

DEMOCRACY BY JUDICIARY
(OR WHY COURTS CAN SOMETIMES BE MORE DEMOCRATIC THAN PARLIAMENTS)¹

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In the remarkable “decade plus” that has followed the remarkable year of 1989, democratic theory has undergone a revival. The collapse of the Soviet Empire brought with it an outpouring of writing on democracy, its nature, its structure, its inevitability. “Transitology,” the study of the transition to democracy, has emerged as a specialty within the discipline of political science,² becoming popular when those who once studied the totalitarian or authoritarian regimes of Latin America, Southern Europe or Eastern Europe found themselves (happily – but uneasily) stuck without a model for understanding what had happened so rapidly to their previously impervious governments. Cold war scholarship in the West has been replaced by a “one model fits all” conception of empirical democratic theory, where the formerly authoritarian and totalitarian regimes of the south and east are now put in the same theoretical framework as the governments of the north and west, with variables varying of course.³ Democracy is all the rage these days, in theory and in practice. It’s very nearly the only game in town.

But the strong theoretical frameworks that the new democratic analysts bring to their work have blinded them to the genuinely new innovations that Eastern and Central European institution-builders have created. In particular, the transitologists, captured by the conventions of first-world empirical

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² See, for example, Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation* (Johns Hopkins U. Press, 1996); Jon Elster, Claus Offe, and Ulrich K. Preuss, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea* (Cambridge University Press, 1998); Guillermo O’Donnell and Phillippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (1986); Guillermo O’Donnell, Phillippe C. Schmitter and L. Whitehead (eds.), *Transition from Authoritarian Rule: Comparative Perspectives* (1988).

³ See, for example, Arend Lijphart (eds.), *Parliamentary Democracy v. Presidential Government* (Oxford University Press 1992); Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (New York University Press, 1994); Kurt von Mettenheim (ed.) *Presidential Institutions and Democratic Politics: Comparing Regional and National Contexts* (Johns Hopkins University Press, 1997). .

political science, have assumed that all democracies must have the same small set of moving parts and to pass roughly through the same stages on their way to a broadly similar endpoint. Accordingly, democratic institutions are seen as more or less “developed” on their way toward building functioning democracies, but what it means to be a functioning democracy is the same ideal for all. To paraphrase Tolstoy, every functioning democracy is pretty much alike, but dysfunctional democracies are miserable each in their own way.

In this paper, I would like to challenge the conventional picture of ideal democratic institutions, focusing in particular on the political innovations brought about by the new (and newly aggressive) constitutional courts. I want to suggest that there may be some times when strong constitutional courts are more democratic than elected parliaments and executives and that a strong substantive democratic theory may be more satisfying than a thinner, more procedurally oriented sense of democracy (particularly in places where democracy was long desired and only recently possible). The new constitutional courts, their values and their operation, are central to making the claim. While I will make the argument specifically about Hungary, where I did four years of fieldwork in the 1990s, I think that other places may well be candidates for the sort of image of the new democracy that I have in mind.

To get at this, we need first to explore what is usually meant by a democracy in what I will call the “standard democratic story.”

The Standard Democratic Story

The standard story about the functioning of democracies goes (simplistically) like this: Democratic institutions are set up through democratically certified constitutions that define the rules of the game.⁴ Democracies are characterized by a set of relatively stable political parties that more or less represent the relatively stable interests of a relatively stable population. These political parties are supplemented by a set of interest groups that bring more specific issues to politics and that provide ways for further articulating and publicizing interests. Candidates associated with parties (and backed by interest groups) are elected to parliaments that work in partnership with democratically accountable executives (who may or may not be directly elected themselves but who are chosen from the same set of parties). Democratic citizenries direct the expression of their political desires to and through these parties and institutions, which aggregate (sometimes well, sometimes imperfectly) these interests into policies. If the policies suit, the politicians and their parties are reelected. If the policies do not, then

⁴ Of course, some countries can have unwritten or only partially written constitutions, and some may have avoided explicit popular ratification, but broadly speaking, the closer one is to the model in which the constitution was written in a constituent assembly followed by some form of broadly popular ratification, the better. See Ralf Dahrendorf, *Reflections on the Revolution in Europe* (Random House, 1990) – for one classic statement of the stages through which democratic institutions should imagine themselves developing in Central and Eastern Europe.

opposition politicians and parties are given a chance to do better at the next election. If the politicians exceed their mandates or violate the rules of the game, judicial review lodged in a high court will require that the politicians step back into the constitutional box.

