members of particular communities in relation to its particular institutions.[117] This gives rise to a reconfiguration of the notion of boundaries beyond customary conceptualizations predicated on territory. The complexity which attaches to food consumption and the risks posed by the use of pesticides and food additives not to mention the use of new technologies has placed increasing reliance on experts who have increasingly monopolized the debate concerning the perception of risk.[118].

Matters of trust and loyalty also have to be reconfigured in the face of the plurality of public spheres, an issue which has been recognized in the context of Food Safety in the EU and the proposal for the creation of a European Food Authority, the mandate of which would be the responsibility concerning risk assessment and communication on food safety issues.[119] The process of reconfiguration has also been accompanied by a re-entrenchment of national and local identity.

There is need for differentiation in order to come to terms with different regimes of trust which operate at a number of levels. Thus, bearing the CEECs in mind, Polish citizens, for example, would undoubtedly trust their government to defend their agricultural interests more than the European Union negotiators for accession.[120] Agriculture is at the heart of Poland's accession to the EU given that it accounts for 3.3 percent of the Polish GDP (as compared with 2 percent in the EU), but employs 18.8 percent of all working people (as compared with 4.4 percent in the EU).[121]

By contrast, the same might not be true as regards police protection where they might look to the EU as providing a form of supranational "checks and balances" to safeguard their rights. This is also the case of minorities in the CEECs who embrace the EU as a way of escaping the constraints of unwanted sovereignty at the state level, particularly as the states' regional policy tend to discriminate against them such as the cases of Romania and Slovakia where the respective states drew regional boundaries in order to preclude minorities having regional power, authority and competencies.

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117 See Alan O. Sykes, 'Exploring the need for international harmonization: domestic regulation, sovereignty and scientific evidence requirements. A pessimistic view', *Chicago Journal of International Law*, Fall (2002).

118 See Ulrich Beck, *The Risk Society: Towards a New Modernity* (trans. from the German by Mark Ritter) (London: Sage 1992) who refers this in terms of "primary scientization" at p. 158. See also Cass Sunstein, *Risk and Reason: Safety, Law and the Environment*, (New York: Cambridge University Press 2002).

119 White Paper on Food Safety, COM (99) 719 final at Chapt. 4.

120 Indeed, a climate of "unnecessary mistrust" has been reported to underpin Polish-EU negotiations. See Stephen Holmes, 'Introduction', *East European Constitutional Review*, 9 (2000).

121 See Susan Senior Nello, 'Food and Agriculture in an Enlarged EU', *Robert Schuman Centre Working Paper No. 58/2002* at p. 3.

5. Conclusion

What does this teach us? Not only must the approach to affiliation and trust be more nuanced, that is to say that there are degrees of affiliation and trust, but also, there are degrees of sovereignty for which there are likely to be different degrees of multi-level dissent. The case of Germany and the judicial response to the European integration project in particular, illustrates the nature of dissent at the level of constitutional court decisions. The CEECs by contrast indicate the need to widen the analytical framework in order to include a multi-leveled approach in order to monitor and track not only their adaptive capacity, but also the adaptive capacity of the current member states. To this extent, much can be learned by the current member states of the EU and by the EU itself from the experience of legal orders which have had to address these issues within a new supranational architecture. The flexibility with which the CEECs have had to both view and reconfigure their own traditions of state theory and practice in the face of EU membership, particularly as regards rights, may serve as a useful example to the EU and its members, not only in terms of burdens but also in terms of benefits.

11. Europeanization Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and the "Return to Europe"

Christian Boulanger

1. Introduction

There are various ways to approach the relationship between constitutionalism and the "Europeanization" of post-Communist accession countries to the European Union. First, one could take the lawyer's perspective and analyse the impact of accession and of the *acquis communautaire* on the constitutional systems of these countries. Such an analysis would point out the ways in which EU Integration induced changes in the constitutional structure of accession countries. For example, constitutions have to be changed in order to accommodate the transfer of certain sovereignty rights to the EU, and therefore to allow for the supremacy of EU law over domestic law. Second, if one thinks of a national constitution as incorporating the totality of the legal regulations of its political structure, rather than consisting purely of *constitutional* laws, EU accession obviously has an enormous impact. Laws pertaining to all fields of political life have to be changed in order to comply with the new European law regime—many concerning technical details, others profoundly changing the legal structure of the countries.[1]

