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## Rule of Law, Division of Powers, Constitutionalism

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**Abstract.** By creating the Basic Law of Hungary, ‘rule of law’ becomes one of the most frequently used expressions in the Hungarian constitutional law. That is why this paper puts the focus on analyzing the achievements of the ‘rule of law revolution’ and at the same times the role of the Hungarian Constitutional Court in this process.

Theories criticising the current Hungarian routine of the ‘rule of law’ are also taken into consideration. According to the title of this paper rule of law, division of powers and constitutionalism are shown on legal and political background. In this aspect the essay also pay attention to the activism and role of the Hungarian Constitutional Court by analyzing its related decisions. Since 1990 (establishment of the Court) the Constitutional Court was the flagship of the Hungarian legal constitutionalism by enforcing the conception of ‘rule of law’ in its decisions. As the integral part of ‘rule of law’ the principle of ‘division of powers’ was affirmed in the decisions of the Court, though it was not defined in the Constitution. The Hungarian Constitutional Court on the basis of their decisions followed the traditional idea of the ‘division of powers’, at the same time the latest trend—according to more and more branches of powers are discovered—was not accepted.

According to this paper it is an intriguing task to find the solution for the conflict between political and legal constitutionalism after 2010. The Hungarian Constitutional Court played unique role in it by deciding the referred cases.

The paper tries to dissolve the main constitutional conflict in the system of separation of powers by the interpretation of the fourth amendment of the Basic Law. The principle of ‘rule of law’ was established in a constitutional frame, in which the Constitutional Court is able to review the amendments from procedural point of view. The focus is also put on the future of the principle of ‘rule of law’, in this matter the Constitutional Court has special responsibility, and constitutional obligation to rule on the constitutionality of the cases brought before.

**Keywords:** rule of law, division of powers, Constitutional Court, Basic Law, Constitution, legal constitutionalism, political constitutionalism

Quarter of a century has passed after the democratic transition in Hungary, and rule of law is in the center of academic and political debate once again. The last election resulted in the super majority (over 2/3 of the seats) of the Fidesz-KDNP coalition in the Parliament, and this has led to the enacting of the “Easter Constitution”, which is now known as the Basic Law of Hungary. Rule of law, one of the key concepts of the democratic transition, has become one of the most frequently used expressions again. The parliamentary opposition has warned the public about the deconstruction of the rule of law, while the governing majority spoke for the restitution of the sovereignty of the legislative. Academic approaches have been caught in the net of political lines.

This paper presents the achievements of the “Rule of Law Revolution” and the role of the Constitutional Court in the different stages of unfolding the rule of law. In this overview I gave special attention to understanding of the views and theories criticizing the current Hungarian practice of the rule of law, because I believe that in a rational debate one has to understand the rival positions before rejecting or supporting any arguments. I discuss the

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topics of rule of law, constitutionalism and the division of powers within the framework of legal and political constitutionalism. I will summarize the views that criticized the activism of the Hungarian Constitutional Court, and which have laid the ground for the expansion of political constitutionalism after the 2010 elections. Finally, I will discuss the challenges of the rule of law and constitutionalism.

### “THE RULE OF LAW REVOLUTION”

The Constitutional Court was one of the first “products” of the democratic transition in Hungary; it started functioning on 1 January 1990, before the first free election took place.<sup>1</sup> The most important feature of the Hungarian transition was the democratic transition that took place in the form of negotiations and compromises, sustaining the governability of the country and the functionality of the state system.<sup>2</sup> The Constitutional Court—which received five more members after the election—has not only joined the political process as a new organization protecting the Constitution, but it has become a key player of the democratic transition by shaping its own competences with great autonomy. The “taxi drivers’ blockade” quickly finished the euphoria of the first democratic elections. The inherited grave economic difficulties, differences in party politics, inherent tension of the governing coalition, the inexperience and unpreparedness of the new political elite, and the mutual distrust quickly eroded the people’s trust in the multi-party system. In this vacuum of politics and trust, the Constitutional Court became a key player with its chosen role of a rule of law revolutionary, its activism, aristocratic aloofness and dogmatic legal language.

The year 1990 went by in the fever of party battles and the elections. The Constitutional Court adopted its most important decisions that influenced the outcome of the democratic transition in 1991 and later. The Court began laying the ground for the rule of law in the 1992 decisions by setting forth that a “rule of law revolution” took place with the democratic transition.

“The enactment of the constitutional amendment of 23 October 1989, in effect, gave rise to a new Constitution which, with its declaration that “the Hungarian Republic is an independent and democratic state under the rule of law,” conferred on the State, its law and the political system a new quality, fundamentally different from that of the previous regime. In the context of constitutional law, this is the substance of the political category of the change of system. Accordingly, an evaluation of the state actions necessitated by the change of system cannot be understood separately from the requirements of the constitutional state, as crystallized by the history of constitutional democracies and also posited by the 1989 Hungarian constitutional revision. The Constitution provides for the basic institutions for the organization of the constitutional state and their most important operative laws and delineates human and civil rights together with their basic guarantees.”<sup>3</sup>

<sup>1</sup> The parliament of the party-state adopted the Act on the Constitutional Court under the number XXXII of 1989, and elected the first five members of the court on 23 November 1989: Ádám Antal, Kilényi Géza, Solt Pál, Sólyom László, Zlinszky János.

<sup>2</sup> Several works have been published on the system change. One of the most structured presentations of the process is by Mihály Bihari (Bihari 2005). A work less focused on the structural processes is by Kéri László (Kéri 2010). An approach focused on public law is by Péter Smuk (Smuk 2011).

<sup>3</sup> Decision 11/1992 of the Constitutional Court. English translation available: [http://www.mkab.hu/letoltések/en\\_0011\\_1992.pdf](http://www.mkab.hu/letoltések/en_0011_1992.pdf) (downloaded June 8, 2014).

In this decision, the Constitutional Court translated the political change of system to the language of law, based on the need to synchronize the whole legal system with the new Constitution based on the rule of law. The Constitutional Court led by László Sólyom made it clear that the change of system had been carried out on the ground of legality, therefore no distinction can be made between the law before the new Constitution and the law after that; the main requirement for any legal norm, without regard to its adaptation, is to be conform with the Constitution in force. The first president of the Constitutional Court described the relationship between legality and the rule of law as follows:

“The Constitutional Court differentiates between legality and legitimacy: the legitimacy of different former systems may not be interpreted in the context of the constitutional conformity of legal norms. The Constitutional Court expressed its position on the question of whether there was a revolution in Hungary or not the following way: it created the paradox concept of ‘rule of law revolution’ to describe the transition in Hungary. The practical consequence of this was the Constitutional Court supporting the principle of legality and legal continuity. This, however, did not confront at all with the Constitutional Court supporting the future oriented concept of the change of system (see: *novatio*), and rejecting any restoration movements.” (Sólyom 2001: 686–687)

The Constitutional Court received a lot of criticism for its views based on legality and legal continuity, because when deciding on the law of the former system the Court preferred the principle of legal certainty, which often walked hand in hand with rule of law. In the rulings on nationalization of property and the forced creation of agricultural co-operatives the Constitutional Court focused on legal continuity and the protection of already concluded legal relationships, and did not differentiate on the basis of when and why the legal act in question became unconstitutional.

