



Hungarian Helsinki Committee



ANALYSIS OF THE PERFORMANCE OF HUNGARY’S “ONE-PARTY ELECTED” CONSTITUTIONAL COURT JUDGES BETWEEN 2011 AND 2014

– Executive summary¹ –

CONTEXT AND INTRODUCTION

In recent years, the Hungarian Government has occupied the country’s Constitutional Court. According to the former Constitution of Hungary (in force until January 2012), members of the Constitutional Court, who were elected with a two-third majority vote in the Parliament, were nominated by a committee consisting of one member of each parliamentary group. As a result, the opposition and the governing majority always had to agree on whom to nominate as a Constitutional Court judge. This rule was changed following a constitutional amendment by the Government in June 2010. Under the new rules, members of the Constitutional Court shall be nominated by a nominating committee consisting of members of the parliamentary groups of parties represented in the Parliament; and the number of members per parliamentary group on the nominating committee shall be proportionate to the parliamentary group’s size in relation to the total number of Members of Parliament. Hence, the governing party has the majority necessary for nominating an individual as a Constitutional Court judge, and as a result, there is no longer any need for the governing majority and the opposition to reach a consensus on the nominations. Accordingly, if the governing party has a two-thirds majority, it can both nominate and elect Constitutional Court judges without the support of any of the opposition parties.

After the new rules on nomination were adopted, István Stumpf and Mihály Bihari were elected as members of the Constitutional Court. Subsequently, the number of Constitutional Court judges was increased to 15 from 11, and due to that change, 5 new judges were nominated and elected by the governing party. Later on, when the mandates of two Constitutional Court judges – including that of Justice Bihari – terminated, their seats could be filled again with the governing parties’ own nominees. In addition, the length of the term of Constitutional Court judges was raised to 12 years from 9 as of 1 January 2012. In December 2013, the upper age limit in place for Constitutional Court judges was abolished. As a result, all of the judges elected under the new

¹ This document presents the context and the main findings of research performed by the Eötvös Károly Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee. The full analysis is available on the websites of the above organisations in Hungarian.

rules for a longer term than before may continue to act as a judge after reaching the age of 70.² At the end of the period assessed by the Eötvös Károly Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee there were eight judges in the Constitutional Court whose election was solely the internal business of the governing parties. (This number was 11 at the time of publishing the analysis.) These eight judges are the following:

- István Balsai, elected by the Parliament as member of the Constitutional Court in June 2011, with effect from 1 September 2011;
- Egon Dienes-Oehm, elected by the Parliament as member of the Constitutional Court in June 2011, with effect from 1 September 2011;
- Imre Juhász, elected by the Parliament as member of the Constitutional Court in March 2013, with effect from 3 April 2011;
- Béla Pokol, elected by the Parliament as member of the Constitutional Court in June 2011, with effect from 1 September 2011;
- László Salamon, elected by the Parliament as member of the Constitutional Court in December 2012, with effect from 25 February 2013;
- István Stumpf, elected by the Parliament as member of the Constitutional Court on 23 July 2010;
- Péter Szalay, elected by the Parliament as member of the Constitutional Court in June 2011, with effect from 1 September 2011;
- Mária Szívós, elected by the Parliament as member of the Constitutional Court in June 2011, with effect from 1 September 2011.

The Eötvös Károly Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee analysed the performance of the above eight Constitutional Court judges.³

The ultimate aim of the analysis, which profiles Constitutional Court judges, was to objectively examine whether the concerns that judges elected by the governing party will serve the political interests of the Fidesz-led government are justified, based on information available as of the autumn of 2014. The question was whether the “temptation of autonomy” was strong enough to ensure the impartiality of the individual judges, both in general and in specific cases. The study also aimed to determine whether professional or moral integrity was more important for any of them than either their political convictions or the expectations of those who appointed them.

The analysis of the NGOs covers the period between the autumn of 2011 (when the number of Constitutional Court judges was increased and five new judges were elected) and the autumn of 2014. The points of comparison remain the same throughout the profiles, in order to aid the comparability of the evaluations of the individual Constitutional Court judges’ performances.

