicated by Dupré, 2003.
is constituted by legal rationality as objective and impartial” (2005: 303). This approach is different from the one we saw the Polish Tribunal undertake, which allowed for considerations of historical justice within clearly defined limits, since it does not conceive of the Rule of Law and justice as contradictory (Přibáň, 2005:303).

But there was also political deftness and awareness to the Court’s use of the concept of continuity over revolution. The continuity-rhetoric was important in order to make possible a negotiated result where, for example, the losing party (the old regime) would not have to fear legal consequences for their previous acts because the statute of limitations would still be in force. This is part of the reason why the Court insisted on applying a legalistic approach to the statute of limitations cases, not giving in to demands of popular, historical or political justice, because that would require exactly the logic the Court sought to avoid.

In addition, this provided the possibility on legal grounds to handle the problem of the crimes of the old regime, as one could apply the statute of limitations to these acts specifically. The concept of continuity was therefore important in order pave the way for a negotiated result. This is why the Court insisted on applying a legalistic approach to the statute of limitations cases, not giving in to demands of popular or political justice. As Arato says: “The constitutional transition provided a genuinely legal model of justice and a semantics of self-limitation for all sides. Not only losers gained in this. As they knew from the history of revolutions, the winners too, indeed the whole society, had good reason to fear the triumph of a revolutionary logic”. (2000:143—44).

The second type of cases that was to be immensely important for the constitutional control of the transitional development of political democracy in Hungary was the so-called compensation cases, which we shall take a look at now.

3.2.2 The compensation cases

Although the question of punishing the perpetrators of the violence against the citizens did concern the Hungarian public, the question of reprivatisation of confiscated property by communist officials was the main public interest in the early years after the transition. A long time had passed since 1956, and the years with terror from the secret police and, as mentioned earlier, the policy of social consensus had been relatively successful in pacifying the population. This was not the case with confiscated property, which many communist officials had acquired for themselves. This is a classical transitional problem,

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28 Jiří Přibáň, "Constitutional Symbolism and Political (Dis)continuity", in Rethinking the Rule of Law after Communism, Adam Czarnota, Martin Krygier, Wojciech Sadurski, Central European Press: Budapest, 2005
since all authoritarian regimes seem to confiscate property, either from a specific part of the population (e.g., the black in South Africa, Jews in Nazi Germany, Indians in Latin America) or from the population in general (the communist regimes). And since the handling of property reform by subsequent governments after transitions are often, unfortunately, ridden or contaminated by the urge for political revenge, property and economic questions must be considered carefully by a court with powers to review the constitutionality of such legislative acts.

The above issues were also particularly relevant in the Eastern European transition which was marked by a rampant break with the former economic system at all levels in society. The Court had to deal with this issue in three different principled cases. The legal problem was whether the Constitution contained a subjective right for previous owners to have their property returned, i.e. reprivatised, or whether state-owned property so acquired should be privatised and sold to new owners on a regular commercial basis involving some form of compensation to the original owner. However, a related question referred to the non-discrimination principle in the Constitution Art 70/A. The settlement of land ownership would be an exception from this form of restitution, since land ownership concerns issues where the original land could be returned directly or other land could be offered in return. This concerned in particular co-operatives as land owners. Also concerned were the constitutional provisions of the requirement of the state to protect private property, Article 13 (1), the Equal protection of property clause in Article 9 (1), and lastly the so-called Takings clause 13 (2), stating that [e]xpropriation shall only take place in exceptional cases, in the public interest, and only in such cases and in the manner stipulated by statute, with provision of full, unconditional and immediate compensation”. Of background significance in this context is that market economy is constitutionally mandated, ref. Article 9.

The statute that was eventually agreed upon in Parliament, to come under constitutional scrutiny, settled for an intermediate position between in-kind return of all expropriated goods and no compensation at all, namely that of compensation in the form of vouchers that equalled a certain percentage of the full value of the confiscated property. The goal of the legislation was privatization, not reprivatization, i.e., to sell superfluous state property to new owners, while former owners was to receive only partial compensation.

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29 As was particularly the case with the land reform of 1945.
30 For an extended overview of the history and function of the compensation law, see Peter Paczolay, “Judicial Review of Compensation Law in Hungary”, in Michigan Journal of International Law, vol.13, no.3, 1992:806—831, which this presentation of the compensation cases follows. The history of governmental confiscation in Hungary is especially complicated, since it consists of a mix between regular communist state confiscations, anti-Semitic confiscations, based on the so-called “Second Jewish Law” and general personal enrichment by communist officials.
The Court was asked to review whether it was unconstitutional according to Art. 70/A to reprivatize certain people’s former property (the land owners’), while other people would not have property returned to them. The nature of the request was a so-called advisory opinion, a competence given to the Court already during the Round Table discussions. This form of advisory opinion “is one of those decisions that may, and usually does, involve the judiciary in political questions. It is also dangerous because of the general nature of precedent” (Paczolay, 1992:812), since in this manner, a political decision by the judiciary in next instance can become a constitutional precedent.