Conversely, political scientists tend to study the effects of EU Integration on institution building and governance. They argue that the effects of Europeanization were visible long before the candidate countries began the accession process. They changed institutions and behaviours in anticipation of accession. These changes do not simply mirror the demands of the formal legal rules that candidate countries are supposed to adapt to (the "legal harmonization" process). In some cases, they go beyond what is being asked, and in other cases they fall short of the EU's expectations. The latter comes as no surprise, given the incredibly short time frame

[1] See, for example, Andrew Evans, "Voluntary Harmonisation in Integration Between the European Community and Eastern Europe," *European Law Review*, 22 (1997), pp. 201–220, and, for a socio-legal analysis of "legal harmonization," Armin Höland, "EU-Recht auf dem Weg nach Osten: Rechtssoziologische Fragen," in C. Boulanger (ed.), *Recht in der Transformation* (Berlin: Berliner Debatte Wissenschaftsverlag 2002), pp. 79–102. For a "holistic" concept of the constitution, see Alec Stone Sweet, *Governing With Judges. Constitutional Politics in Europe* (Oxford: Oxford University Press 2000).

Wojciech Sadurski et al. (ed.), Spreading Democracy and the Rule of Law?, 263–280.

in which the candidate countries have had to roll back half a century of Leninism and a few years of independent law-making.[2]

Other analyses look at the transfer of law from the opposite direction. They ask whether there is a cultural basis for constitutionalism in individual post-Communist countries in general,[3] and for an "EU-constitutionalism" in particular. They do this by studying public opinion[4] or by speculating on the significance of deep cultural legacies, which affect the (non)functioning of today's legal institutions.[5] Such analyses assume that constitutions and laws do not exist in a socio-cultural vacuum. Rather, they work against the background of discourses and practices inherited from the past in various ways, i.e. in the context of what is often called "culture".

One area that has so far received only limited attention in this context is the role of the newly established constitutional courts in the region. Their remarkable activity has been studied in various contributions,[6] but the relationship between their jurisprudence and EU Integration has not systematically been researched. This research would have to point out the various ways in which the jurisprudence of the constitutional courts has promoted smooth EU Integration or slowed it down.

In this chapter, I am interested in a different, rather more informal way that "Europe" and EU Integration affected constitutional politics in the decade after the regime change and vice versa. I am going to explore an argument formulated by Kim Lane Scheppele, namely that "the success of a constitution depends less on its constitutional pedigree than on the political culture into which the constitution

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2 See Darina Malová and Tim Haughton, "Making Institutions in Central and Eastern Europe, and the Impact of Europe," *West European Politics*, 25 (2002), pp. 101–120 and Heather Grabbe, "How does Europeanization affect CEE governance? Conditionality, Diffusion and Diversity," *Journal of European Public Policy*, 8 (2001), pp. 1013–1031 for the effects on institution-building.

3 Philip Selznick, "Legal Cultures and the Rule of Law," in M. Krygier and A. Czarnota (eds.), *The Rule of Law After Communism: Problems and Prospects in East-Central Europe* (Aldershot: Ashgate/Dartmouth 1999), pp. 21–38; Rett R. Ludwikowski, "Constitutional Culture of the New East-Central European Democracies," *The Georgia Journal of International and Comparative Law*, 29 (2000), p. 1.

4 Jan Stankovsky, Fritz Plasser and Peter A. Ulram, *On the Eve of EU Enlargement. Economic Developments and Democratic Attitudes in East Central Europe* (Wien: Signum 1998).

5 Georg Brunner, "Rechtskultur in Osteuropa: das Problem der Kulturgrenzen," in *Politische und ökonomische Transformation in Osteuropa* (Berlin: Arno Spitz 1996), pp. 91–112.

6 See for case studies and comparative analyses Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: Chicago University Press 2000), Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Budapest: Central European University Press 2002) and Wojciech Sadurski (ed.), *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer Law International 2002).

is inserted. The ideas that judges, lawyers and politicians have about how constitutional cultures work are more important than the actual text, and even more important than the actually existing reality of the constitutional cultures that serve as a model."[7]

In particular, I would like to discuss one of the ideas that she presented in a conference paper: The claim that notions of Hungarian "Europeanness" has influenced the development of the Hungarian constitutional jurisprudence in terms of the receptiveness of Hungarian politicians and publics towards the court's activism. Talking about the so-called "Sólyom court" which worked from 1990 to 1998, she argues that "the Court's power to override the democratically elected Parliament comes from the image it forwards of the Hungarian nation firmly anchored in European culture."[8]