The explicit subject of the analysis was the performance of these individuals as Constitutional Court judges, so even though their former professional and public activities are briefly outlined, they were not analysed. However, certain elements of the judges’ backgrounds may be significant in ensuring a correct assessment of their performance as Constitutional Court judges.

² It is worth noting that at the same time, the Government tried to decrease the upper age limit for ordinary judges to 62 years from 70 years, and, following more international court decisions, the age limit is being gradually decreased to 65 years.

³ Since they did not participate in reaching the decisions analysed, the performance of the new judges who took office in September and November 2014 (Ágnes Czine, Tamás Sulyok Tamás and András Varga Zs.) could not have been analysed.

Accordingly, this is summarized in the form of short biographies, and such elements were also referred to in the analysis when it was necessary.

The performance of the judges was analysed on the basis of Constitutional Court cases which were presented by a given judge to the judicial body, and their concurring and dissenting opinions attached to decisions.

The assumption behind the analysis was that the rules of electing Constitutional Court judges were amended in order ensure that such persons can be elected with the support of only one party who will not go against the political will of the parliamentary majority in politically important questions. In order to prove or rebut this hypothesis, such decisions of the Constitutional Court were analysed which could be interpreted as a reaction to the government's politics in the designated period. In the cases assessed, the Constitutional Court took a stand on the public-law basis of the power system and political system established by the new rules, which were adopted by the two-thirds governing majority, including amending and supplementing the constitution, the independent institutions of the system of the separation of powers, such as the courts, the media, the democratic public, and the election system. Furthermore, Constitutional Court decisions reviewing governmental measures which restrict the right to property were analysed. Finally, significant decisions in cases related to human rights which indicate the current two-thirds majority's concept of the ideal person are assessed.

The following four questions were posed in all of the profiles:

1. *What is the judge's approach towards the role of the Constitutional Court?*

The reason for the fall of constitutionality in Hungary is not really the change in the text of the constitution, but rather the fading away of the protection of the constitution. It became the practice of the two-thirds majority to make measures which were unconstitutional in merit formally constitutional by amending the constitution,⁴ with the aim of excluding the possibility of a constitutional review of these measures. The Fourth Amendment to the Fundamental Law (the new constitution of Hungary, in force since January 2012) intended to weaken the Constitutional Court more openly than ever before by declaring its former case-law void. Matters were made worse by limiting the judicial body's right to constitutional review to procedural questions right after the Constitutional Court overruled its formal case-law and showed an inclination towards acknowledging its own right to a limited constitutional review of the Fundamental Law. By including the above new rule in the Fundamental Law, the two-thirds parliamentary majority prevented such a case-law from emerging. The judges' opinions on the constitutional review of constitutional amendments say a lot about the perception of his or her role as a Constitutional Court judge in the framework of this increasingly alarming process.

2. *What is the judge's approach towards democracy, elections, and democratic debate?*

In the recent years the two-thirds majority significantly transformed the rules of the election system and the election campaign, in such a way that the new rules are in its favour. The possibility of democratic debate was also restricted by the new rules regulating the operation of the Parliament. The Constitutional Court reviewed the constitutionality of several such provisions on the basis of motions aimed at the constitutional review of the regulation and individual constitutional complaints.

⁴ Issues included retroactive taxation, criminalization of homelessness, defining the notion of the family in an exclusionary way, the new regulation on churches, and the system of transferring court cases. See a summary table of provisions of the Fourth Amendment to the Fundamental Law contradicting decisions of the Constitutional Court [here](#).

3. *What is the judge's approach towards the separation of powers and the guarantees of independence?*
The two-thirds majority undermined the constitutional status of independent institutions using various techniques, often through the enactment of new legislation. Both the courts and the Constitutional Court were targeted by these measures, some of them being subject to constitutional review later on.
4. *What is the judge's approach towards fundamental freedoms?*
The legacy of the first two decades of the Constitutional Court was the high-level of protection given to the fundamental human rights of individuals, which was of high level even in comparison to European countries. In contrast, many provisions of the current Fundamental Law cannot be reconciled with the general concept of fundamental rights. Some of these provisions were included in the Fundamental Law with the intent to overwrite the protection to which people are entitled by virtue of being a human, which was enshrined in the former case-law of the Constitutional Court. Every Constitutional Court judge faced the question whether he or she maintains the idea of every person's equal dignity and freedom as opposed to the inventions of the Government.