In the decisions on the relationship between formal legal certainty and justice the Constitutional Court laid down the following principle: “the declaration of the rule of law state in Hungary may only be interpreted as formal rule of law.”<sup>4</sup> The Constitutional Court did everything within its power to stop natural law principles from gaining ground in solving political debates about the system change. They stated that “rule of law may not be achieved against the rule of law”. The Constitutional Court treated legal certainty as a constitutional principle, which helps them promote constitutional positivism before natural law. László Sólyom writes the following about the moral and professional challenges the Constitutional Court faced in the first period of its functioning: “In the big, symbolic questions of the change of system—especially in the case of criminal law “justice”—making a choice was inevitable. It is well known that Germany ruled on the ground of justice. The Czechoslovakian and Polish constitutional courts have also thought it to be possible—as a one-time exception only—for the legislator to ignore the criminal law guarantees of the constitution. The Hungarian Constitutional Court chose the other path. They rejected any kind of retroactive changing of the rules of limitation in criminal law. Justice didn’t have to be sacrificed for the rule of law. The Constitutional Court made it possible to prosecute the crimes that scarred our society the most—basically the mass murders committed during and after the 1956 revolution—on the basis of international law.” (Sólyom 2011: 699) Based on the system change dogmatic it developed, the Constitutional Court has put it forward multiple times that declaring Hungary a state based on the rule of law is a statement of fact and a program at the same time. The Court tried to soften the singularity that came from the

<sup>4</sup> Decision 31/1990 of the Constitutional Court.

historical circumstances, and made its decisions with the need of basic cleaning up and constitutional consolidation. They constantly demonstrated that law limits politics, and they wanted to make rule of law believable through their own behavior. In the decisions interpreting the concept of the rule of law they made it clear that alone the violation of the constitutional rule of law principle makes a legal act unconstitutional! After that the Constitutional Court “rendered” elements that make up the principle of the rule of law, and that can be used as a constitutional measure by themselves: the requirement of legal clarity and the sufficient time for preparation, the need for the law and institutions to function in a predictable way, the prohibition of retroactive legislation, and later the doctrine of legal invalidity. The majority<sup>5</sup> of the Court was aware of the fact that they introduced requirements as parts of the rule of law that have not been written in the Constitution, thus clearly admitting the activism of the Court.<sup>6</sup> It was a widely spread belief that fundamental rights activism is agreeable, but activism in jurisdiction and state system is not. István Kukorelli put it this way: “as for activism, I would clearly separate two types of norms: to the constitutional regulations of power and the state (the branches of government) I would put the ‘no entry’ sign. In the civil part (for example in the field of fundamental rights) law can be interpreted more freely.” (Kukorelli 2006: 102)

In the beginning of the 1990’s, with very intensive work, through the decisions on limitation in criminal law, on cases of screening of politicians, and by answering petitions demanding remedy for past injuries, the Constitutional Court developed the doctrinal fundamental categories of rule of law. The requirements of legislation were detailed later, thus compensating for the Constitution’s lack of a chapter on legislation. Besides the mentioned legal clarity, preparation time, and legal invalidity, the Constitutional Court also dealt with the democratic legitimacy of power, the protection of acquired rights, qualified majority acts, and with the rule of law based requirements of specific legal fields (criminal justice, public administration, civil law). Rule of law had a distinctive effect on the decisions of the Court mainly because of its normative contents. During the time of the “rule of law revolution” it was very important that anyone could petition the Constitutional Court (*actio popularis*), and the Court directly matched the legal act in question with the rule of law requirements.

“After the change of system, we had to create faith in the rule of law. It was the Constitutional Court’s historical role to make it obvious: the new Constitution demands unconditional dominance.” (Paczolay 2013: 13)

No doubt, the Constitutional Court was the flagship of legal constitutionalism in Hungary. They introduced and through their decisions they enforced the idea and practice of a rule of law state, in connection with common European constitutional traditions.<sup>7</sup> The

<sup>5</sup> Constitutional Court judges Géza Kilényi, Péter Schmidt and Imre Vörös wrote a dissenting opinion on this matter. See decision 48/1991 of the Constitutional Court.

<sup>6</sup> The legal certainty requirements of legislation are obvious, and are not invented by the Constitutional Court, just like the requirement of legal certainty itself. These principles should be constitutional level regulations, should the concept of acts with constitutional force remained, and should the parliament have enacted the new act on legislation by that time (Sólyom 2011: 708).

<sup>7</sup> The Venice Commission of the Council of Europe defined the requirements of the rule of law as follows: (1) Legality, including a transparent, accountable and democratic process for enacting law (2) Legal certainty (3) Prohibition of arbitrariness (4) Access to justice before independent and impartial courts, including judicial review of administrative acts (5) Respect for human rights (6) Non-discrimination and equality before the law. In: CDL-AD(2011)003rev-e Report on the rule of law— adopted by the Venice Commission at its 86th plenary session (Venice, 25–26 March 2011).

“founding fathers” of the Constitutional Court, and especially its first president, carried out their task with strong constitutional commitment and identity. Therefore it is not at all surprising that László Sólyom once said that the Constitutional Court brought Hungary back into Europe!

### **THE CONSTITUTIONAL COURT AND THE DIVISION OF POWERS**

In the background of today’s heated debates there lies the question, whether, 25 years after the change of system, it is time to cut back some of the competences of the Constitutional Court that has gained too much power. This debate isn’t new, the executive branch that is strongly tied together with the legislature, based on the authorization they won on the elections, often criticized the Constitutional Court, saying that the Court limits the functioning of the most important representative of people’s sovereignty. The fundamental dilemma of constitutional jurisdiction as counter-majoritarian activity is that on what basis and to what extent a non-representative body can overrule the decisions of the parliament, which has a direct legitimacy (Dorsen et al. 2003: 108–109).