This chapter takes up this argument and tries to draw some theoretical conclusions from it since it touches on several broader socio-legal debates. First, it departs from the dominant theoretical paradigm of the study of constitutional courts, which perceives their power as dependent upon strategic power-plays in the political arena.[9] Second, the argument contributes to a discussion, which has been around since Max Weber first spoke of the relevance of elite "world views"[10] which act as "switchmen" in the institutionalization of new regimes. Third, Scheppele positions herself in the heated debate on the "counter-majoritarian difficulty" (Bickel) of judicial review: contrary to many who think that judicial review is undemocratic, she argues that the Sólyom court in many cases responded to the aspirations of Hungarian society more adequately than the democratically legitimated parliament.

The empirical puzzle I am interested in solving in this context is the following: After the demise of the Hungarian Socialist regime, a powerful Constitutional Court emerged from the round-table-talks between the Socialist Party and the opposition. Equipped with broad jurisdiction and the possibility of easy access by citizens to the court, it began, under the leadership of chief justice László Sólyom, to aggressively challenge the legislature about new legislation. Since access to the court was very easy (everybody could challenge any law without any requirements of "standing"),

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7 Kim Lane Scheppele, "The Accidental Constitution," paper presented at the conference *Contextuality and Universality: Constitutional Borrowings on a Global Scale*, March 20–21, 1998, University of Pennsylvania, Philadelphia.

8 Kim Lane Scheppele, "Imagined Europe," paper presented at the conference *Annual Meeting of the Law and Society Association*, July 1996, Strathclyde University, Glasgow, Scotland.

9 Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: Congressional Quarterly 1998); Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge, UK: Cambridge University Press 2003); Georg Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge: Cambridge University Press 2005).

10 Max Weber, *Gesammelte Aufsätze zur Religionssoziologie* (Tübingen: J. C. B. Mohr 1988), p. 252.

basically all of the legal and political problems of the transformation ended up at the court and had to be decided. And in spite of severe criticism by parliamentarians and the government, virtually all decisions of the court were complied with and no attempt was made to curtail the court's powers, as has occurred in other countries of the former Soviet bloc,[11] leading Scheppele to characterize the Hungarian political system of the first years after the regime change as a "courtocracy."[12] It is beyond the scope of this paper to provide a detailed account of the court's activities, which are, however, well documented.[13] This sudden rise to power requires explanation. After all, it is received wisdom by now in the social sciences that despite what jurists tell us, courts are not all-powerful and above politics. They depend on the political elite to execute their decisions and therefore have to act strategically and with self-restraint. As Martin Shapiro has pointed out, it took the US Supreme Court more than a century to accumulate enough political capital before it would challenge the political establishment in civil rights cases.[14] My claim here is not that judicial and political strategies are less important than cultural factors. Instead, I take the (hardly) original position that history and culture matters more than is usually admitted by studies that rely on strategic models. In sum, the argument is that cultural dispositions help to bring about political outcomes, they do not *cause* them. Thus, the degree to which the Hungarian elites in the early 1990s were imagining Europe as a cultural space might not differentiate them from Poland or the Czech Republic, it certainly differentiated them from other places such as Slovakia at that time, Belarus, Ukraine, and Russia, of then and today. And this is the reason why I think the cultural analysis presented in this chapter is worthwhile.

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11 Compare this, for example, to what happened to the Slovak, Russian, or Kazakh court. See Herman Schwartz, "Defending the Defenders of Democracy," *Transition*, 4 (1997), pp. 80–85.

12 Kim Lane Scheppele, "Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)," paper presented at the *Conference on Constitutional Courts*, 1–3 November 2001, Washington University of Saint Louis, p. 16.

13 The only monograph on the court in English so far is Cathrine Dupré, *Importing the Law in Post-Communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity* (Oxford: Hart Publishing 2003); László Sólyom and Georg Brunner (eds.), *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbour: University of Michigan Press 2000) provide a collection of cases and commentaries, an extension and English translation of Georg Brunner and László Sólyom, *Verfassungsgerichtsbarkeit in Ungarn* (Baden-Baden: Nomos 1995). A comprehensive legal analysis in German, covering the early years of the court is provided by Gábor Spuller, *Das Verfassungsgericht der Republik Ungarn: Zuständigkeiten, Organisation, Verfahren, Stellung* (Frankfurt a.M.: Peter Lang 1998). For a sympathetic reading of the Solyom court's activity see Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: Chicago University Press 2000), Chapt. 4.