The total voting rates in the decisions during the period analysed were assessed, along with the numbers and the nature of dissenting opinions expressing a countervote. The results of the latter analysis can also be used to reveal a philosophical and ideological dividing line within the Constitutional Court.

NEW JUDGES, NEW MAJORITY

Of the Constitutional Court decisions reached between September 2011 and September 2014, 23 decisions were selected on the basis of the aspects described above,⁵ and it was examined how the decisions of the majority and the standpoint of the “new judges” relates to the probable political interests of the Government in the given case.

According to the overall data, the Constitutional Court reached a decision which was in line with the probable interests of the Government (in most cases the latter meaning the failure of abolishing a legal provision) in 43% of the above 23 cases of fundamental importance, while in 57% of the cases⁶ a decision was reached which went against the presumable interests of the Government. Six out of the eight judges nominated under the new rules, i.e. “one-party” judges (Justices Balsai, Dienes, Pokol, Juhász,⁷ Salamon and Szívós) took a position in more than 80% of the cases which served the probable interests of the Government. Of the judges elected as “one-party” nominees, six of them generally voted in concurrence with each other, while Justices Stumpf and Szalay were the only ones who did not necessarily follow their example. Justice Stumpf's decisions in 35% of the cases corresponded with the probable interests of the Government, while Justice Szalay's did so in 57% of the cases. These numbers are close to the average of the Constitutional Court. The six judges from the one-party nominees who generally voted the same way as each other reached a decision which conflicted with the probable interests

⁵ Due to the similarity of their subject matter, of the two decisions which were reached simultaneously in relation to the right to freedom of expression of Members of the Parliament, only one was taken into consideration in the calculations.

⁶ In light of the laws reviewed, this is not a high rate at all, but quite the contrary.

⁷ Justices Béla Pokol and Imre Juhász were also supported by the Jobbik party. It may be telling from this perspective that Justice Juhász's position matched the probable interests of the two-thirds majority in 100% of the cases.

of the Government in between 0 and 3 of cases out of the 23 cases analysed, while in the other cases they either took a standpoint in line with the interests of the Government, or their dissenting opinion could neither be interpreted either as vote for nor against the interests of the Government (e.g. the judge argued for an in-merit review, while the motion was rejected by the majority of the judges on formal grounds). However, the number of such ambiguous dissenting opinions was insignificant.

Taking into account the total voting rate of the Constitutional Court (43% in favour of the Government, 57% against the interests of the Government), it can be concluded that the vast majority of judges elected as one-party nominees supported, with a few exceptions, decisions in line with the presumable interests of the Government.

Breaking point in the decision-making

An important breaking point in the Constitutional Court's decision-making (during the period assessed) was when the one-party elected judges became the majority. This happened in April 2013, when Justices Bihari and Holló retired, and Justices Juhász and Salamon took office. As a result of these changes, the eight "new" judges, whose decisions were analysed by the NGOs, became the majority, as opposed to the seven judges elected under the old rules. Justices Czine, Sulyok and Varga Zs. took office after the period studied (December 2011 to July 2014), and at the same time, Justices Balogh, Bragyova and Kovács left the Constitutional Court. Justices Czine, Sulyok and Varga Zs. were of course also elected as one-party nominees, so the number of "new" judges increased again to 11, as opposed to 4 after the above three judges took office. None of the 10 decisions reached before the one-party judges became the majority corresponded with the probable interests of the Government, while of the subsequent 13 decisions only 3 went against the probable interests of the Government. This means that after the one-party judges became the majority, a decision corresponding with the probable interests of the Government was reached in 76.9% of the cases studied, as opposed to the preceding period, during which no such decision was reached.

