Judiciary Panel

The Hungarian Constitutional Court and Social Change

László Sólyom†

On January 1, 1990, the Hungarian Constitutional Court became the first institution created by Hungary’s new Constitution to assume its responsibilities. The birth of a constitutional court can generate a complex set of problems in any society. A government must build public acceptance of, and support for, the institution and create an effective structure for its activities. A whole new set of problems arises when a constitutional court begins its work in a time of transition from an undemocratic state to a state based on the rule of law. This paper discusses some of the problems encountered by Hungary as well as Hungary’s attempts to solve them.

I. CONTINUITY AND A NEW START

The new Hungarian Constitution went into effect on October 23, 1989. The first five judges of the Constitutional Court were elected by Parliament in November 1989; the first free parliamentary elections followed in April 1990. Because the Court was established before the elections, it was able to oversee events until the new government took office and issue opinions on the new election law and on the President’s legal standing. The existence of the Constitutional Court during the transition thus allowed the transformation of political problems into legal questions that could be addressed with final, binding decisions. Furthermore, it gave the Court an opportunity to demonstrate its political independence and, thus, the possibility of separation of powers between governmental branches.

† President, Hungarian Constitutional Court.


2. Law No. 31 of 1989 on the Amendment of the Constitution. The author assumes responsibility for the accuracy of untranslated sources.


The Constitutional Court has played a major role in "harmonizing" pre-constitutional norms with the Constitution through a process of abstract judicial review. The new Constitution did not automatically suspend pre-existing laws. Instead, it required Parliament to review all pre-constitutional laws and regulations to insure that they would be consistent with the newly established Constitution. In the process, such old laws acquired validity in the new system.  

Parliament is now reformulating regulations in nearly all areas of government. Abstract judicial review, provided for in the Court's implementing legislation, the Law Concerning the Constitutional Court (LCC), permits anyone to lodge an application challenging the constitutional validity of an enacted law or regulation, regardless of whether that person has been affected by the challenged regulation. This review has been the chief activity of the Court since its establishment. Because motions for abstract judicial review determine which questions of law the Court can review, however, the Court cannot coordinate its judicial review with Parliament's harmonization efforts. At most, the Court can delay the effective date of the annulment of a provision so that Parliament can promulgate a new law.

In addition to its use of abstract judicial review, the Court has been heavily involved in reviewing legislation pertaining to basic rights. Under the new Constitution, any rules that "relate to a basic right" must be specified by an act of Parliament. This provision of the Constitution immediately generated a number of challenges to laws issued under the old legal order that affect fundamental rights. Were the Court to adopt a practice of striking down old laws and regulations that conflict with the Constitution in this formalistic sense, it would be forced to strike down the vast majority of pre-constitutional laws. Consequently, the Court generally has invalidated only those laws and regulations that conflict with the Constitution in substance.

5. See Judgment of Mar. 5, 1992, 1992/11 ABH. 77, 83 (unofficial translation on file with author) ("The politically revolutionary changes adopted by the Constitution and the fundamental laws were all enacted in a procedurally impeccable manner, in full compliance with the old legal system's regulations of the power to legislate, thereby gaining their binding force.").

6. Law No. 32, supra note 1, art. 21(2). The LCC sets forth three major types of review: (1) review of proposed legislation and regulations for constitutional infirmities, (2) interpretation of the meaning of constitutional provisions (advisory opinions), and (3) review of enacted legislation and regulations, as well as actions and omissions, for constitutional infirmities.

Klingsberg, supra note 3, at 55-56.


8. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 8(2) (Hung.) ("In the Republic of Hungary, an Act shall determine the rules on fundamental rights and obligations, however, it shall not limit the essential contents of fundamental rights."); Judgment of Dec. 17, 1991, 1991/64 ABH. 293, 300 (unofficial translation on file with author) ("However, not every kind of relationship calls for statutory regulation. Such regulation is required for any direct and significant restriction of basic rights while, in some cases, the determination of content of basic rights and the manner of their protection also calls for statutory measures. However, where the relationship with basic rights is indirect and remote, administrative regulation is sufficient; if it were otherwise, everything would have to be regulated by statutes.").