Two types of discrimination would therefore have to be considered: (1) between former owners and former non-owners, and (2) between former owners according to the type of property. In other words, both the subjective and the objective aspect of ownership would be examined. As regards (1), “if it were the case that, with the preferential treatment of former owners, the distribution of state property would produce a more favourable overall social result as regards the constitutionally mandated “market economy” than equal treatment would, then this would be permissible” (the decision, Solyom and Brunner, 2000:109). Therefore, the court granted that exceptions to the prohibition on discrimination could be justified against an “overall social result”. In cases such as (2), “it was necessary to ascertain whether the other former owners had had their interests considered as thoroughly and impartially as those of former landowners in order to reveal the objective basis of the discrimination between former owners. Further, it had to be proved that former non-landowners had to be put into a disadvantageous position in order to achieve equality of persons as completely as possible in the future market economy.” (2000:ibid.).

With regard to the first question, the Court found that the state had no legal duty to treat former owners and former non-owners alike, since reprivatisation and partial compensation appeared in different economic and political contexts and were applied according to different legal criteria. Hence, there was no legal relationship between them. What is interesting, however, is that the Court argues that although there might not be a legal duty to treat former owners and non-owners alike, there is a moral reason to treat them in the same context. The Court stated that the “sole basis legal for the partial compensation planned by the Government is equity: the State is not obliged to pay such compensation, and no one has the right to receive such compensation” (the decision, Solyom and Brunner, 2000:112). As to the second question, the Court decided that it was unconstitutional to differentiate between former owners on basis of the object of

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32 The history of advisory opinions by Constitutional Courts is therefore a contested one, being disregarded by the founders of the American constitution, and having an unfortunate history in West Germany. For more on this, see Paczolay, 1992:812–13.
property, i.e. whether the object of property was land or another form of goods. This was the first of three so-called Compensation Cases, where the Court developed the concept of continuity, stated its powers, both in terms of defining the extent of its competence and restricting itself on certain issues of political decision-making. The aspect of the decision that was to receive most public and political attention was the argument that one cannot discriminate when it comes to compensation and reprivatisation on the basis of the object of property, and any political decision so doing is invalid.

This reprivatisation cases had huge political implication in an agrarian society, where the Small Holder party was outraged, and political forces began to speak of a counterrevolution. But how could there be a counterrevolution when the Court, as well as dominant political players of the Round Table discussions, insisted that there never was a revolution in the first place? This is also how the Rule of Law concept came to play a decisive political role in structuring the democratic process, countering cries for a retreat to former or other systems of government. In this sense, the Court therefore exercised its accountability function in the sense that it rounded in the possible space of political rhetoric, mainly by taking away democratic show-stoppers in the form of revolutionary or non-legal strategies. The players of the democratic game could therefore go on playing.

3.2.3 Compensation Case II: Activism or restraint?

As mentioned above, the competence of the Court covers both preventive and retroactive review. Although the majority of the cases of the Court concerns retroactive norm control, the concept of preventive review has received substantial criticism. The Hungarian Constitution does not precisely determine when a preventive norm review is permissible, or exactly how it is supposed to function. Although it makes sense to apply it in order to prevent unconstitutional rules from coming into play, it can also, in its typical broad and general formulation, contribute to the removing of delicate political questions from a parliamentary body which is designed to deal exactly with such issues. In an April 1991 decision, in the second compensation case, the Court stated quite clearly that it will not review rules that are under debate in Parliament, and pointed to the fact that no countries practicing a preventive norm control preventive review at all stages. Only just before the signing of it by the President will the Court review the constitutionality of any bill or rule. This argument was based on the fundamental idea of the separation of powers, an idea guiding enough to limit the Court’s involvement in ordinary politics and to prevent the Court, according to its own view, from taking on the role of an advisory body to the legislature. As the Court stated: “The Constitutional Court is not an adviser to the Parliament but the judge of the result of the legislative work.” (the decision,
Solyom and Brunner, 2000:154). By doing this, the Court indirectly declared the provisions of the Act on the Constitutional Court unconstitutional.