14 Martin Shapiro, "Some Conditions for the Success of Constitutional Courts: Lessons from the U.S. Experience," in W. Sadurski (ed.), above n. 6, pp. 37–59.

2. DEMOCRACY, JUDICIAL REVIEW, AND EUROPEANIZATION

I want to start the theoretical discussion by exploring the relationship between democracy, judicial review, and Europeanization, in terms of the concept of legitimacy. As it is well known, there are two ways the concept of legitimacy can be investigated: legitimacy has a normative and an empirical dimension.[15] Normative legitimacy is the subject of political philosophy. The debate focuses on questions of justification of the political order, and the appropriate behaviour of an institution within this order. Since Lambert's famous critique of US American judicial involvement in politics as a "gouvernement des juges," much has been written on the extensive literature on the legitimacy of judicial review.[16] Surprisingly, the external and internal debate on the legitimacy of the activism of Constitutional Courts in CEE countries has been limited.[17] Western scholarship has, thus far, generally been supportive of a strong constitutional court, with a few exceptions.[18] Internally, there was more dissent. In Hungary, for example, Béla Pokol and András Sajó, among others, have accused the Constitutional Court of overstepping its authority.[19]

The social scientific debate on empirical legitimacy tries to distance itself from the normative debate. As Lipset argued, following Weber, in this understanding "legitimacy involves the capacity of a political system to engender and maintain the belief that existing political institutions are the most appropriate or proper ones for the society."[20] It does not matter if we, as observers, share this belief. All that matters is that people subjected to the authority of the institution believe it.

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15 Rodney Barker, *Legitimating Identities. The Self-Presentation of Rulers and Subjects* (Cambridge, UK: Cambridge University Press 2001), pp. 7–29.

16 E. Lambert, *Le gouvernement des juges et la lutte contre la legislation sociale aux Etats-Unis. L'experience américaine du contrôle judiciaire des constitutionalité de la loi* (Paris: Giard 1921); for the vast literature on the subject see Mauro Cappelletti, "Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice," in M. Cappelletti (ed.), *The Judicial Process in Comparative Perspective* (Oxford: Clarendon 1989), pp. 182–211.

17 Wojciech Sadurski, "Constitutional Justice, East and West: Introduction," in W. Sadurski (ed.), above n. 6, pp. 1–18.

18 See for a generally positive assessment Schwartz, *op. cit.* n. 6. One of the very few critical voices was Stephen Holmes, "Back to the Drawing Board," *East European Constitutional Review*, 3 (1993), pp. 21–25.

19 Béla Pokol, "The Constitutionality of Legislation," in V. Gessner, A. Höland and C. Varga (eds.), *European Legal Cultures* (Aldershot: Dartmouth 1996), pp. 451–454; András Sajó, "How the Rule of Law Killed Hungarian Welfare Reform," *East European Constitutional Review*, 5 (1996), pp. 31–41, which is an abbreviated translation of an originally Hungarian, widely circulated manuscript.

20 Seymour Martin Lipset, "Some Social Requisites of Democracy: Economic Development and Political Legitimacy," *American Political Science Review*, 53 (1959), p. 68.

As Max Weber put it, legitimacy is the "prestige of being exemplary or binding" (*das Prestige der Vorbildlichkeit oder Verbindlichkeit*).[21]

Constitutional Courts have, so far, largely been left out of focus of "transitology." But over the past few years, a new field of research is emerging, spilling over from the research on the "Global Expansion of Judicial Power."[22] In this context, different theoretical paradigms are used in the analysis of courts. Many political scientists start with Robert Dahl's assertion that a constitutional court can be analyzed just as any other political institution, "an institution, that is to say, for arriving at decisions on controversial questions of national policy."[23]

One major school of thought used in political science to analyze political actors and institutions is the theory of rational choice.[24] Epstein, Knight and Shvetsova have proposed an approach to study post-Communist constitutional courts using rational choice theory.[25] The authors explain the fate of the first Russian Constitutional Court under Chief Justice Zorkin. The court, acting overtly "political", violated what Epstein et al. have called the "tolerance intervals" of President Yeltsin and the legislators. After it had provoked the power centre, the court was left without allies and was subsequently disbanded. In their model, it is assumed that there are certain strategic imperatives Constitutional Courts have to respect if they want to command obedience from the other branches of government. If they disregard the interests of the major political players, they have no chance of survival.