Some observers, contending that the old legal norms caused many of the new regime’s social problems, have criticized this piecemeal, gradual reorganization of the Hungarian legal order; they would dispense with the entire old legal order. The Constitutional Court has itself been criticized because of its support for legal continuity. Its response to pressures for a speedy transition from the old system to a new one has therefore been a critical issue in Hungary.

II. THE CONSTITUTIONAL COURT
IN THE NEW SYSTEM

Although the Constitution defines the scope of the authority of the Court and guarantees the independence of its judges, determining its position in the structure of the newly created constitutional state — that is, its relation to the other organs of the state — has raised fundamental issues of constitutional interpretation.

A. Parliament

Parliament has found, to some dismay, that its powers are limited by the Constitutional Court’s oversight. Since the legislature under socialism had unlimited sovereignty, it is understandable that some members of Parliament would have difficulty accepting the existence of a Constitutional Court. The Court has been able to withstand their political attacks by responding with the legitimizing force of constitutional analysis.

On the other hand, political parties have tried to use the process of pre-enactment review to their advantage in parliamentary debate. A premature review could, of course, determine the future course of debate. In order to minimize any interference with parliamentary processes, the Court has refused pre-enactment review of draft legislation if numerous petitions for modification of the draft are still pending. To do otherwise would be inconsistent with the Constitutional Court’s role, which is that of a judge of legislation, rather than an advisor to legislators.

The Court has taken a similar approach with regard to its authority for "abstract constitutional interpretation." It has denied petitions for review that would require it to assume functions more properly carried out by other branches of government. For example, the Court rejected a Ministry of Finance petition that would have required the Court to analyze and evaluate several economic models. The Court set strict preconditions for justiciability

10. The Court can review a draft law to assess its constitutionality at the request of Parliament, a parliamentary committee, or a group of fifty representatives. Law No. 32, supra note 1, arts. 1(a), 21(1). The President of the Republic and the cabinet is also entitled to ask for pre-enactment review. Judgment of Apr. 23, 1991, 1991/16 ABH. 58, 58-61.
11. See Law No. 32, supra note 1, art. 51.
and made clear that it would not accept the responsibilities of political governance.\textsuperscript{12}

Because the Constitutional Court cannot choose the issues presented for review and, therefore, cannot coordinate its rulings with the government's plans, the Court's decisions have caused some problems. From another perspective, however, unexpected decisions of the Constitutional Court can be seen as a catalyzer or an accelerator of legal development. For example, the Court reviewed a regulation obligating individuals to present their personal identification number (PIN) to state authorities upon request.\textsuperscript{13} It found that the regulation as implemented violated individual rights, because state authorities frequently and arbitrarily demanded citizens to produce their PIN. The Court held the regulation unconstitutional for failing to specify the objective of such requests and for not otherwise adequately securing individual rights.\textsuperscript{14} This decision set in motion long overdue legislation on data protection.\textsuperscript{15} Similarly, a Court decision induced Parliament to extend the scope of judicial review to all administrative decisions.\textsuperscript{16} Another decision, however, which declared unconstitutional an extraordinary procedure used to appeal decisions to the High Court of Justice,\textsuperscript{17} prompted the legislature to introduce a new form of extraordinary appeal, although ideally it should have led to a reorganization of the court system.