The judges of this high court are not democratically elected, but instead must wrestle with the “counter-majoritarian difficulty.”⁵ This difficulty consists in the fact that elected politicians, with their democratic and majoritarian mandate, must sometimes be reigned in by non-democratically-certified judges who protect the survival of democratic institutions or minority rights from the populism of the majority or from democratically elected representatives run amok. The big worry in democratic regimes, then, is that these non-elected judges will usurp political power that should be reserved for the truly democratic institutions. Judges, therefore, must be constrained by constitutionalism, which is the *framework* that allows democratic institutions to maintain their democratic character in the face of the odd anti-democratic challenge. As long as judges are subordinate to a constitution that itself emphasizes democratic values, the elected branches will be the source of policy and the direction of state. The unelected judges will simply ensure that the government continues to color inside the constitutional lines.

That’s the standard story about constitutional democracy. Of course, it is idealized, but it identifies the crucial actors and the sources of their democratic legitimacy within a well-functioning, democratic political system. The problem is that it also contains within it a picture of democratic institutions that reflect the specific and idealized histories of (at least some) Western democracies, histories that the newly minted democratic regimes cannot suddenly repeat. It is often remarked that Eastern and Central Europe have different historical trajectories than the “West,” and this observation is usually followed by a dire assessment of the ability of post-communist regimes to catch up to the Western history of democratic institutions.⁶ I do not want to argue that there is an essential democratic deficit in post-soviet regimes, but instead want to explore how different historical paths and different senses of opportunity and danger are reflected in the new institutions that new democrats have built. In other words, I think that interesting new democratic ideas are coming out of the former soviet world, ideas that are not the same as those more familiar in the established democracies, but that are quite democratic in their own way. They are worth taking seriously even when they don’t follow the standard democratic story. The new democracies may tell this democratic story somewhat differently than democracies that established themselves earlier, which doesn’t mean that the new ones have it wrong.

⁵ The classic statement is Alexander Bickel’s. See *The Least Dangerous Branch*.(Bobbs-Merrill, 1962)

⁶ See, for example, Kathryn Hendley, *Trying to Make Law Matter* (University of Michigan Press, 1996), a study and condemnation of late soviet labor courts with a pessimistic view on whether Russia could ever successfully achieve the rule of law.

To see how these new democratic ideas can emerge, it may be helpful to examine the ways in which the institutional arrangements produced in the standard democratic story depend on assumptions drawn from the concrete histories of the West. Western political institutions⁷ were strategic responses to the particular historical convergences that characterized their history. I will explore two that underlie the standard democratic story: the proceduralist assumption and the social organization assumption.

a) The Proceduralist Assumption

In North America and much of Western Europe, protracted political and sometimes military struggles in the modern period settled the question historically of whether power would be lodged primarily in an executive or in a parliament and how those powers would be shared.⁸ At first, in the age of constitutionalism,⁹ these were struggles over the ability of parliaments or constituent assemblies to constrain the monarchy. Then those struggles turned to bringing monarchs to account in more general terms through instituting explicit procedures for the selection of an executive that did not depend on heredity. By forcing a monarch to rule with a parliament, and then by toppling the monarchy and replacing heredity with elections (either popular or parliamentary), democracy made gains regardless of the content of the specific policies that resulted in governments constructed on the new model. As the democratic story has progressed, parliaments too have become more directly accountable through electoral mandate. To prevent the excesses of hereditary power concentrating themselves again, power was dispersed either through functional separation across different institutions or through creating overlapping responsibilities and majorities among differently chosen political leaders, themselves differently accountable to broader constituencies.

Generalizing from these distinctive experiences, the main constitutional choice in the standard democratic story as it currently plays itself out in the drafting of new constitutions is between a *presidentialist* regime where the executive has an electoral mandate that is independent of the electoral mandate of the parliament and a *parliamentarist* government in which electoral power underwrites a

⁷ Of course there is variance in Western political institutions too – roughly on the parliamentarist v. presidentialist continuum. What I want to suggest is that there are options outside that usual range, and that is what makes the new democracies different.

⁸ In an earlier constitutional era, we might say the same about battles between church and state.