The principle of division of powers was not in the Constitution, but still the Constitutional Court has consistently enforced it in its decisions as an integral part of the rule of law.<sup>8</sup> Unlike the well-developed system of the rule of law, the Constitutional Court didn’t give a detailed description on the division of powers, they rather expressed their opinion in connection with a specific case. Therefore, when defining its own legal status in the early period of its functioning, the Constitutional Court ruled that when exercising powers directed to specific parts of the Constitution, the principle of division of powers has to be taken into consideration, as one of the most important organizing and functional principle of the Hungarian state system.<sup>9</sup> The Constitutional Court consistently rejected to take the responsibility of the government or the legislature to itself in connection with preliminary constitutional rulings. The Court accepted the traditional three-part division of the branches of government, doing so mostly because of a practical consideration, rather than a theoretical one, thus making it obvious that they would not follow the latest fashion of discovering more and more branches of power (media, local governments, unions).

In the “big” decision on the appointment of judicial leaders, the Constitutional Court defined the characteristics of the judicial branch in the system of powers. “When interpreting the principle of the separation of powers (as a part of the rule of law) the Constitutional Court based its decision on the current way the separation of powers is used in today’s parliamentary systems, and on the way it is written in the Constitution. The ‘separation’ of the legislative and executive branches today basically means the division of powers between the parliament and the government, although they are politically connected. The majority parties of the parliament are entitled to form a government, and the parliament votes on the bills the government introduces. (...) Under these circumstances the main character of the judicial branch, as opposed to the other two ‘political’ branches, is that it is constant and neutral [even if the judiciary enforces the bills and decrees that are often created to enact political programs]. This neutrality is expressed by article 50 paragraph 3 of the Constitution

<sup>8</sup> In the previous legal system the principle of the division of powers was only mentioned in the preamble of the Act on the Constitutional Court. The Basic Law, however, explicitly sets forth the separation of powers: “the functioning of the Hungarian State shall be based on the principle of division of powers.” Article C paragraph 1.

<sup>9</sup> Decision 31/1990 of the Constitutional Court.

by declaring that the judges are independent and are only subordinated to law. (...) Therefore the judicial branch is independent from the political determination of the other two branches, and in this sense it is constant and continuous. Hereinafter the Constitutional Court interprets the neutrality of the judicial branch as described above.”<sup>10</sup> Early decisions of the Constitutional Court show that they interpret the separation of powers not as a hierarchical relationship but as a balanced system of mutual control mechanisms. Besides the separation of powers, the Constitutional Court also emphasized the obligation to cooperate: “From the principle of the rule of law (article 2 paragraph 1 of the Constitution) comes the obligation of the institutions described in the Constitution to carry out their constitutional powers with *bona fide*, in cooperation, mutually helping each other.”<sup>11</sup> Finally, I would like to cite a decision concerning the separation of powers that was made under the socialist-liberal coalition government, which won a two-thirds majority in the 1994 election. In this decision the Court commits itself to principles that became the center of attention twenty years later.

“The separation of powers does not only mean that one branch cannot take the powers of the other, but it also means that in a democratic state based on the rule of law there is no unlimited and not limitable power, therefore some branches do limit the powers of other branches.”<sup>12</sup>

### THE CONSTITUTIONAL COURT AND THE “INVISIBLE CONSTITUTION”

When the founding generation left the Constitutional Court, several evaluations were made on the work of the Court. Every one of them emphasizes the activist approach of the Court and the metaphor of the “invisible constitution”. In the foreword of the book summarizing the first nine years of the Constitutional Court Gábor Halmai summarizes his opinion: “No doubt that the Sólyom-era of the Constitutional Court could be compared to the Warren-court type, with a liberal president, who wanted to take constitutional protection towards an activist approach concerning the interpretation of both the Constitution and the powers of the Court”. (Halmai 2000: 12) Indeed, many members of the Constitutional Court didn’t consider the text of the Constitution, which was enacted in the turmoil of the system change and was intended to be only temporary, such a masterpiece that could not have been enhanced by the law professor members of the Court. It is no surprising that the founding president said the following in an interview later: “for the sake of coherence our constitutional jurisdiction—especially in difficult cases—is often on the border of the creation of a constitution, I never denied that.”<sup>13</sup> Although the Court was divided when it came to the interpretation of its own role, the majority believed that in the given historical situation the Constitutional Court had to be activist. László Sólyom expressed the concept of the “invisible constitution” in the concurring opinion he attached to the decision ruling death

<sup>10</sup> Decision 38/1993 of the Constitutional Court.

<sup>11</sup> Decision 8/1992 of the Constitutional Court.

<sup>12</sup> Decision 28/1995 of the Constitutional Court.

<sup>13</sup> A „nehéz eseteknél” a bíró erkölcsi felfogása jut szerephez. Sólyom Lászlóval, az Alkotmánybíróság elnökével Tóth Gábor Attila beszélget. [It is the moral assessment of the judge that prevails in hard cases—interview by Attila Gábor Tóth with László Sólyom, president of the Constitutional Court.] *Fundamentum* 1997/1. in: *A megtalált alkotmány. A magyar alapjogi bírászkodás kilenc éve.* [The constitutional found: the first nine years of fundamental rights adjudication in Hungary] szerk.: Halmai G. *Fundamentum Könyvek*, INDOK, Budapest, 2000. 395.

penalty unconstitutional: “The Constitutional Court has to continue its work to formulate in its interpretations the fundamentals of the Constitution and the rights it contains; to create a coherent system with its decisions over the Constitution that is often amended for short-term political interests; as an “invisible constitution” it serves as a solid constitutional measurement, and therefore it will surely neither contradict the Constitution to be adopted, nor any future constitutions.”<sup>14</sup>

It is surely unprecedented that a “doctrine” written in a concurring opinion should have such a career. Even the author of this opinion thinks that many people misinterpreted the point of this thought, because the metaphor of the “invisible constitution” is not a synonym of the “eternity clause”, on which basis even the written constitution could be taken under critical revision. Rather he wanted to point out that the constitution is something much higher than technical norms: it is a strict order of the principles laid down in the decisions of the Constitutional Court. In its decisions the Court has to express, make visible, and use these principles as a coherent system. It is worth noting that in the later decisions the Court avoided even using this metaphor, making sure that their decisions could be connected directly to constitutional rules, and they avoided the appearance that their decisions be a revision of the written constitution. Despite this, the spirit of the “invisible constitution” lived on in the legal culture, as well as hidden in the jurisdiction of the Court.

The functioning of the Constitutional Court was characterized by the constant conflicts with the ones in power. After serious inner debates the Constitutional Court defined its role as a real counterbalance of majority rule. They acknowledged the Constitution as an absolute measure above them that had been enacted by the parliament. Even until 2011 the majority of the Court held that they do not demand the power to review the contents of a constitutional amendment, although—a silent dissenting voice said—“theoretically it could be justified.” During the era of the Horn-government with a two-third majority, the governing parties were occupied by dealing with the constitutional veto of the Bokros-package, and the enacting of a new constitution, not by the interpretation of unconstitutional amendments of the Constitution. Already in this era there were lively debates on whether the parliamentary supremacy based on people’s representation, or the constitutional control safeguarding fundamental rights should be the main principle of public affairs. These debates got heated in the era of the second Orbán-government, which had a two-third majority.