B. Other Courts

The relationship between the Constitutional Court and other courts is also uncertain. As previously noted, anyone can submit a petition for abstract judicial review of a law or regulation. When an individual petitions the Court with a fact-based complaint — claiming that the law or regulation applied to her case violates one of her basic constitutional rights — the Court can issue whatever legal remedies appropriate and quash the lower court's decision in order to open the way for a new lawsuit.\textsuperscript{18} Just as Parliament has found it difficult to accept judicial review of its laws, some judges of the ordinary courts think that the Constitutional Court is meddling with their jurisdiction. Had the LCC provided the Court with jurisdiction only over "constitutional complaints" in the classical sense (i.e., authority to provide legal remedies against violations of constitutional rights by judicial or governmental decisions), its powers over ordinary courts would be less controversial. Nevertheless, the Court has been able to exercise a significant amount of

\textsuperscript{14} Id.
\textsuperscript{15} Law No. 63 of 1992 on Protection of Personal Data and Disclosure of Data of Public Interest.
control over the lower courts and the government by using fact-based complaints to review laws in their entirety rather than simply their applications in specific cases. It may thus strike down an entire law (instead of holding its application invalid) when the interpretation of the lower court or agency is unconstitutional. The Court has also started to issue binding interpretations of certain laws before lower courts have had an opportunity to rule on them.

C. Public Opinion

Just as the Court's position in the overall structure of government is somewhat ambiguous, its place in a representative democracy has been questioned. A number of the Court's decisions have been contrary to public opinion. For example, the Court held a law establishing the death penalty unconstitutional, although the vast majority of the Hungarian population view this punishment as acceptable and necessary. Many observers expected the Constitutional Court to strike down the Law Concerning the Compensation for Expropriated and Nationalized Property (Compensation Law) given the widespread public support for complete restitution to former property owners. The Court, however, did not mandate restitution or any other form of privatization. Rather, it focused on the constitutionality of the specific solution chosen by the legislature. In another case, the Court considered the constitutionality of a law permitting the government to prosecute certain crimes that had not been prosecuted previously for political reasons, and that were then technically barred by the statute of limitations. Despite considerable public outcry, the Court found that the government could not prosecute the crimes. The Court, like similar institutions in other countries, strives not to be swayed by public opinion. Its position, however, is a precarious one. In a new democracy, one may expect the majority's opinion to rule. Some citizens may have difficulty reconciling this majoritarian vision of democracy with the significant authority of a counter-majoritarian body, albeit one whose members are elected by Parliament.

19. E.g., id.
III. THE DEVELOPMENT OF CONSTITUTIONAL RIGHTS AND DOCTRINES

Hungary understandably lacks polished constitutional theories and doctrines. The Court must make up for forty years lost during Communist rule. From its first cases, the Court has required that the government demonstrate a compelling state interest and a proportional relationship between means and ends as preconditions to any limitations on constitutional rights. It has introduced the concept of Wesensgehalt, or "the core of a right," which stands for the principle that the essential content of a constitutional right cannot be limited by law.27 The Court has also set forth principles for interpreting the equality provisions of the Constitution.28 The Court has applied several of Ronald Dworkin's theories,29 first as a statement of basic principles, then as a detailed test for the constitutionality of discriminatory legislation.30

27. I originally introduced the concept of Wesensgehalt in a dissenting opinion in Judgment of Feb. 18, 1990, 1990/2 ABH. 18, 23 (Sőlyom, Pres., dissenting). The Court adopted it after the Constitution was amended in June 1990 to incorporate the concept. For example, the Court overturned a law requiring leaders of political parties and social organizations to declare their property:

The legislator, when extending the duty to make a declaration of property to persons beyond those holding state posts, limited, without a compelling reason, the rights ensured by Section 59 of the Constitution and thereby imposed restrictions on the essential contents of a fundamental right. On the other hand, the provision does not meet with the proportionality requirements for the norms limiting the fundamental right . . . in the interest of achieving the purpose. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. If the limitation adopted is unsuitable to achieve the purpose, the violation of a fundamental right may be established.


According to the Court, Wesensgehalt is violated when there is no "compelling and proportional" reason to limit a constitutional right. The Hungarian Constitutional Court considers only the right to life and human dignity unrestricted. This view was first formulated in my concurring opinion in a death penalty case:

Article 8 of the Constitution confines the limitability of fundamental rights. It withdraws from the outset their "essential contents" from the control of the legislature (i.e., the State), and it forbids the suspension or curtailment of the exercise of the most important fundamental rights even in times of emergency, national crises or extreme danger. But the rights to life and human dignity are conceptually unlimitable, and man may be deprived of those completely and once and for all (i.e., no distinction may be drawn between the part that may be limited and the "essential contents"). The right to life and human dignity is the essential content itself.