⁹ My account of the story, and therefore what I will label the age of constitutionalism, begins in somewhat different places in different countries. It begins when a country starts to shake off absolutism by having parliamentary (as in England) or populist (as in France) challenges to the absolute power of the king. I identify the age of constitutionalism as beginning in each state with the rise of long-term agreements between the king and some other sectors of the society that power will be shared and thereby constrained.

parliament to whom an executive can be then held accountable through election by that body.¹⁰ In both presidentialist and parliamentarist visions, democratic legitimacy is assumed to be given by the very fact that the representatives have been elected, because the immediate historical alternative was that political position was inherited or given by divine grace. Power in the age of constitutionalism is dispersed either through a system of checked and separated powers (presidentialism) or through the large numbers necessary to control a government (parliamentarism).¹¹

In Western experience, the precise *content* of the democratic institutions is commonly portrayed as empty (except for a thin constitutional veneer that guarantees the structures themselves and includes a few basic rights) until it is filled by the desires of “the people.” The democratic (that is to say, elective) nature of the institution is given by the procedure through which its members are chosen. The substance then takes care of itself, except in the unusual instance when democratic excesses produce unconstitutional results (in the thin sense just described).

The problem with applying this assumption to Central and Eastern Europe is that these countries have long since gotten rid of monarchs, and they have already replaced these monarchs with institutions that share some formal features with modern democracies. Heredity was, for example, already a non-starter as a way of picking leaders. Parliaments and presidents (or general secretaries) performed familiar legislative and executive roles, save for the crucial fact that there was no party pluralism and that the communist party was the only option. Off the formal political stage, of course, the governing party program in soviet-style governments set the agenda directly and no political leader could easily beg to differ.¹² And the governing party organization had a lot to say about priorities and policies, providing expert guidance to the formal committees of the parliament and the staffs of various ministries. But in practice, the governing parties of western democracies shared at least some formal features with this arrangement since proportional representation relies on party lists chosen by party leaders and political appointments to staffs and ministries still accounted for most of the work a government does.

¹⁰ See Matthew Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge University Press, 1992); Arend Lijphart (eds.), *Parliamentary Democracy v. Presidential Government* (Oxford University Press 1992); Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (New York University Press, 1994)

¹¹ The extent of separations of powers in western democracies varies widely, from the Westminster model of concentrated powers to the presidentialist one of separated and checked powers. The tendency in parliamentarist systems, however, is toward increased separation of powers, as the recent proposals for a Supreme Court in England suggest. And the tendency in presidentialist regimes is exactly in the opposite direction, toward more sharing of power with the parliament. Here, France’s period of “cohabitation” followed by the decrease in the presidential term from seven to five years blurs the boundaries between presidentialist and parliamentary regimes.

¹² What most analyses miss about the political logic of those regimes, particularly after Stalin and Stalinism, however, was how much pluralism there was within the communist party. Not that pluralism in a one-party state equals the pluralism of a multi-party state. But there was at least some space of political choice.

There was, of course, a crucial difference in constitutional-democratic and state-socialist governments. But this was not so much in the structure of formal governance as in the presence of an *opposition* in constitutional-democratic governments and therefore in the array of choices presented to an electorate at election time. That is by no means a trivial matter, but even the Soviet Union had nominally contested elections by the end, and the choices were not nearly so different as one might think from two-party democracies where both parties aim for the center of the political spectrum in their party platforms.¹³

As for elective legitimacy, soviet-style governments already featured (at least somewhat) elected parliaments and could boast of political leaders that had been chosen on the basis of merit (however defined) and political program rather than parentage. Of course, the elections for high party positions were not open and ordinary voters could not get rid of their leaders if they tried. But within the chambers of the Central Committee of the Politburo (or their Central European equivalents), leaders were already being chosen for their potential effectiveness at governing in line with the party beliefs and not by the accident of parentage. (We might think of the earlier times in the democratic transition of the West when the franchise was restricted to a relatively small inner circle as well and when parties chose their leaders without a general democratic mandate. In some cases, of course, they still do. Tony Blair and Gerhard Schroeder were not elected directly but were chosen as leaders by their party organizations which were entitled to put their choices of executive forward because their parties and their parties' individual candidates got working control of the parliament.)

Soviet-style regimes were, obviously, hugely different from Western democracies. But we should not forget their superficially democratic appearances of elected parliaments and meritocratic choice of leaders. The *content* of soviet-style policy was radically undemocratic and what counted as merit was different as well, particularly if one has the view that democratic norms respect the dignity of individuals and accord individual needs an important place in public policy. Specific abuses were characteristic of the soviet-style regimes: the lack of attention to the citizen as a bearer of rights, to the citizen as the author of her/his own life, to the citizen as individual whose political views deserved respect. There were also abuses of the culture, of the environment, of privilege. The question I want to raise is whether those were primarily matters of form or substance.