However, this declaration was the first part of the decision. The second part, which has been considered to be in direct conflict with the first, self-limiting part, took up the issue that was rejected as being outside the domain of the Court in the first part. Therefore, notwithstanding its stated refraining from political interference, the Court nevertheless felt obliged to express its “theoretical stance” on the substantial issue that was involved. In this part of the decision, the Court “enters into the discussion of the challenged provisions and gives guidelines to the legislature” (Paczolay, 1992:819), thereby taking on exactly the role of an advisor to Parliament. Although the Court gave the legislature considerable space to legislate in the area of compensation and loosened the intensity of Constitutional scrutiny, the Court intruded on the very space it said it would refrain from in the first part of the very same decision.

This extraordinary manoeuvre alone does not conflict with the stated self-limitation approach delineated in the first part. Neither does it necessarily, by giving the State considerable freedom in designing compensation schemes, imply increased self-limitation, although that would be a natural reading. As Paczolay puts it: “(...) merely by entering into the evaluation of the challenged proposal contradicted the first part of the ruling. Under the circumstances, the statement that the legislature must decide the question meant that the majoritarian standpoint would prevail, and the proposal of the Government would become law.” (Paczolay, 1992:823).

This brings us over to the third compensation case, which was petitioned by the President after the act’s passing in Parliament but before its signing, in accordance with the procedures defined by the Court in the second case.

3.2.4 Compensation Case III

The President formulated six specific questions, in addition to asking for a general review of the whole piece of legislation. In upholding the constitutionality in three of the questions and declaring the other three unconstitutional, the Court referred to its previous position, claiming that the State did not have a legal obligation to compensate, but only a moral one. This time around, however, the moral entitlement to compensation created an independent source of obligation. This argument was based on a conceptual creation of the Court, called “novation” or “renewal” (Paczolay, 1992:823), not to be confused with contractual meaning of the term. The concept of novation, being constitutionally acceptable, gives the state considerable space in choosing the method
and size of the compensation scheme. Although the concept of novation did not entail any radical infringement on the rights of citizens, it was a drastic position for the Court to take, basing the entire argument on the position that the state only had a moral obligation to compensate and from then on was free to determine the scope and measure of the compensation according to its own preferences and political program. The Court did not stop at reviewing whether the proposed scheme of compensation by Government was constitutional, but proceeded to investigate the social ramifications of the compensation scheme itself and whether it was in accordance with sociological facts. Eventually approving the bulk of the Act, the Court made an interesting shift in style of argument justifying it by an interesting argument with significance for the transitional state of society and the concept of continuity. As Ethan Klingsberg states: “This double task is a part of the unique historical situation, in which the change in ownership as a task determined by the Constitution takes place, and in which the consequences of a former, opposite change of regime in property relations which is classified today as unconstitutional has to be settled”. (Klingsberg, 1992:41).

The entire compensation issue can be seen as concerning the question of rectification of past wrongs by new authorities, as well as the role of the Court in the transitional process. Through these compensation decisions, the Court had to choose carefully between limiting itself to being a constitutional watchdog or taking an active part in the whole process of paving the way for proper political decision-making, both in terms of procedure and content. The Court made a choice, as we have seen the last option, and placed itself early and firmly at the heart of political life.

4. POLISH AND HUNGARIAN COURTS COMPARED

So, what lead the Hungarian court to assume such an active role in exercising the accountability function, as opposed to the Tribunal in Poland? Given that this is a correct characterisation, it is a complex question and should not be answered exclusively in terms of any one theory. As emphasised in section 1.3, in order to explain and understand the operations of institutions such as constitutional courts and their accountability functions, it is necessary to look at three main sets of variables: the political context, the institutional and the actor’s mindset. We will look at them in that order.

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4.1 The political context: The state of civil society

In the first years after the transition, Hungarian society witnessed all the consequences of a sudden introduction of private market economy without the safety net that the communist framework had guaranteed for its citizens. Although Hungary, perhaps due to its experiment with private market economy, had a more conservative and cautious approach to liberalisation than Poland's shock therapy, the effects on Hungarian society were fairly dramatic as well. Jobs were in short supply, welfare payments were no longer secured to the extent they were before the transition, and crime, both in the form of violence and general reduction of safety and in the form of tax evasion and disrespect of public law rules, was rising rapidly and to an unprecedented level.