The rational choice model provides us with some significant theoretical insights. It shows us that although we usually consider a constitutional court to be a "legal" institution only subordinated to the commands of "the law," it is actually an institution that has to take part in power-plays in the political arena. The judges have to consider the political effects of their actions, they have to strategically choose opponents and allies, and this will in turn have an influence on their decisions. Starting from a rational choice approach, we can predict that no court will decide cases with complete disregard for daily politics. Scholars of judicial politics have operationalized the rational-choice paradigm on a macro-institutional level by using the concept of "veto-players."[26] They argue that courts will become more

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21 Max Weber, *Wirtschaft und Gesellschaft: Grundriß der verstehenden Soziologie* (Tübingen: Mohr 1980), p. 16.

22 C. Neal Tate and Torbjörn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press 1995).

23 Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Politics*, 6 (1957), pp. 279–295, p. 2.

24 Jon Elster (ed.), *Rational Choice* (Oxford: Blackwell 1986).

25 Lee Epstein, Jack Knight and Olga Shvetsova, "The Role of Constitutional Courts in Establishment and Maintenance of Democratic Systems of Governments," *Law and Society Review*, 35 (2001), pp. 117–164.

26 Nicos Alivizatos, "Judges as Veto-Players," in H. Döring (ed.), *Parliaments and Majority Rule in Western Europe* (New York, 1995), pp. 566–592.

powerful if few other institutions exist that can act as veto players, i.e. institutions which can delay, or prevent altogether, a decision already taken by a different institution. Looking at Hungary comparatively, this approach has many merits. Certainly, the fact that in Hungary the court was the only effective remedy against decisions by the parliamentary majority was crucial in putting the court into focus within the political process, given the importance of the questions to be decided. Some observers have spoken about a binary division of power in the 1990s: the opposition of government and Constitutional Court.[27] By way of contrast some have observed that the Polish political system, with an upper chamber and a very politically active Ombudsman, took conflict over many issues into arenas other than the constitutional judiciary.

A different theoretical approach, which stresses structural characteristics of judicial review more than individual choices, has been proposed by Alec Stone Sweet, in his comparative analysis of Western European constitutional courts.[28] Constitutional Courts' main role, in Stone Sweet's interpretation, is one of an arbiter in situations of "triadic dispute resolution": Two parties in the political arena cannot solve their conflict over interpretation of the constitution (understood by Stone Sweet not simply as the written text, but as the sum of all legal norms and political practices of a political community). Without constitutional courts, the "real meaning" of the constitution can only be determined by the majority principle: the political majority in parliament decides what the constitution "means" by adopting laws that shape the constitutional order and practice itself. This is the British practice.[29] But in post-Word War II Europe, constitutional courts have been entrusted with this task, and, as Stone Sweet argues, the institutional arrangement has produced the end of parliamentary supremacy. By way of the mechanism inherent in the institution of judicial review, especially of abstract review, over time, more and more decision-making power shifts from the democratically elected parliament to the constitutional court, or, more precisely, to its jurisdiction. An increasingly dense web of constitutionally mandated norms restricts the scope of the legislative will. Judges start acting like legislators and politicians internalize the constraints of constitutionality.

Stone Sweet's model explains many of the "social mechanisms" in the game of constitutional politics. We can expect that much of what he describes for Western Europe is also applicable in the new democracies of the East. In Stone Sweet's model the legitimacy of judicial review is mainly a function of the constitutional courts arbitration role. As long as the court is able to portray itself as a neutral "third"—for which there are a couple of techniques such as giving partial victories

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27 Füzér, K., "Wirtschaftlicher Notstand: Konstitutionalismus und Ökonomischer Diskurs im Postkommunistischen Ungarn," in Christian Boulanger (ed.), *Recht in der Transformation* (Berlin: Berliner Debatte Wissenschaftsverlag 2002), p. 188.

28 Stone Sweet, *op. cit.* n. 1.

29 Now undermined by the Human Rights Act (1998) which allows the jurisprudence of the European Court of Human rights to override domestic legislation.

to all sides—the legitimacy of judicial review is preserved. Once this belief breaks down, however, nothing can save the court.

There are two aspects both rational choice and triadic dispute resolution models neglect, and they tie in the subject of this paper: the influence of external normative influences, on one hand, and the political–cultural socialization of the political elite with which Constitutional Courts have to deal, on the other.