### **CRITICISM OF THE ACTIVIST APPROACH OF THE CONSTITUTIONAL COURT**

There is no uniform definition of the Constitutional Court’s activism in academic sources. “Most of the time it reflects disapproval: the Court does not hold on to the text of the Constitution, ignores the precedent, used an unacceptable method of interpretation, invaded the territory of legislation, or just made a decision that the critic disapproved on political grounds. The opposition of the constitutional jurisdiction thinks that the whole institution of constitutional revision of the parliament’s acts is activism.” (Tóth 2009: 17) The debates have got momentum in the recent years through papers of academics supporting political and legal constitutionalism.<sup>15</sup>

<sup>14</sup> Decision 23/1990 of the Constitutional Court.

<sup>15</sup> Basically the legitimacy and effectiveness of constitutional jurisdiction is questioned by

Activities of the Constitutional Court got in the center of attention in Hungary and abroad. The methods of constitutional interpretation served as an example for other countries as well (South Africa, Lithuania, Ukraine, and Albania). Although many critics accused the Court of importing German law, the competences of the Constitutional Court didn't contain the German type of constitutional complaint, the review of court decisions. The Court was believed both in Hungary and abroad as "the most active and the most powerful constitutional court in the world". (Brunner 1992: 539) The most important decisions of the Court (abolition of death penalty, decisions on compensation and justice, drawing the line between the competences of the president and the executive) often generated strong political reactions, sometimes even angry emotions. According to critics the Court only chased the acknowledgement and legitimation of the western countries in the beginning, and did not show any sense for everyday reality from its "ivory tower". According to Csaba Varga, one of the most radical critics of the Constitutional Court: "the Court settled on the whole political process, and in many cases it determined the course of the process, therefore they forced the whole society, the political class, the parties and among them the legislative, executive, and judicial branches that represent the society under their arbitrary philosophies, views, and the obligations and restrains that go with them; therefore restraining the chances of a will to change the system—a will to substantially overcome the past and go into a new nation building." (Varga 2006: 540) He claims that the professor-style Constitutional Court shackled the system change with its "devastating liberal doctrinarism". They created an invisible constitution out of mere abstraction, and based on foreign law. By creating the measurement themselves on which basis they nullified the will of the sovereign they carried out an unconstitutional protection of the constitution. As opposed to the legal nihilism of the party state they fetishized law, putting the rule of law in the center of the new catechism. The decisions of the Constitutional Court got built irrevocably into the legal system with constitutional power.

Beside the general criticism, the most important decisions of the Court, just like ruling the so-called "justice act" unconstitutional, invoked especially heated reactions. Zétényi Zsolt, one of the co-sponsors of the "justice act", proposed the following argument during the parliamentary debate: "Rule of law shouldn't be a shield against injustice. Restoring the rule of law has to mean punishing capital crimes, so that no criminal offence shall remain unpunished. (...) Limitation and the general principles of the rule of law are not intended to perpetuate or transfer unlawful or pre-law conditions. Summarizing: rule of law regulations have to apply in a rule of law state, but not in a way that it means excluding unlawful conditions from the scope of criminal justice forever. I don't doubt the logic of the argument that the requirements of formal law are violated by the above method, but I do doubt that in this case there is no other way than doing nothing. (...) In a country where law was trampled upon it would be like slapping rule of law in the face to use these exact same trampled upon laws against natural law."<sup>16</sup> Supporters of the bill tried several times to help justice triumph

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University College London professor Richard Bellamy in his recently published book: *Political Constitutionalism. A Republican Defense of the Constitutionality of Democracy*. Cambridge University Press, 2007. Among Hungarian authors Kálmán Pócza (2012): *Alkotmányozás Magyarországon és az Egyesült Királyságban [Constitution-making in Europe and in the United Kingdom]*. *Kommentár*; 2012/5, 35–50. and Attila Antal (2013) *Politikai és jogi alkotmányosság Magyarországon [Political and legal constitutionalism in Hungary]*. *Politikatudományi Szemle* 2013/3 wrote on the subject.

<sup>16</sup> Day 12 of the 1991 autumn session of the Parliament, 8 October 1991. In: *Országgyűlési Értesítő* 1990–1994. 10656–10658.



over formal rule of law but all of their attempts have failed the test of the Constitutional Court.

From among the first professional critics of fundamental rights activism the five-point criticism of Béla Pokol is worth noting:

“1. Activism overly transfers the weight of the most important decisions affecting the society from the parliament to the Constitutional Court, therefore it erodes the fundamentals of the parliamentary system based on elections and the parliament.

2. The favorite fundamental right formulas of activism are the most abstract constitutional declarations with no normative directions behind them—being at least covered by the consensus of some circles of legal professionals. Therefore activism has no more legitimacy than the inner moral bravery of a constitutional judge. The argument, which is sometimes used in the context of forcing the parliament to the background, that “this way the logic and predictable arguments of law take the place of political fights”, is completely unfounded.

3. In activism deduction from abstract principles takes the place of the compromising ad hoc decision making mechanism of the pluralist political system, and this paralyzes the society. This decision making method is unable to harmonize the thousand inner conflicts of a complex society, and therefore also unable to maintain the society through it.

4. The appearing and gaining strength of constitutional jurisdiction in matters of fundamental rights in the past 40 years in the western world has brought tension to the traditional texture of law: the cooperation of political legislation, legal dogmatic processes, and development of law by courts. Activism dangerously enhances this tension, making fundamental rights “dynamites”, which will damage the legal system eventually.

5. Finally the above mentioned problems in the Hungarian political system may lead to the point where major political forces consider cutting back constitutional jurisdiction, or, in radical movements, completely abolishing it. Activism is dangerous not only to the political system and parliamentarism, but to the institution of constitutional jurisdiction itself.” (Pokol 1992: 154)

Beside frontal attacks the group of friendly critics could be seen, most of whom considered fundamental rights activism acceptable, or even supportable, while in matters of the scope of jurisdiction and the organization of the state they considered sticking to the text of the Constitution primary.<sup>17</sup>

In his analysis of constitutional democracy János Kis identified three types of activism (Kis 2000: 112–114). In his view activism in the scope of jurisdiction is when the Constitutional Court starts a procedure or makes a decision to which they weren’t entitled by law, as well as when they broaden the scope of inquiry to legal acts not challenged by the original proposal. Activism of interpretation is when the Court doesn’t just use the Constitution, but changes or amends its regulations, most often by comparing the legal act in question to rules not explicitly written in the Constitution. If the Court makes a decision that is biased on the grounds of political reasons, we talk about activism by political bias. János Kis thinks that the border of fundamental rights interpretation should be drawn somewhere beyond traditional legal positivism, but not as far to reach natural law, therefore not making it possible to overrule the text of the Constitution on moral grounds. Arguing

<sup>17</sup> In the first part of his book Gábor Attila Tóth gives a good summary on the academic standpoints concerning activism, with special regard to the criticisms by Tamás Györfi, Béla Pokol, János Kis, and Gábor Halmi (Tóth 2009: 15–30).