What is interesting in this connection is that the suspected result in such circumstances of social and economic crisis – the rising of social and radical protest movements – was not in fact happening. On the contrary, and in line with the previous passivity of Hungarian civil society, the population reacted by growing even more politically passive and silent, instead trying to cope with the newly arisen situation with working multiple jobs. Choosing such a strategy for coping – instead of the path of political protest – implies little time for engaging in political and civil activities. Now the crucial question becomes: who is to fill that void and how.

The obvious candidate to fill the void is the Court, which might at first blush explain its significant presence in the system of Hungarian political life and its ramifications for the structuring of the political debate. The Court enjoyed a remarkably high level of public support in the midst of a new and inexperienced political culture where politicians made promises they could not fulfil. The Court supervised the legislature to some extent, making sure that the laws coming from both Parliament and the administration were applicable, procedurally by being in harmony with other laws, and substantially by not violating the rights of the citizens who were not bringing their protest to the political arena. In other words: the issues that concern the performance of the Court’s accountability function.

Although Poland suffered even more severely from the substitution of communist economy with liberal market economy, Poland had a longer and stronger tradition of popular and political movement, embodied first and foremost in the Solidarity. The Solidarity had strong democratic support, in the sense that a majority of Polish citizens

34 For a demonstration of this unusual high knowledge and public support of an institution such as the Hungarian Constitutional Court, see Antal Örkeny and Kim Lane Scheppelle, "Rule of Law: The Complexity of Legality in Hungary", in The Rule of Law after Communism. Problems and Prospects in Central and Eastern Europe, Martin Krygier and Adam Czarnota (eds.), Dartmouth, 1999:55—77.
were in favour of its program or at least its broader aims. They could therefore, to a much larger degree than in Hungary, claim democratic legitimacy both in the process leading up to the transition and after the transition was complete and ordinary politics began.

4.2 The legal culture

As was noted above, the Polish transition did not focus on the role of the judiciary in the transitional process itself. It had already established a Tribunal and the Solidarity was not particularly interested in changing the legal framework. In addition, one did not know how far the communists were willing to be pushed before they would give up and resort to force.

In Hungary, on the other hand, the situation looked entirely different. First of all, Hungary has been described as a “nation of lawyers” due to the social and academic prestige that lawyers enjoyed in society. This included, as we saw, the popular conception of the legitimacy of the Court. In one case, after the Court had made a controversial decision in the so-called “media cases” ruling against the Government in the question over privatisation of the media, the right wing party, MDF, mobilised demonstrations in the streets of Budapest. As a sign of how strongly the public supported the Court, counter-demonstrations were immediately mobilised to voice protest over the attempt to interfere with the Court’s decision. The counter-demonstrations were not only against the substantial issues, but against the very idea of putting public pressure on a Court with high democratic status in Hungarian society. No equivalent existed in Poland where the Tribunal’s decisions were subject to discussion in the Sejm only. Interestingly, then, whereas the people supported the political movement of the Solidarity in Poland, the people supported the Court in Hungary and looked with distrust at the political institutions. This may explain why the Court in Hungary took such an activist role, along with the fact the Tribunal’s powers were not strong enough to make the decisions “stick” in the corresponding political process.

Secondly, the Janos Kádár regime actively sought social consensus by, amongst other things, granting privileges after the 1956 uproar. These privileges were partly legal privileges, and the Hungarian system became more rationalised and legalised in the sixties than in neighbouring countries. This ideal of social consensus also motivated the negotiating parties at the Round Table to judicialise the transition through legal principles.

35 The “media wars” was an area where the Court was particularly influential. The question concerned the nationalisation v. privatisation of the media in Hungary and created a fierce public and political debate.
everyone could agree on. In addition, legal education and research were relatively free from official control and scrutiny, especially in the domain of civil law. This included access to the legal systems of other European countries and research trips and travels to Western countries, thereby establishing a robust and highly qualified legal environment. Hence, as a consequence of the general respect for lawyers in Hungarian society and the competence of the personnel, the elites in Hungary had more faith in law than its surrounding countries, such as Poland. It was therefore easier to apply legal instruments in the transitional period in Hungary, since the public was fairly well-known with legal language in political issues and since the political elites accepted the Court as an integral part of the political tradition.

The oppositional movement in Poland was more directly oriented towards the grass root politics and workers' rights than the more procedurally oriented Hungarian version.

4.3 The institutional and constitutional structure

What is important to highlight in this connection and to see in light of the previous difference in the conceptions of the democratic legitimacy of the courts, is the institute of actio popularis in Hungary, which flooded the Court with cases, catapulting it into the centre of legislative politics. Poland had no such institute. In Poland, in contrast, the Tribunal always had to keep in mind that its decisions could be overturned and its authority correspondingly reduced. The implications for the accountability function of the Hungarian Constitutional Court of this instrument can hardly be overstated.