And the answer I want to propose is that those who are emerging from the soviet political space, whose idea of democracy came from longing for it rather than from having a history of it, may have a

¹³ Lest I be misunderstood, let me emphasize that I am not saying that there is no difference between single-party and multi-party regimes. There is a critical difference in having a formal opposition. I am trying to point out, however, that complex single-party states often do have some internal variation that is resolved by electoral choice, and such was the case in much of the soviet empire in the days of Perestroika.

more substantive sense of what it means to have a democracy. This may be especially true where the old communist parties recycled themselves as socialist or new communist parties and where electoral politics has many of the same people still hanging on from the old days. As a result of this, the transition from the soviet-style governments to more genuinely democratic ones might be signaled by some more radical break, more of substance than of structure. The institutions might retain the same superficial appearance – no one wanted to abolish parliaments and elections. Instead, reformers wanted instead to change the number of parties and the independence of the voters who voted for them. Perhaps more crucially, however, the new post-soviet citizen would not believe that a democracy was real until the substance of the policies had changed. The new constitutions not only guaranteed this, but also gave these institutions more radically democratic *content*.

This democratic content is given by the “thickness” of post-soviet constitutions, which are often quite detailed and which specify not only how the new democratic institutions are to operate but also how they are to govern. These new constitutions provide answers to questions that are in older constitutional democracies given by legislation rather than by constitution (or rather, by procedure rather than by substantive limits on policy).¹⁴ Thick constitutions take a great many issues out of the hands of the new democratically responsive institutions and lodge them instead in a higher law. In many of the countries of the post-soviet world, these issues have been given over for safekeeping to the special competence of the really new political institution in their post-authoritarian worlds – the constitutional court. Though these courts vary widely in their bravery, powers and successes, they have been the primary marker that the new political orders are very different from the old ones.

The proceduralist assumption, crucial to the standard democratic story, is that institutions are democratic in content if they are democratic in form. But this does not always meet with widespread faith in the countries of the former soviet world. The low esteem in which both executives and parliaments are almost everywhere held in the former soviet world stands as proof of this.¹⁵ Much higher in the confidence scheme are the totally new institutions, like constitutional courts, ombudsmen and committees of experts whose substantive knowledge and substantive commitments to democratic values give them a

¹⁴ For example, post-soviet constitutions typically specify a large number of rights, including social rights. Instead of leaving the shape of a welfare state up to the elected branches, these constitutional provisions seem to sketch out the substantive goals to be achieved. Also, post-soviet constitutions frequently include provisions that regulate central banks, the military, a central audit office, the national prosecutor’s office, ombudsmen, ministries and judicial systems. By putting these things into a constitution rather than into ordinary legislation, constitution-drafters took both the shape and content of government out of the realm of ordinary political decision-making.

¹⁵ Come to think of it, parliaments and executives don’t do all that well in the opinion polls of more established democracies either.

basis for their power. As a result, it may be that what matters in the post-soviet world is not only a formal commitment to democratic institutions, but also a substantive commitment to democratic values.

b) The Social Organization Assumption.

The standard democratic story also assumes that the citizenry has interests and desires that can be represented reasonably well through intermediary organizations like parties and interest groups, so that these interests and desires can be communicated in an orderly way to those who are elected to serve. Here again, the older established democracies (whose historical practices are now re-described as normative theory) had a different historical experience than those newer democracies coming out of the soviet period.

In the older established democracies, “civil society” organizations and political parties grew gradually as democratic institutions expanded their reach and responsibilities. Some of these intermediary organizations (intermediate between state and citizen) were moral and religious; others were based on independent trade unions and other groupings emerging from the pursuit of economic interests; still others depended on more specifically political agendas. Political parties, reasonably well differentiated from simple interest groups, came to take on relatively stable programs supported by a core of electors, and outcomes of elections were determined by those voters whose loyalties were less stable and could move from party to party. As Alexis de Tocqueville’s famous assessment of America reported, a successful democratic society grows best from a socially organized population.¹⁶ And as Robert Putnam’s more recent historical study of Italy has also argued, the stability and success of democratic institutions has been associated with the development and growth of civil society.¹⁷

The typical pattern in the West, then, was for the franchise to expand into an already-mobilized population, whose interests were quite organized and whose institutions were ready for political action, if need be. By contrast, in Eastern and Central Europe, civil society was either decimated or colonized by the only party there was. Official unions, youth groups and women’s groups responded to the call of The Party. Other formal or public groups were illegal or discouraged. The Party might have been internally diverse (as it surely was in the last days of the soviet empire both in the Soviet Union and in Central Europe) but its public face still appeared quite unified. Most citizens’ interests and desires were not deeply connected to these structures, which were seen as belonging to a public realm of official compliance rather than to the private realm of the satisfaction of needs.¹⁸ Instead, informal friendship

¹⁶ Alexis de Tocqueville, *Democracy in America*.