28. A MAGYAR KöZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 57(1) ("Everyone shall be equal before the law . . . ."); 70/A(1) ("The Republic of Hungary shall ensure human and civil rights for everyone within its territory without discrimination of any kind, such as upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or upon any other grounds.").

29. See generally RONALD M. DWORKIN, LAW'S EMPIRE (1986); RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

The Constitutional Court has developed an extensive interpretation of the content of the right to human dignity. The Court has construed this right as a "source right," or a "constitutional right that the Constitutional Court as well as ordinary courts can call upon in a subsidiary fashion in the interest of protecting individual autonomy in every case where none of the concrete rights explicitly named in the Constitution are applicable in the given circumstances." In the death penalty case, and, even more so in the abortion case, the Court explained the right to human dignity in terms of its interaction with the right to life and the right of legal capacity. In these opinions, the Constitutional Court held that the rights to dignity and to life are absolute, because they ascertained that these rights are conceptually borderless and that their denial is conceptually arbitrary.

The Court's decisions on privacy and abortion illustrate how the Court seeks to strike a balance between the protection of fundamental rights and the practical limits on its own power. For example, the Court recognized a right to protection of personal data and thereby induced Parliament to enact data protection legislation. In a similar case now pending, the Court has the opportunity to consider the right to free access to information and to set a direction for future legislation about freedom of information and public access to governmental files.

In the abortion case, the Court declared a ministerial decree regulating abortion unconstitutional on procedural grounds. Specifically, it ruled that a fundamental right cannot be regulated through non-statutory means. The Court, however, did not limit its discussion to this aspect of the case. It noted that the constitutionality of regulating abortion turns on whether the embryo is human in the legal sense — that is, whether the embryo is a legal subject. The Court then noted that Parliament has a duty to define the term "human." The relevant inquiry is whether the embryo can have fundamental rights at all. Parliament's decision is constrained only in that it cannot narrow the present legal definition of the human being. If the legislature declares the embryo a legal subject, pregnancy could be terminated only to save the mother's life. If the legislature does not deem the embryo a legal

31. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 54(1) ("[E]veryone has the inherent right to life and human dignity, of which no one shall be arbitrarily deprived.").
33. See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 54(1); id. at 56 ("[E]very human being shall have legal capacity."); Judgment of Oct. 31, 1990, 1990/23 ABH. 88, 92 (death penalty case); id. at 103-07 (Sőlyom, Pres., concurring); Judgment of Dec. 17, 1991, 1991/64 ABH. 293, 308 (unofficial translation on file with author) (abortion case).
34. See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 61(1) ("[E]veryone shall be entitled to freely express one's opinion as well as to have access to and disseminate data of public interests.").
36. Id. at 306. The Court overturned Minister of Health Decree No. 15 (1988) (regulating abortion).
38. Id. at 312.
subject, the Court could weigh the mother's right to control her body\textsuperscript{39} against the state's duty to protect human life.\textsuperscript{40} Since such a balance must be struck, neither a complete prohibition of abortion nor a complete freedom of abortion would be constitutional.\textsuperscript{41}

IV. DIFFICULTIES OF TRANSITION

The Constitutional Court has faced a number of complicated issues arising from the transition from a non-democratic to a democratic society. Most of these issues first surfaced in 1991, after the Constitutional Court had spent a year developing its procedures and building its legitimacy. Constitutional problems arose primarily in four areas: (1) the regulation of property relations, (2) the prosecution of politically motivated crimes committed during the previous regime, (3) the separation of powers and federalism, and (4) legal procedure and due process.