The first has been described in a recent contribution by Radoslav Procházka.[30] As a lawyer, Procházka does not frame his argument within the social scientific literature on the topic. But he shows convincingly how the dynamics of international relations, and more specifically, European Integration, has a powerful influence on the nature and development of the constitutional judiciary. He compares the cases of Poland, Hungary, and the Czech and Slovak Republics and argues that there are two major ways in which this influence has been played out.

First, the candidates for integration into the European Union knew that they were being watched, and that any violation of what they perceived to be "European" norms and values could be a potential obstacle in their candidacy. Second, there was even, Procházka argues, an intra-regional competition as to constitutional adjudication. He interprets the acquiescence of the Hungarian elite to their Court's activism as a way of actually using the court as a public relations instrument. In this way, the behaviour of the political elite is also directed towards an audience, i.e. the governments of those EU countries which have to give their permission for them to join. This behaviour, however, can be interpreted as "strategic" or "opportunist" by rational choice analysis.

My claim is, by contrast, that all of these analyses neglect the nature and socialization of the political elite. I therefore propose that in order to understand the development of the constitutional judiciary in a specific country, we should not only have to look at the material interests of the political elite, but also at its cultural aspirations, including the definition of national identity. The behaviour of these elite towards the court, or, more specifically, the kind of claims to legitimacy that these elite is going to accept, strongly depends on the Central European context and also on what they think is appropriate behaviour, both on a national and an international level. In the case of Hungary, as I will demonstrate in the next section, the political elite tolerated much more than a simple model of interest congruence would predict. "Europe," in this perspective, is an imagined cultural space to which elites like to belong, and will, if necessary reorder their preferences accordingly.

3. The First Hungarian Constitutional Court

The idea to set up a constitutional court originated in the negotiations between the last socialist government and the democratic opposition at the so-called national round table. There is evidence that both sides—the socialist government and

[30] Procházka, *op. cit.* n. 6.

the opposition—viewed the court as one of the institutional guarantees that would protect them in case the other side would win a decisive victory in the first elections, and the court was therefore equipped with a vast number of competencies.[31] The court's design[32] is particular in several regards, but for the purpose of this paper, I only mention the so-called *actio popularis*: the abstract, de-individualized constitutional complaint. This feature means that everybody (even foreigners) can appeal to the court to declare a certain law invalid on the ground that it violates the Hungarian constitution. This eliminates all barriers created by the conditions of *standing* required by other constitutional courts and, of course, it puts the court right in the centre of legislative politics. Almost every major legislative project in connection with the regime change ended up at the Constitutional Court.

The Court began its work on January 1, 1990, even before the first democratic parliament was elected. It was the first new institution of post-Leninist Hungary, and it began its work immediately. The victorious coalition of the conservative Hungarian Democratic Forum (MDF) with the small Christian Democrats and the Smallholders' party were quite surprised to find out what a constitutional court is capable of doing. In fact, the court showed little respect for what they had expected to be a system of parliamentary sovereignty. It has, for example, struck down the death penalty, against the opinion of the overwhelming majority of the population and probably also of legislators.[33] It found fault with the conservative government's restitution plans, which included giving land that had been taken by the Communists, back to the peasants.[34] It also became the centre of attention in a conflict between the prime minister and the president, the so-called "media war." After the constitutional court had ruled against the government, the far-right wing of the MDF mobilized demonstrations against, among other things, this decision in the streets of Budapest. This attempt to put public pressure on the court, however, failed after huge counter-demonstrations showed that the public was not going to tolerate this kind of politics.[35]

Two decisions were especially controversial: when the government introduced a measure to punish those responsible for atrocities during the 1956 revolution by changing the statute of limitations, the court thwarted these plans. In its decision, the court declared that Hungary was a "Rechtsstaat" and that in a Rechtsstaat, it

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31 Scheppele, "The Accidental Constitution," above n. 7; John W. Schiemann, "Explaining Hungary's powerful Constitutional Court: A Bargaining Approach," *Archives européennes de sociologie*, 42 (2001), pp. 357–390.

32 For details see Sólyom and Brunner (eds.), above n. 13; Spuller, above n. 13.

33 Tíbor Horváth, "Abolition of Capital Punishment in Hungary," *Journal of Constitutional Law in Eastern and Central Europe*, 3 (1996), pp. 155–160.

34 Péter Paczolay, "Judicial Review of the Compensation Law in Hungary," *Michigan Journal of International Law*, 13 (1992), pp. 806–831.

35 Elemér Hankiss, "Die Zweite Gesellschaft," in S. Kurtán (ed.), *Vor der Wende* (Wien: Böhlau 1993), pp. 83–104.