¹⁷ Robert Putnam, *Making Democracy Work*. (Harvard U Press, 1994).

¹⁸ See Ferenc Fehér, Agnes Heller and György Marcus, *Dictatorship Over Needs* (St. Martin’s Press, 1983).

networks occupied the space of social organization and provided not only social solidarity, but also scarce goods.¹⁹

Building democratic institutions which can mobilize electorates whose interests are well-specified and well-represented is extremely difficult if there is a vacuum of public social institutions. As a result, in the post-soviet period, political parties are often friendship networks gone public rather than a group of relative strangers united by a common substantive commitment. The consequence is that the platforms of political parties are not very stable, and may in fact change wildly between elections. Groups of friends may disagree quite a lot over what their circle should do if it gets into power and this disagreement is communicated to the general public in the form of vague, weak or nonexistent party platforms. Politicians, even those who are central to their party, quit their original parties and join different ones when their friendship ties unravel. The general public who may be voting for these parties can hardly be expected to be more loyal.²⁰

Added to this is the fact that, while it is legally possible now, most people have no time to form voluntary interest groups outside of the new party structures because they are busy accumulating multiple jobs for pay in economies gone haywire. If your official job cannot possibly provide the income to support you, you have to spend your time outside your official job doing something else that will pay you to survive. Volunteerism, as a result, is nearly nonexistent in these societies. The calls by western democrats to develop civil society organizations have largely fallen on hearing ears connected to overscheduled bodies. (They don't fall on deaf ears. There is nothing that many people would rather do than have time to do something meaningful instead of something just for money.) Since the political changes, political parties occupy nearly the whole sphere of organized interests because they are the only organizations who can pay people to work for them.²¹ But these parties are based more on ties of friendship than on substantive political commitments. The structure of interests and its representation is not stable as a result, and so the new democratic institutions of parliaments, prime ministers and presidencies are often built on sand.²²

¹⁹ For a particularly good description of the workings of such networks in soviet and post-soviet Russia, see Alena Ledeneva, *Russia's Economy of Favours: Blat, Networking and Informal Exchange* (Cambridge: 1999).

²⁰ See RFE/FL Daily Report, 17 June 1999, End Note by Paul Goble.

²¹ The parties usually have money because political campaigns are state-financed.

²² Interestingly enough, perhaps the most stable party in most post-communist societies is the former communist party, reworked to be socialist or social democratic. This is a party whose members share a substantive agenda, and there have been fewer defections of leaders from this party (once the initial wave of defections produced new parties as soon as pluralism opened up the space). In contrast, liberal and conservative parties have seen a trading of officials and a general weakness in party loyalty, even among the leaders of these parties.

It is no wonder, then, that the legitimacy of the new elective institutions is not very high. These institutions do not always represent the interests of the public, because the mechanisms through which such interests would be aggregated and expressed are not well-established. If one happens to be in a circle that has converted its friendship network into a political party, then one may have more faith in the legitimacy of elective institutions. But if one is outside of those circles, it is hard for one's voice to be heard.

Given that the procedural assumption and the social organization assumption about the bases of democratic legitimacy and success are both not dreadfully valid in the post-soviet world, what should analysts make of the new elective (democratic?) institutions? I have argued that elections, taken alone, have not been terribly impressive, both because the political outcomes once election-winners take office bear so little relationship to what the constituencies who voted for them wanted and because the capacity of the current party structures in Eastern and Central Europe to capture the wishes of the voters is limited. If democracy is associated more with a *substantive* change of policies than with a *procedural* change in institutions, and if the social infrastructure of interests is not well-connected to political parties, then what do elections mean? Are elections the primary way in which the new democratic tendencies express themselves?