The table below shows that the judges elected as one-party nominees attached a dissenting opinion (showing their disagreement) in vast majority to those decisions which went against the probable interests of the Government. Six of the eight judges elected as one-party nominees (Justices Balsai, Dienes, Juhász, Pokol, Salamon and Szívós) attached a dissenting opinion supporting the probable interests of the Government to at least two-thirds of the decisions which went against the probable interests of the Government. The table below also suggests that after they became the majority, the new judges elected as one-party nominees who issued dissenting opinions in the preceding period were not compelled to do so any more, since their opinion became the standpoint of the majority.

The Fundamental Law and the Constitutional Court ceased to be the limits of the Government

The formal change detectable in terms of the Constitutional Court's decisions (i.e. that after the above breaking point, the vast majority of the Constitutional Court's decisions served the probable interests of the Government) shows a close correspondence with the parallel in-merit changes affecting the core of constitutionality. The factual formal change occurred in April 2013, when the judges elected as one-party nominees became the majority (which was also reflected by the decisions reached by the Constitutional Court after that point), while the fact that the Constitutional Court refused to review the Fourth Amendment to the Fundamental Law in May 2013 constituted a significant in-merit change.

The Fourth Amendment to the Fundamental Law showed that the constitution itself and the constitutional reviews performed by the Constitutional Court are not real limits to the Government any more. Through the Fourth Amendment, the governing majority included provisions into the Fundamental Law of which the unconstitutionality was earlier established by the Constitutional Court. Such provisions included linking the notion of family to the marriage between a man and a woman [Decision 43/2012. (XII. 20.) of the Constitutional Court], the concept of a regulation requiring a decision by the Parliament for granting a religious community the legal status of a church [Decision 6/2013. (III. 1.) of the Constitutional Court], and the provision establishing the possibility to criminalize the use of public space for habitation, i.e. rough sleeping [Decision 38/2012. (XI. 14.) of the Constitutional Court].

At the same time, the Fourth Amendment explicitly excluded the in-merit constitutional review of amendments to the Fundamental Law by the Constitutional Court, even though there had already been a decision which suggested that the practice of the Constitutional Court was changing and it no longer excluded its own in-merit review of amendments to the Fundamental Law. [Decision 45/2012. (XII. 29.) of the Constitutional Court goes as follows: “In certain cases the Constitutional Court may also examine the undiminished predominance of the content-related constitutional requirements, guarantees and values of the democratic state based on the rule of law, and their *inclusion in the constitution.*” – Italics added by the authors.] In addition to the above, the Fourth Amendment to the Fundamental Law formally “declared void” the decisions of the Constitutional Court adopted prior to the entering into force of the Fundamental Law.



Replacing the members of the Constitutional Court, adopting constitutional amendments which made formerly unconstitutional rules constitutional, and restricting the powers of the Constitutional Court finally led to a situation where the Fundamental Law and the Constitutional Court are no longer able to fulfil their basic function of limiting the Government in a constitutional way. The governing majority, if its political interests require so, is easily able to overstep these limits.

TABLE ON DECISIONS ANALYSED AND THE STANDPOINTS OF CONSTITUTIONAL COURT JUDGES





The number and subject of the Constitutional Court's decision	Did the decision serve the interests of the Government?	Paczolay	Balogh	Balsai	Bihari	Bragyova	Dienes-Oehm	Holló	Juhász	Kiss	Kovács	Lenkóvics	Lévay	Pokol	Salamon	Stumpf	Szalay	Szívós
164/2011. – The public law nullity of the law on churches	X	D					D							D			D	D
165/2011. – Media constitution and media law	X			D								D		D				
166/2011. – Code of Criminal Procedure (court's jurisdiction based on the prosecution's pressing of charges, prohibition of contacting the defence attorney while in 72-hour detention)	X						D	D		D			D	D				D
176/2011. – Local government's decree on punishing scavenging	X													D				D
33/2012. – Lowering the mandatory retirement age of judges	X			D			D					D		D		D	D	D
38/2012. – Criminalizing the use of public space for habitation	X			D			D							D				D
43/2012. – Law on the protection of families, the notion of family	X			D			D							D				
45/2012. – The Transitional Provisions of the Fundamental Law	X			D			D					D					D	D
1/2013. – Voter registration	X			D			D					D		D				D
6/2013. – Law on churches	X			D			D					D					D	D
10/2013. – Forming a parliamentary group	✓					D				D	D		D					
12/2013. – The Fourth Amendment to the Fundamental Law	✓					D				D			D			D		
13/2013. – Laws on the organisation and administration of courts and the legal status of judges	X	D		D		D			D	D					D			D
24/2013. – Nullification law	✓					D				D			D					
26/2013. – Slot machines	✓					D				D								