Béla Pokol, Gábor Halmai who supports Dworkinian ideas, protects fundamental rights activism on moral grounds, but criticizes activism in the field of the scope of jurisdiction and state system: “judges should decide on concrete cases not only on the ground of the words of the Constitution but based on principles formulated from the abstract clauses of the Constitution. Activism in the sense of founding arguments based on such principles will probably not be taken away from constitutional jurisdiction.” (Halmai 1994: 85)

The debate didn't bring consensus in the question of what theoretical basis does supporting fundamental rights activism and rejecting activism in the scope of jurisdiction have. As Gábor Attila Tóth put it: “the question is not whether there exists an acceptable form of activism, but whether the solutions fundamental rights activists support are equal with amending or rephrasing the Constitution.” (Tóth 2009: 24)

### **CONSTITUTIONAL REVOLUTION RELOADED—THE ADVANCEMENT OF POLITICAL CONSTITUTIONALIST ARGUMENTS**

The 2010 elections brought a landslide win for the Fidesz-KDNP coalition. The governing forces, having the majority to adopt a constitution, began preparing a new constitution. The strategic decision-makers of Fidesz have long prepared to demolish the system based on the compromises bargained by the economic, political and philosophical elite of the status quo, and to break the “clotted post-communist structures”.<sup>18</sup> Analysts close to the national-conservative side kept emphasizing that “what was carried out on the behalf of the rule of law by limiting multi-party parliamentarism, is considered as choking democracy today.”<sup>19</sup> They believed that serious distortions had happened within the constitutional system, drastically limiting the governments' scope of action. Therefore excessive separation of powers is to be cut back, restoring the supremacy of the elected parliament, and building a strong state and an effective public administration. Several proposals were formulated to change the constitutional system and to introduce innovations to the new constitution.<sup>20</sup> Some analyses suggested radical breaking ties from the past era, and initiated rehabilitating the jurisdiction of the Holy Crown, and the restoration of the legal continuity that was

<sup>18</sup> The introduction of this concept in the political discourse was done by Gyula Tellér, who characterized the socialist-liberal coalition, which followed the first freely elected government, the following way. “There were enormous economic and social forces behind the coalition parties of 1994. On the one side, the financial-administrative apparatus with the structure moving and financing the economy built in the last 20 years according to the recipe of the Monetary Fund, limiting the scope of action of every government: the three circles of usury; on the other side the party clientele of MSZP with its network concentrating significant finances and connections: the ‘clotted structures’.” On the surface almost nothing could be seen from these deeply working forces that determined the whole course (Tellér 1999: 51).

<sup>19</sup> According to Béla Pokol “However big of a legislative majority wipes off the previous government and takes control representing the voters' will, its hands are tied by the regulations written in the twenty-thousand pages long collection of the Constitutional Court's decisions, which can be interpreted multiple ways; therefore no government can be sure if they can carry out their will.” (Pokol 2011: 451)

<sup>20</sup> In the aforementioned study Béla Pokol gives suggestions regarding the more exact contents of constitutional rights and obligations, the significant rearrangement of the Court's functioning and scope of jurisdiction, the rethinking of the judicial hierarchy and the appointment of judges, and such guarantees of the interpretation of the new constitution, which can limit the use of the “invisible constitution”. (Simon 2011: 453–455)

broken by taking away the historical constitution. Others thought that the progress of the new rule of law based state is a dead-end, arguing that “constitutionality and rule of law cannot be created otherwise than as an own answer to an own challenge”,<sup>21</sup> therefore it is time to stop copying foreign examples. Behind the European Union attack of the prime minister was his effort to re-politicize political matters and to enforce the mandate given to him by the majority of voters. This contradicted the main trend of European Union politics of turning political matters to legal problems that is solving problems in a legal/judicial way. “European politics characterized by the extreme dominance of human rights logic and the downright limitation of the majority principle is in sharp contrast with the principle of total sovereignty of a one-party parliamentary majority.” (Pócsa 2012) Basically this argumentation is the main pillar of political constitutionalism.

The adopting and the amendments of the Basic Law of Hungary show that the national-conservative majority seized the “moment to make a constitution”<sup>22</sup> and they carried out the largest scale reform after the system change in the contents and structure of the Hungarian legal system, in many points based on the criticisms of the current constitutional system. The Basic Law, adopted exactly one year after the 2010 elections, was intended to symbolize—even in its name—the breaking with the previous system based on the pacts of the old elite. A new political generation introduced its demand for position that is not bound by the compromises of the previous era, that doesn’t accept “nullifying” the historical constitution, considers the importance of the family in maintaining the community, and doesn’t give up the idea of uniting the nation without moving the borders. The preamble of the Basic Law, the National Avowal, symbolizes the breaking with the former, politically neutral constitutional identity.<sup>23</sup> From the point of view of political constitutionality gaining ground we could interpret the first chapter of the Basic Law as it was intended to symbolize the dethroning of the “invisible constitution” and the rehabilitation of the historical constitution. It demonstrates the returning to the traditional statehood by not even mentioning rule of law, and having the followings instead: “We hold that the common goal of citizens and the State is to achieve the highest possible measure of well-being, safety, order, justice and liberty.” The National Avowal is not only intended to lay down the

<sup>21</sup> Csaba Varga gives a very critical description of the Constitutional Court’s responsibility in tipping the balance of rights and obligations by overemphasizing the citizen’s rights, making the state a public enemy, emptying the law by stripping it off morals, and rehabilitating the law of the law-denying past. He thinks that rule of law “gave primary protection to the former regime’s legal status, players, and rights acquired by them; and by interpreting the present as something that stems from the past uninterrupted, it helped the legal, political, social, and economic survival of the forces of the forces of post-communism... through the theoretical and insensitive legal practice of a retiring scholar it dismissed the virtues of experience and practice from law”. (Varga 2011: 488–489)

<sup>22</sup> Bruce Ackerman called that situation this way, when one single political power has got enough majority to adopt a constitution, and no other player with veto right can stop them from reshaping the political rules of play to their own image (Ackerman 1993).