A. Property Relations

The Constitutional Court has played a major role in harmonizing the legal and political aspects of the new system of property. Under Communism, more than ninety percent of industrial and commercial enterprises was state-owned. The political and economic reorganization of the 1980s was intended to create a market economy based on private property. Privatization is a constitutional goal: the Preamble refers to the "social market economy"\textsuperscript{42} and Article 4 grants public and private property equal rank in a market economy.\textsuperscript{43}

One important issue was whether private property that was nationalized in the 1940s and 1950s should be returned to its original owners or whether those owners should be compensated. Those who favored the latter approach disagreed on whether compensation should be limited to property loss or whether it should include additional payments to those who were persecuted by the old regime. The largest party of the ruling coalition, the Hungarian

\textsuperscript{39} The Court held that "even the very limited restrictions on the availability of abortion imposed by existing regulations directly and substantially affect the mother's right to self-determination ... [which] is one aspect of the general individual right ... as espoused by Article 54(1) of the Constitution." Judgment of Dec. 17, 1991, 1991/64 ABH. at 301.

\textsuperscript{40} A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 54(1) ("[E]veryone has the inherent right to life ... ."); id. art. 8(1) ("The Republic of Hungary recognizes the inviolable and inalienable fundamental human rights; the observance and the protection of these shall be a primary duty of the State.").

\textsuperscript{41} Judgment of Dec. 17, 1991, 1991/64 ABH. at 316 ("The state has a duty to protect human life from the moment of its inception and hence the right to self-determination cannot be dispositive even in the earliest stages of the pregnancy.").

\textsuperscript{42} A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] pmbl. ("In order to facilitate a peaceful political transition to a constitutional state implementing a multiparty system, parliamentary democracy and social market economy . . . .").

\textsuperscript{43} Id. art. 9(1) ("The economy of Hungary is a market economy where public and private ownership shall enjoy equal rights and equal protection.").
Hungarian Constitutional Court, wanted a policy of partial monetary compensation for property as well as certain additional damages for personal suffering. The Smallholders Party (representing former peasant landowners) sought the actual return of land, which would have required that land of agricultural cooperatives be expropriated without compensation. The ruling coalition drafted a bill that would have provided all those who had lost land with their original or similar plots, and all those who had lost personal property with payment. To determine the bill's constitutionality, the Prime Minister asked the Court to interpret the Constitution’s provisions relating to equality and to the right of property.

The Court found that a scheme to compensate former real property owners and personal property owners by such significantly different means, would, in the absence of a compelling reason for the discrimination, violate the Constitution’s equality provision.\(^4\) Furthermore, for the government to distribute governmental largess to some individuals (i.e., former property owners) and not others, it must demonstrate that the discrimination is necessary for fair competition in the marketplace.\(^4\) The Court also declared that the Constitution protects the property of agricultural cooperatives, and that this property cannot be taken away without prompt and complete compensation.\(^\text{46}\)

The Court disregarded the fact that the cooperatives’ property rights had arisen through forced collectivization. It held that the Constitution protects property acquired through measures that were legal at the time, and that settled legal relationships must be respected and accepted.\(^\text{47}\) The Court’s position on these questions reflects an acknowledgement of the complexity of compensation and restoration. Property may have changed hands a number of times between 1939 and 1989, sometimes through now-discredited governmental acts. For example, Germany, during its World War II occupation of Hungary, expropriated the property of Jews. After the war, the Hungarian government expropriated property in the hands of ethnic Germans and redistributed it to ethnic Hungarian refugees.\(^\text{48}\) These lands were subsequently nationalized under Communist rule. In recent years the government has sold such nationalized property to private individuals. The question thus arises, if property is to revert to its former owner, to whom should it be restored?

The Compensation Law ultimately provided for partial compensation to those who were "unjustly" deprived of private property rather than for a direct

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46. Id. at 79-82.
48. See Klingsberg, supra note 3, at 105 & nn. 158-60.
restoration of the property itself. Compensation would have taken the form of options to purchase privatized government property, including land owned by agricultural cooperatives. Under this scheme, agricultural cooperatives would have been forced to sell land at an extremely low price set by law. The cooperatives viewed this obligation as expropriation and, therefore, unconstitutional.