Explaining the difference between Hungary and Poland in light of the actio popularis would beg the question, since what needs to be explained is the very presence of the institution of the actio popularis. Several hints of such an explanation have been made. The elites – the oppositional representatives of the transitional process in Hungary – consisted largely of jurists. The leader of the legal discussions was Laszlo Solyom, the influential leader of the Court and responsible for its activism. Although he was not responsible for the proposition of the actio popularis, he backed it very much. It was in this process that the actio popularis was proposed. However, such a proposition would not have resulted in a constitutional amendment had it not been conceived as democratically feasible in Hungarian society as such, being, as it were, “a nation of lawyers”. The comparison with the Polish transition and the scarcity of lawyers and legal language indicates that this is a plausible explanation.

Another feature of the constitution making process, was the state of the constitutions in the two countries. Poland’s history of constitution making is much more successful, both in terms of democratic legitimacy and in legal quality. Although establishing a strong presidential system, the Little Constitution was nevertheless fairly applicable, whereas the Hungarian Constitution was a patchwork of amendments, being notoriously vague on important issues such as the relationship between the Parliament and the President. The Poles also managed to form a new and complete workable Constitution, which came into effect in 1997. The Hungarians, partly due to the strong public support of the Court, did not succeed in this aspect, and the Court was forced to apply a legal document allowing a variety of interpretations and applications, in turn enhancing the Court’s powers as interpreters of political sensitive issues.

4.4 Key players?

In transitional processes as those of Eastern Europe, individuals play decisive roles. This was particularly true in Hungary and in Poland, although the roles differed substantially. In Hungary, the transitional process and the Round Table talks were initiated by lawyers and legal academics, and the very idea of setting up a constitutional court came from the well-known Hungarian legal sociologist, Kalman Kulcar. Laszlo Solyom, the strong President of the Court in its first ten years, was the chief opposition negotiator on legal issues, giving force to the idea of a constitutional court supervising even the first free elections. The representatives of the socialist party had little knowledge of and experience with constitutional courts, and the opposition could design the structure and competence of such a court undisturbed by an authoritarian counter-party. No equivalent existed in the Polish experience, for reasons explained above.

This is not to say that Poland did not witness strong and influential key players, but that these players were not primarily placed within the judiciary, Lech Walesa being the most influential and obvious name.

The decisions of the Court had a remarkably high degree of “stick”. In contrast to the decisions of the Polish Tribunal, Parliament did not “punish” the Court by enacting new constitutional provisions in response to unfavourable political decisions. This is explainable in light of the previous factors, but especially well exemplified by the carefulness with which the nomination of constitutional judges was made in Hungary. Even though the Government only needed a two-third vote in Parliament in order to elect judges, a consensus on the candidates was sought, even at times where the government could opportunistically elect sympathetic judges. In other words, even when the Government could have elected controversial or politically distinct candidates, it refrained
from doing so, and settled for judges that were almost unanimously agreed upon. This practice remained even after the Government was replaced.

What, then, could one say in general about the accountability function of the constitutional courts in the two countries of Poland and Hungary?

First of all, one could say that the activism of the Hungarian Court must be distinguished according to the legal area considered. In the domain of individual and fundamental rights, i.e. concerning the relationship between the state and the individual, the Hungarian Court has been remarkably active and exercised its accountability function to its highest imaginable extent. In the first years, it annulled over 200 laws coming from Parliament, partly due to their poor technical character, but also because many of them were found strongly unconstitutional.

However, within the domain of checking the state more directly, the Court has a poorer history, often showing signs of submissiveness. This tendency increased as the first nine-year period came to its end, while the activeness within the domain of fundamental rights still stood on firm ground. It is also natural that a court’s activity decreases and deferential attitude to politics increases simultaneously as the legislative process becomes more stable and political professionalism prevails to a greater extent. Also, the number of cases decided decreased, so that the legal issues to be solved did not present as many opportunities to manifest its influence as heavily as before.

In the Polish case, the accountability function of the Tribunal can be said to have difficult working conditions, as its decisions were not final until 1997. That being said, the Tribunal showed willingness and eagerness to take up and pave the way for a Rule of Law style transitional process through the substantial development of the Rechtsstaats-clause. Also, the Tribunal had in many ways already succeeded in the development of a robust material principle of legality before the transitional process, thereby manoeuvring the process of administrative decision-making into the right path. After 1997, when Poland received its full Constitution, the need to actively check the process in a transitional light had, however, decreased.