<sup>23</sup> Péter Szigeti expressed his concerns about this ideological foundation in one of his papers: “The “National Avowal” represents a break with the ideological neutrality of the state, because it raises the historical-value-perception, the values, and the ideology of the Hungarian right wing to a constitutional level. This ideological base is not at all innocent, and one can never know, what they are going to build on this foundation in the future. Will denying the legal continuity of 46 years bring the logic of “sinful era–sinful system–sinful organizations–sinful individuals?” Putting history to trial?” “... the concept based on rule of law and division of powers that we used for twenty years have been replaced by a new course-building, gouvernalistic state of power.” (Szigeti 2013: 535)

emotional basis of the new constitutional identity, but it may play an important role in the interpretation of the constitution. According to Article R paragraph 3 of the Basic Law: “The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution.” The message of this triad of constitutional interpretation—especially when connected with the fourth amendment discussed later—is to replace the “invisible constitution”, which served as a measure of fundamental rights activism.

If we sum up the criticisms of the previous constitution we can see that the Basic Law incorporates the most important provisions the old constitution lacked according to critics. Community-centered regulation is built in next to the human rights catalogue of the Fundamental Rights Charter; citizens’ obligations also appear beside citizens’ rights; among the legal interpretation requirements of courts common sense and public good appears, as well as the presumption of legal acts serving moral and economical purposes (Article 28). Strengthening the role of the state, the limits of selling national wealth, and the—much debated—pension rules and the proportional sharing of taxation also became parts of the Basic Law.

The new constitution shows an interesting dichotomy: “it identifies itself as the finisher of the system change—but it does not build continuity on the constitution of the recent 20 years. (...) It suggests the returning to the historical roots of Hungarian statehood in its rhetoric, but it is connected to the democratic constitution of 1989 in its normative contents.”<sup>24</sup>

The “poll booth revolution” has brought upon the triumph of political constitutionalism. The activism of the Constitutional Court has been replaced by the activism of the activism based on super majority and the supremacy of parliament. The new parliamentary super majority has—parallel with preparing the Basic Law—amended the old constitution nine times, in the year of the election, thus radically changing the architecture of the Hungarian state.<sup>25</sup> These amendments served symbolic purposes and purposes of political authority, made strong shifts in the system of the branches of government, and delegitimized the 1989 constitution.

The sharpest conflicts of the new system of powers have arisen between the Constitutional Court and the governmental authority strongly tied to the legislative branch,

<sup>24</sup> This contradiction is even more obvious if we take into account that the preamble of the Basic Law declares the 1949 constitution “invalid”, but paragraph 2 of the Closing provisions is in direct opposition with this, declaring that the Basic Law has been adopted with regards to the procedural regulations set forth in the replaced constitution (Jakab–Sonnevend 2013: 122, 125).

<sup>25</sup> Key points of the changes: the first amendment set forth the radical reduction of the number of members of parliament, introduced the institution of deputy prime minister, and created the status of government officials. The second one made it possible to elect someone with no local government representative status as deputy major. The third one changed the composition of the body nominating the constitutional judges. The fourth changed the system of public service media. The fifth made it possible to endow court officials not yet promoted to the status of a judge with decision making powers. The sixth one created the conditions for retroactively taxing highly debated severance payments. The seventh served the purpose of implementing the changes necessary because of the nullifying of the act on legislation; it also included the changing of the act on public prosecution. The seventh one also put the control of PSZÁF and the institution of government commissioners into the Constitution. The eighth one limited the powers of the Constitutional Court in the case of economic-related acts. The ninth one put the institution of National Media and Infocommunications Authority (NMHH), with its president appointed by the prime minister for nine years, in the Constitution. Six out of nine amendments were based on the proposal of an individual member of the parliament!

and appearing as constitution enacting power. The makers of the Basic Law intended to create a constitution “carved in granite”. However, the democratic and professional deficit of the “revolutionary legislation”, the “purposeless lawyering” of the Constitutional Court, and the “intriguing of globalist circles” hiding behind the Venice Commission forced the parliamentary majority to tailor the Basic Law to the political challenges through several amendments. After the fourth amendment, and only a few months before the 2014 elections the constitutional conflicts do not rule the political agenda anymore. If we want to draw a picture after the war, we could say that the government considers the first stage of the constitution making closed, and is intended to consolidate the achievements of the second constitutional revolution. The opposition thinks of a kind of “restorative constitution making”, the radical side argues for the returning to the constitutional fundamentals of 1989, the moderates propagate conciliation with the national-conservative side. Constitutional lawyers try to process the changes through academic conferences and research projects.<sup>26</sup>

### **CONSTITUTIONAL CONFLICTS IN THE NEW SYSTEM OF SEPARATION OF POWERS**

Unlike the old constitution the Basic Law declares the principle of separation of powers: “the functioning of the Hungarian State shall be based on the principle of division of powers.” (Article C paragraph 1) The new regulation—contrary to previous presumptions and the concept of the ad hoc committee in charge of preparing the new constitution—didn’t just maintain the republican form of government, but also didn’t make radical changes to the governmental structure. Some shifts have happened in the relationship between constitutional institutions. As a new actor in the system of checks and balances Budget Committee appeared which can significantly limit the actions of the parliament, because no central budget may be adopted without the consent of the Committee. Although the President didn’t receive the right to dismiss the parliament (in times of serious constitutional or political crisis arising because of the lack of confidence), as the preparatory committee first suggested, he is still capable to shorten the term of the parliament if they don’t adopt the central budget of the year until 31 March. The previous constitution also included the right of the President to dismiss the parliament if they don’t elect a prime minister within 40 days the first candidate was introduced. Beside the power of political veto (sending a bill back to parliament to reconsider), the President’s power of constitutional veto (sending the bill to the Constitutional Court if he finds it unconstitutional) was broadened as well. However the Basic Law sets forth that if the President doesn’t exercise his veto rights, he has to sign the bill into law within 5 days.

As for the government, the Basic Law strengthens the position of the Prime minister (chancellor type of government). The constructive type of the vote of no-confidence was upheld; as a new constitutional regulation, besides the government, the Prime minister can assign duties to the ministers. The inclusion of local governmental institutions and

<sup>26</sup> The opposition doesn’t consider the Budgetary Committee a real constitutional balance, because its composition (presidents of the National Bank, the State Audit Office, and the Committee) ensures the majority of Fidesz for a long time. They think about its actual functioning that in the case of a different political composition of the parliament, it can create the possibility of obstructing the government’s work, even forcing a new election.

autonomous regulatory organs (with the power to issue decrees) in the Basic Law adds a new player to the system of separation of powers.