The Constitutional Court saw the problem within the broader framework of the transformation of property ownership. To effect this transformation, the government must change the former, privileged "social property" (property of the state and of cooperatives) into private property and other equivalent forms of property (e.g., property of local communities). The Court also considered drafts of laws that would transfer such property as state-owned apartments and real estate free of change to municipalities and distribute the property of agricultural cooperatives to its members. It found that the Constitution does not bar the government from placing burdens on those who acquire the former "social property" free of charge, including the agricultural cooperatives who challenged the Compensation Law. These burdens can arise either from the circumstances of the creation of the social property or from the duties that arise from the new Constitution.

The question then remained, should the former owners not have a right to the restoration of their property or to full compensation? The Constitutional Court scrutinized the Nationalization Law of 1948-52 and declared it unconstitutional on the ground that abolishing private property is not a collective goal under the current Constitution. Although the Nationalization Law indicated that additional laws would control the question of compensation, these laws were never promulgated. The Court therefore left open the possibility that Parliament would enact this compensation legislation.

Because the Court limited its review to whether the particular solution chosen by Parliament was constitutional, the Court could not evaluate the broader issue of the constitutionality of restoration. As it considered the validity of the Compensation Law, the Court made clear that a solution to the property problem, despite the exceptional nature of that problem, had to be found within the boundaries of the Constitution.

B. Prosecution of Politically Motivated Crimes and General Legal Procedure

The prosecution of acts of murder, manslaughter, and high treason committed between 1944 and 1990 has been a particularly controversial issue for the Court. For political reasons, some of these crimes were not prosecuted under the old regime, and the applicable statutes of limitations have long since expired. Parliament enacted a law that would have reset statutes of limitations,

The Court thus squarely confronted the question of whether Parliament could take action potentially inconsistent with the rule of law for the sake of prosecuting individuals affiliated with the old regime. It held unconstitutional attempts to punish criminal deeds already barred by a statute of limitations, attempts to extend the statute of limitations for the prosecution of crimes where the statute of limitations had not yet expired, and attempts to retroactively introduce new causes of action to bypass statutes of limitations. In effect, the Court's holding forestalls the passage of any retroactive criminal laws. This ruling, however, did not end the Court's confrontation with Parliament over the issue of political crimes. In March 1992, Parliament passed an authoritative resolution on the interpretation of statutes of limitations, which excluded the period between 1944 and 1989 from such statutes of limitations. The Court declared the regulation unconstitutional on both procedural and substantive grounds. Since an authoritative parliamentary resolution does not qualify as a legislative act, it cannot regulate citizens' basic rights, and it violates the principles of legality, legal certainty, and judicial independence. Substantively, the Court found the resolution unconstitutional because it sought to make retroactive criminal prosecution possible.

In response to this ruling, Parliament enacted a bill in February 1993 amending the Criminal Procedural Act of 1973. By doing so, Parliament sought to oblige public prosecutors to bring charges in certain cases, even if trial would be barred by a statute of limitations. The President of the Republic did not sign the bill but turned to the Constitutional Court for a preliminary ruling on the bill's constitutionality. The Court rejected the bill, based on the same arguments used in the decision to strike down Parliament's interpretive resolution, stating that the bill violated the principles of the rule of law, legality, and legal certainty. Finally, in October 1993, on the President's motion, the Court reviewed a bill passed by Parliament concerning crimes committed during the 1956 revolution. The Court held that crimes defined by international law can be prosecuted without regard to domestic laws, including statutes of limitations.