3206, 3207/2013. – The right to freedom of expression of Members of Parliament	✓	D				D				D	D		D			D		
36/2013. – Transfer of court cases	X			D			D		D	D		D		D	D			D
7/2014. – The limits of criticizing public figures	X			D			D		D			D		D	D			D
3036/2014. – Restricting the placement of electoral posters	✓	D	D			D				D	D		D			D		
3141/2014. – Winner compensation at the parliamentary elections	✓					D				D			D					
20/2014. – The integration of credit institutions set up as cooperative societies	✓					D				D			D		D			
3194/2014. – Law on tobacco shops	✓					D				D			D					
26/2014. – The election of the members of the capital's municipal government	✓	D	D			D				D	D		D		D			
Overall data		Paczolay	Balogh	Balsai	Bihari	Bragyova	Dienes-Oehm	Holló	Juhász	Kiss	Kovács	Lenkovic	Lévay	Pokol	Salamon	Stumpf	Szalay	Szívós
Overall number of decisions corresponding with the interests of the Government				18			19		12					19	11	7	12	19
Overall number of decisions conflicting with the interests of the Government				0			3		0					2	1	14	8	2
Ambiguous				0			0		0					0	0	1	1	1
For the government (%)				100.00%			86.3%		100.0%					90.48%	91.67%	31.82%	57.14%	86.36%
Against the Government (%)				0.00%			13.6%		0.00%					9.52%	8.33%	63.64%	38.10%	9.09%
Ambiguous (%)				0.00%			0.00%		0.00%					0.00%	0.00%	4.55%	4.76%	4.55%
Average of the Constitutional Court	100.00%																	
For the Government (%)	43.48%																	
Against the Government (%)	56.52%																	

Explanation of the markings

In the case where a law adopted by the governing majority was annulled, the decision of the Constitutional Court was considered to be against the probable interests of the Government. In the case where the law was not annulled, the decision was considered to be in line with the probable interests of the Government. In the cases marked with , the majority decision was in line with the probable political interests of the Government, while in the cases marked with  the decision contradicted the interests of the Government at least partially.

The letter “D” marks when a judge attached a dissenting opinion to the given decision, expressing his/her disagreement with the decision of the majority. The voting rates for Constitutional Court decisions and the votes of the individual judges are not public, so in the course of the analysis a judge is considered to be in favour of a decision of the majority if he/she does not attach a dissenting opinion to the decision. Even though members of the Constitutional Court are not obliged to attach a dissenting opinion to the decision if they do not support the standpoint of the majority, literature on constitutional law traditionally considers the lack of a dissenting opinion (or a lack of joining another judge’s dissenting opinion) as supporting the majority decision.

In the case of the judges who were nominated and elected by the governing parties (Justices Balsai, Dienes, Juhász, Pokol, Salamon, Stumpf, Szalay and Szívós), dissenting opinions were categorised using the following colour code:  – the dissenting opinion served the interests of the Government in comparison to the majority decision;  – the dissenting opinion is ambiguous in this regard;  – in comparison to the majority decision, the dissenting opinion went against the interests of the Government. The dissenting opinions of other judges were unanimously marked with the colour .

In the period assessed, the mandate of Justices Bihari and Holló expired and the Parliament elected Justices Juhász and Salamon to fill in their seats. Furthermore, there were certain cases where not all of the acting Constitutional Court judges participated in the decision-making. The cases where a given judge did not participate in the decision-making, for whatever reason, were marked in the table with the colour .