Most important changes occurred to the position of the Constitutional Court within the system of powers. In the first period of preparing the constitution many experts supported the idea of turning from the centralized (European) model of constitutional jurisdiction to the decentralized (American) model. A system of constitutional protection should have been created where the Curia (Supreme Court of Hungary) takes the role of the Constitutional Court, and lower level courts become the primary institutions of fundamental rights protection. The creation of a separate administrative court also came in the picture. Eventually, the parliamentary majority didn't undertake the conflicts that would have come with the radical reform of constitutional protection and the judiciary, the de facto abolishing of the Constitutional Court, but many significant changes were made.<sup>27</sup> With the constitutional amendments of 2010 and 2011 the government majority assumed a dominant position in nominating judges to the constitutional court, limited the powers of the Court in the field of economic constitutionality, put the election of the president of the Court in the hand of the parliament, and finally raised the number of judges to 15.

These steps however didn't prevent the Constitutional Court from making decisions according to rule of law norms in politically sensitive cases. In December 2011 they annulled several provisions of the media act.<sup>28</sup> The next year the Court decided on the conditions under which they can still use arguments that they set forth in decisions made before the new constitution came into force;<sup>29</sup> they ruled sending court judges to retirement at the age of 62 unconstitutional;<sup>30</sup> they annulled the regulations that set the ground for the future criminalization of homelessness;<sup>31</sup> finally when reviewing the act on the protection of families the Court deemed the act's definition of a family too narrow.<sup>32</sup> The decisions of the Court clearly showed that the rule of law institutions still function, and that the Court, accused with having a majority of judges loyal to Fidesz, is able to carry out the constitutional control over the legislation and the government.

The tension got more intense late 2012-early 2013, when the Court partially nullified the Transitional Provisions of the Basic Law,<sup>33</sup> and then, initiated by the preliminary norm

<sup>27</sup> The strong position of the Constitutional Court was disliked mainly by the former members of the Antall-government, but among the leaders of Fidesz—except for the Speaker of the Parliament—many thought that the members of parliament, who gained mandates in the election, should decide in the important questions of the society, rather than a small group of people “read from the constellation of stars, the guts of animals and the bones of birds, what the god of constitutionalism wishes to say to the mortal people”. The governing majority feared that the abolition of the Constitutional Court would mean the abolishment of democracy to the outside world, and that courts of law are not prepared for constitutional jurisdiction. By creating the Curia, the government created the grounds for dismissing the president of the Supreme Court; the National Office for the Judiciary and its president elected for nine years took over the control over the judicial system.

<sup>28</sup> With this decision the Court excepted print and online media from the scope of the Media act, abolished the institution of the “media commissioner”, deemed the regulation of journalist's source protection unconstitutional, and partially limited the investigative powers of the National Media and Infocommunications Authority.

<sup>29</sup> Decision 22/2012 of the Constitutional Court.

<sup>30</sup> Decision 33/2012 of the Constitutional Court.

<sup>31</sup> Decision 38/2012 of the Constitutional Court.

<sup>32</sup> Decision 43/2012 of the Constitutional Court.

<sup>33</sup> Decision 45/2012 of the Constitutional Court.

control request of the President of Hungary, ruled several provisions of the act on electoral process unconstitutional.<sup>34</sup> These two decisions were in connection with each other, because the need for voters to register themselves to the electoral roll had been written into the Transitional Provisions by the second amendment of the Basic Law, therefore partial nullification gave the chance to carry out the constitutional review of the registration.<sup>35</sup> Elaborating the decision on the Transitional provisions the Court faced with grave questions, such as whether the Constitutional Court has the competence to review the Basic Law and its amendments, and the question which legal source category to put the Transitional provisions into. The firm practice of the Court was that they may not review the constitution itself, but they didn't rule out the possibility of a review if the legal validity of the amendment is challenged. The Court based the possibility of reviewing the Transitional provisions on the assumption that the sovereign, by enacting the Basic Law, intended to create a stable, permanent legal act, defining its scope, contents and structure. The Court ruled that based on the criteria deriving from the Basic Law there may only be one single source of law on the top of the hierarchy of legal sources. The Transitional provisions disrupt this coherence, because they intend to raise multiple provisions to the top level, which are not built into the text of the Basic Law. It can cause uncertainty in the constitution if the contents and scope of the Basic Law is obscure or it can be defined multiple ways. "The Fundamental Law obliges the Constitutional Court to examine all those laws that break up the internal unity of the legal system, in particular the ones that violate the unity of the Fundamental Law itself. Accordingly it is not only a right but a constitutional obligation of the Constitutional Court to protect the Fundamental Law against any legislative decision that would hinder or deteriorate the enforcement of the provisions contained in the Fundamental Law, making its legal contents, scope and its position in the hierarchy of the sources of law, as well as the contents of the Fundamental Law as a constitutional standard uncertain. The Constitutional Court's obligation to protect the Fundamental Law includes the duty of protecting it as a single and unified document"<sup>36</sup> The Constitutional Court made it clear that without incorporation no provision shall become part of the Basic Law. The "incorporation order" also means that the amendments shall not create insoluble contradictions between the regulations of the Basic Law. The decision set it forth that "As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic States under the rule of law."<sup>37</sup> The majority reasoning of the decision left open the possibility of reviewing the contents of constitutional amendments. These two decisions should have created a balance in the system of the separation of powers between the forces of political constitutionality and legal

<sup>34</sup> Decision 1/2013 of the Constitutional Court.

<sup>35</sup> The Court has 30 days to decide on a preliminary norm control case. Because of Christmas and New Year's vacation this time was reduced to half, and they had to decide on the constitutional status of the Transitional Provisions as a preliminary question. Government politicians created conspiracy theories: "it would take too much of malice from me to think that the Constitutional Court only deemed the Transitional Provisions unconstitutional in order to kick out the constitutional leg of the election registry" (interview with László Kövér in *Heti Válasz*).

<sup>36</sup> Decision 45/2012 of the Constitutional Court. English version available: [http://www.mkab.hu/letoltések/en\\_0045\\_2012.pdf](http://www.mkab.hu/letoltések/en_0045_2012.pdf) (downloaded: 10 July 2014).

<sup>37</sup> The decision was adopted with the concurring opinions of András Holló and István Stumpf, and with the dissenting opinions of István Balsai, Egon Dienes-Oehm, Barnabás Lenkovic, Péter Szalay and Mária Szívós.

constitutionality. The parliamentary majority however considered it as the Constitutional Court crossing the Rubicon and violating fundamental political interests of the parliamentary majority having the mandate of voters. They retreated in the case of electoral registration but took up the hatchet in the case of constitutional amendments.