These opinions have had a major impact on the debate over whether major transitions in Hungarian society can and should be accomplished strictly within the framework of the rule of law. The Court chose the appropriate

51. Id. at 88.
52. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art 8(2).
course. A full transformation cannot take place through means inconsistent with the Constitution. The Court thus held that the rule of law must be respected under all circumstances.57

The Court's approach can be questioned on two grounds. First, why should legal relationships that developed under unconstitutional legal norms be preserved? The Constitutional Court has answered simply that settled legal relationships are generally unaffected by a declaration that the underlying legal norms are invalid.58 Second, does Hungary's special historical situation weigh in favor of a more flexible application of the rule of law? According to the Court, while the historical situation may be important, it cannot justify violations of the underlying guarantee of the rule of law.59 A state governed by the rule of law cannot be realized through means incompatible with that rule of law. In cases of conflict, the Court will place legal stability, which is based on objective and formal principles, ahead of substantive justice, which is partial and subjective.

In addition to prosecuting past political crimes, an important aspect of creating a state based on the rule of law is establishing due process guarantees consistent with the Constitution and international accords. In the past year alone, the Court invalidated limitations on a defendant's rights in military criminal trials;60 invalidated a regulation that based compensation for unlawful detention upon estimates by the Justice Minister;61 and expanded the availability of rights of appeal.62 The Court also invalidated many civil law norms including procedural rules that had favored the government and its public enterprises. Still, the Court upheld many rules that were alleged to be infringements of various personal rights for the sake of legal stability and finality.63

57. "However, the basic guarantees of Rechtsstaat cannot be set aside by reference to historical situations and the Rechtsstaat's demand for justice. A state under the rule of law cannot be created by undermining the rule of law. The certainty of the law based on formal and objective principles is more important than the necessarily partial and subjective justice." Judgment of Mar. 5, 1992, 1992/11 ABH. at 82.

58. Id. at 81-82. According to the general rule set by Law No. 32, the annulment of a legal provision shall effect neither the legal relationships that developed prior to the publication of the decision nor the rights and duties derived from them. Law No. 32, supra note 1, art. 43(2); see also Judgment of Feb. 25, 1992, 1992/10 ABH. 72, 74-75 (finding Article 43 constitutional). This rule is subject to certain exceptions in criminal procedures. Law No. 32, supra, art. 43(3). The Court also has discretion to declare a provision unconstitutional with ex tunc (retroactive) effect if retroactivity would be justified by a particularly important interest of legal certainty or of the person who initiated the procedure. Id. art. 43(4). The Court, however, declined to exercise this discretion to give retroactive effect to nationalization laws: "[T]he annulment of such legal rules with retroactive effect not only would lack remedy of the legal damages of the former owners, but would inevitably cause further legal damages in mass proportions. In view of all this, the Constitutional Court found that the exceptional authorization contained in section 4 of Article 43 of the Act on the Constitutional Court is not applicable in the present case." Judgment of May 20, 1991, 1991/27 ABH. 73, 80 (unofficial translation on file with author).


Hungarian Constitutional Court

C. Separation of Powers and Federalism

Throughout the political transformation, the role and legal position of the President of the Republic was the topic of intense political debate. This controversy focused on whether Hungary should be a parliamentary or a presidential republic. Ultimately, the Constitution enshrined a parliamentary system and thereby defined the limits of the presidency. Nevertheless, the Constitutional Court has on occasion had to address the question of the President's legal position.

The most important decision pertaining to separation of powers arose from a petition by the Minister of Defense. The Constitution declares that the President of the Republic is commander in chief of the armed forces. A separate article of the Constitution, however, provides that "only" Parliament, the President, the National Defense Council, and the responsible minister "shall have the power, within the limits determined by the Constitution and a separate Act, to command the armed forces." The Court was called upon to interpret constitutional provisions regarding presidential control of the armed forces, as well as the President's power of appointment. The Constitutional Court held that the President, as commander in chief, did not hold the power to command. Rather, the President had the power to appoint a commander, subject to the Prime Minister's endorsement.

The Court's long and detailed opinion is significant for more than its resolution of the specific issues at hand. The Court attempted to integrate scattered provisions on separation of powers into a coherent constitutional structure. It also classified different kinds of presidential decisions and enumerated the range of circumstances in which the President's rejection of a cabinet nominee for Commander in Chief would be constitutional. The Court interpreted the Constitution's provisions on the structure of the state quite rigidly, in marked contrast to its broader construction of basic individual rights.

The Constitutional Court has also decided separation of powers issues relating to the judiciary. Under Hungarian law, the Minister of Justice has the power to appoint the presidents of the various courts. The 1991 amendment of the Judiciary Act introduced new, self-governing institutions (judicial councils) for the judiciary, but did not abrogate the competencies of the Minister. When the act was challenged, the Court upheld the validity of the law but set forth specific constitutional requirements for appointments by the

1992/13 ABH. 95.
64. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 30/A.
67. Id. art. 40/B(3).
69. Id. at 232-36.
Minister of Justice: because the judiciary shares the appointment power with the executive branch, any appointment by the Minister must be supported by at least fifty percent of the judges already on the bench in that court.\(^7\)

In addition to questions about the horizontal distribution of power among branches of the national government, the Court has faced questions about the vertical distribution of power between the national and local governments. Because the new Constitution explicitly grants autonomy to local communities,\(^7\) many problems in demarcation and jurisdiction have arisen.\(^7\) The Court has the authority to supervise municipal bylaws and local referenda, and it has, through case law, largely defined municipalities’ room for action, particularly the degree to which local ordinances can deviate from national regulations.\(^7\) Nonetheless, the Court believes that the newly created administrative courts should supervise municipal bylaws and referenda, as the large number of cases raising these issues would place a great burden on the Constitutional Court.

V. CONCLUSION

Fortunate countries are blessed with time for organic development — time in which the principles of basic rights can evolve through the interaction of legal science and case law. Doctrines in such countries arise out of detailed analysis in a series of cases. In contrast, a country attempting to form a democratic government after a totalitarian regime does not have the benefits of time. The new Hungarian Constitutional Court, for instance, was confronted with momentous decisions shortly after its creation. Issues relating to abortion, the death penalty, separation of powers, individual rights, and property rights had to be resolved immediately.

\(^70\) Judgment June 11, 1993, Alkotmánybíróság Határozatai [Constitutional Law Court], 1993/75 MK. 4134.

\(^71\) A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 42 ("The enfranchised citizens of the communities, towns, of the capital city and its districts, as well as of the counties, shall be entitled to the right of local self-government. The local self-government shall be the autonomous and democratic administration of the local public affairs concerning the enfranchised citizens and the exercise of local public authority in the interest of the population.").

\(^72\) Communal councils existed for forty years in Hungary but functioned only as "local organs of the State."

\(^73\) Law No. 32, supra note 1, art. 1 ("The competence of the Court shall comprise the following: . . . 1) the elimination of a conflict in connection with the sphere of authority arising between several State organs, a self-government and other State organs (bodies), or self-governments . . . ."); id. art. 59(1) ("The general authority of supervision of legality shall extend to legal rules issued by the state administrative organs of a lower level than the Government and to the local self-government and to other legal means of the State control, as well as to the orders of general validity and to the individual decisions made by these organs in the process of law-application."); Law No. 65 of 1990 on Local Governments, art. 51. In one case, the Court overturned a local government's decree banning the sale of erotic and pornographic goods. Since legislative acts already allowed the sale of such goods, the local government was permitted to make only certain territorial restrictions. Judgment of Nov. 30, 1991, 1991/63 ABH. 470.
The Court's decisions were made in an atmosphere characteristic of the regimes that emerged out of the collapse of the Eastern Bloc. The new regimes frequently attempted to incorporate idealized pre-communist arrangements. When confronted with difficult questions, the government and Parliament have tried to avoid unconventional solutions. The Court has realized, however, that important cases need not be decided in a traditional manner, and that the Court was not bound by the constitutional practice of other state organs. Because the Court has enjoyed relative insulation from certain political forces, it has been able to develop its own approach to the interpretation and contextualization of constitutional rights.