The fourth amendment didn't only incorporate most of the Transitional provisions in the Basic Law but also included several other regulations that have been previously deemed unconstitutional by the Court. It rearranged the system of the separation of powers, trying to lock the Constitutional Court in a cage. Indirectly it prevented the Court from reviewing the text of the amendments, but in case of a breach of procedural regulations it explicitly made it possible to review the amendment. It declared that the Court was bound to the content of the initiative, and that they may only broaden the scope of inquiry in the case of close connection; it annulled all the previous decisions of the Court, but it didn't rule out the possibility for the Court to come to the same conclusion. The amendment set forth a close deadline for the constitutional review of court petitions, and created the partial publicity of the proceedings of the Constitutional Court. The fourth amendment was followed by strong political debates, many have seen it as the end of the separation of powers, and sanctions were demanded from the Council of Europe against Hungary for the breach of European Union law.

### THE FUTURE OF THE RULE OF LAW

With the fourth amendment that kind of perception of the rule of law received constitutional confirmation according to which the only constitution creation power in a democratic state is the parliament elected by the people, which exercises this right in a regulated manner through its members who won their mandate in an election, and which accepts no limits in exercising this right. The Court can review the constitutionality of the amendments but only from a procedural point of view. It means that if the parliament with a majority to amend the constitution thinks that the Court made a "bad" decision, it can overrule the Court's decision by making the annulled regulations a part of the Basic Law. Supporters of political constitutionalism believe that the legislators with democratic mandate are much more capable and have better legitimacy to solve problems caused by "reasonable disagreements". The judges of the Constitutional Court on the other hand ignore the majority opinion, and enforce such minority opinions that do not have strong support in the political community. They believe that the substance of the constitution is not the boundaries that the constitutional regulations force on the legislator through the human rights catalogue, but the democratic decision making that leaves the final deciding competences in the hand of elected politicians. As for the separation of powers, checks and balances are not constituted by the veto actors (e.g. the Constitutional Court), but the party competition in free elections and the chance of a political course.<sup>38</sup>

<sup>38</sup> In a recent publication, Béla Pokol added an international dimension to the arguments of political constitutionalists. "(...) the decisions of the ECJ of Strasbourg, the regulations of the global constitutional-advisory organizations, and the constitutionalized 'general' international law would take control over the constitution itself, its amendments, and the constitution making power. Thus, the circle would close, and the most important characteristic of a state, the power to adopt a constitution, would cease to exist." In the end of his article, Béla Pokol envisions the threat of a forming global constitutional oligarchy. *Jogelméleti Szemle*, 2013 dec.



The constitution making power is theoretically unlimited until the point of adopting the constitution, but it has to be aware of the international *ius cogens*, the formal regulations of adopting the constitution, and the integrity of the constitution (it shall not incorporate regulations that are in an insoluble conflict with the other regulations of the constitution). And because the Basic Law does not distinguish between the power to adopt and to amend the constitution, the current government with a super majority in the parliament believes that there are no limits to its amending acts either.

There shall not be an unlimited power in a democracy, so the constitution amending power is not limitless either; it is bound—over the above mentioned limits—by the regulations of the current constitution, the Basic Law. The Basic Law created the constitutional system of the separation of powers in which the Constitutional Court as the protector of the Basic Law is obliged to stand up against the limiting of the effectiveness and the emptying of the contents of the fundamental norm. The Constitutional Court has to enforce its function of constitutional protection as long as it is allowed by the Basic Law and the eligible instruments of its interpretation. The review of the constitutional amendments shall not mean taking over the power of amending the constitution. The Constitutional Court is obliged to respect the regulations of the Basic Law and it has to make decisions based on it. It is the responsibility of the Parliament whether it respects the Basic Law it adopted in order to maintain the level of constitutionality already reached. The Constitutional Court ruled that the regulations becoming parts of the Basic Law though amendments have to coherently be built into the structure of the Basic Law (incorporation order). The amendments shall not create an insoluble contradiction within the Basic Law. The structural and contents coherence is a rule of law requirement based on Article B paragraph 1 of the Basic Law that the legislator has to provide.<sup>39</sup>

“The unified and coherent character of the constitution is not a conceptual formation for its own sake. It is a precondition of successful constitutional jurisdiction and therefore the legitimacy of the constitution to be protected that the legal norm on the top of the hierarchy of legal sources is capable of being the basis of a coherent constitutional court practice. It is worth noting that therefore it is also the interest of the constitution making power and the framework of society constituted by it. Nothing can be the cornerstone of the legal system that is not stable and predictable because of its ambiguous contents. In every country coherence has to be provided by the constitutional court.” (Csink–Fröhlich 2013: 5–6)

There is no democratic alternative to rule of law, and no effective governance may be carried out without stable constitutional foundations. Just as the historical constitution could not have been ruled out of the Hungarian legal culture, more than twenty years of the Constitutional Court’s legal development can’t be edited from the constitutional culture either. The political elite of the system change cannot shift the responsibility of their own indecision inability to reach a consensus to the overly active Constitutional Court. Now we have to deal with the exact opposite: the governing majority made several decisions that they didn’t measure the social and economic consequences thereof. The responsibility for this is theirs alone, and voters shall decide whether they find these decisions right. The Constitutional Court has no competence to rule on political decisions, but they have the

<sup>39</sup> I summarize the practice of the Court and the views concerning the coherence of the Constitution in my concurring opinion attached to the Court’s decision 45/2012, and in the dissenting opinion I attached to the decision concerning the fourth amendment.

competence to rule on the constitutionality of the cases brought before them; this is their constitutional obligation. If the parliament's super majority excludes financial and taxation matters from constitutional control because of short-term political interests, they severely harm the rule of law and economic constitutionality. If they keep overruling the Court's decisions they don't like by "over constitutionalizing", they dismember the coherence of the constitution, subjecting themselves to the accusation of abusive constitutionalism.<sup>40</sup> In the system of the separation of powers besides the principle of separation, the constitutional requirement of cooperation has to prevail. In the case of a parliamentary super majority the Constitutional Court, the only real counterbalance, bears a special responsibility. It is more visible in a consolidated time how much the national parliament and the government has to rely on the guardian of constitutionality, the Constitutional Court. It is the common interest of constitutional institutions—I should say it is a national interest—that the values and the normative contents of the Basic Law win the sympathy of the people and so they are willing to follow the rules. If we sacrifice rule of law values and constitutional stability on the altar of political interests, the whole society will have to pay a great price for it. In a democratic rule of law state separation of powers has to give answer not to the question of who defeats whom, but to the substance of the system of constitutional responsibility supporting each other and to the most complete serving of public good.

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<sup>40</sup> In one of his recent works American legal scholar David Landau has cited Hungary—among Venezuela and Columbia—as an example for abusive constitutionalism. University of California, Davis Law Review vol. 47. 189–260. [lawreview.law.ucdavis.edu/issues/47/1/Articles/47-1\\_Landau.pdf](http://lawreview.law.ucdavis.edu/issues/47/1/Articles/47-1_Landau.pdf)

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