I think not. I do not want to say that the move to free elections has been worthless in Central and Eastern Europe – only that it has not been enough to make many people believe that they live in truly democratic countries now. Instead, I think that the new voters of Eastern and Central Europe want the post-communist polity to show its commitment to change by committing itself to a thick *substantive* vision of the new democratic state. This vision has, in some places, been provided not by parliaments and executives, but by the sudden and radical expansion of the role of judicial review taken on by activist constitutional courts. The place where these developments proceeded the farthest and the fastest was in Hungary, so I will turn to the more specific materials on Hungary to continue my argument.

Court-Centered Politics: An Overview of Hungary's Constitutional Structure

For most of the period after the Second World War, Hungary was a state on the edges of the soviet empire in two ways. First (and most obviously), it was on the edges of the soviet empire *geographically*, which has enabled Hungary to move in the 1990s from a position firmly in "Eastern Europe" to an aspirational position in "Central Europe."²³ Being next to and historically linked with

²³ One of Hungary's millennial slogans is "1000 years in the heart of Europe." See also Kim Lane Scheppelle, "Imagined Europe," plenary address to the meetings of the Law and Society Association, Glasgow, Scotland, July 1996. In this address, I discuss the way that Hungary's dominant constitutionalism was linked to the idea of "rejoining Europe," something easier for Hungary to do if it could position itself at the heart of it.

Austria, which is now a member of the European Union, was critical to this “un-edging” of Hungary through the 1990s as it hurtled as fast as it was allowed toward joining the EU itself. Second, Hungary was on the edges of the soviet empire *politically* as well during the soviet period, since Hungary had one of the more liberal regimes in the former soviet world and had already engaged in quite a lot of economic, legal and political reform before 1989. Economic pluralism came with a series of reforms in the mid-1970s. Political pluralism came as a number of Communist Party members tried to separate government from party in the 1980s. Both processes were already relatively far along by the time of the Roundtable that negotiated the transition to formal economic and political pluralism.

Throughout the soviet period, Hungary’s courts retained a certain positivist legalism that shielded them from much direct political interference, and private-law lawyers and academics enjoyed a substantial amount of room for maneuver especially at the end of that era. Public law lawyers and academics were more politically compromised, as were the specialized political courts. Through the later days of the soviet period, intellectuals, too, were given more room for maneuver. As one of my friends in Hungary put it, “As long as we published in journals and in jargon, they didn’t care what we said.” These liberalizing tendencies meant that Hungary had an educated elite that was accustomed to having ideas that were not already colonized by the Party. Even the Party was not fully colonized by the Party by the end.

Even before the dissidents called the government to negotiate multiparty elections and a transition to more open politics in 1989, there was a split within the Hungarian communist party between the reformers who wanted to separate the government from party control (and who were remarkably far along in doing so) and the more conservative party officials who insisted on keeping the political lid on. The transition moved as smoothly as it did in Hungary in part for demographic reasons; the hard-liners were reaching retirement age and being pushed out for the neutral not-apparently-political reason of age limits on office as 1989 neared. The reformers clearly had the upper hand. The calls for a new constitution, replacing the Stalinist-era Twentieth Law of 1949 (as the Hungarian constitution was then called), came as early as 1987, when the then-new justice Minister Kálmán Kulcsár (himself a distinguished Marxist sociologist of law who was to become a born-again liberal) ordered his ministry to prepare one. By early 1988, substantially before it was clear that the East-Central European states would be allowed to move out of the soviet orbit, a new constitution was in circulation and introduced in the parliament. It still outlined a People’s Republic but proposed many changes that would make the state significantly more autonomous from the party. These substantial internal reform attempts were overtaken by the Roundtable

Talks that started in spring 1989 between the party and the democratic opposition.²⁴ The Roundtable Talks succeeded in producing what amounted to a wholly new constitution in 1989, accepted by the still-communist parliament several weeks *before* the fall of the Berlin Wall. The constitution was again changed through another large series of amendments in 1990, wiping away the remnants of the compromises with socialism that the former dissidents had made.

The new constitution created a new Constitutional Court, which turned out to be one of the most revolutionary parts of the new institutional structure. The Constitutional Court opened for business on 1 January 1990, five months before the first multi-party elections, and was immediately deluged with petitions from ordinary citizens, demanding that their rights be recognized. The Court operated from its opening day as if the transition had already happened, and it started striking down laws as inconsistent with the new constitution at a rapid rate. These were all, after all, communist-era laws, many of which could be expected to be inconsistent with a new, basically liberal, constitution.

After the first election, as Hungary hurtled through the early years of “transition,” most citizens experienced not just the early heady sense that the sky was the limit, but also the vertiginous sense that there was no limit to how far things could drop. The transition produced 13 daily newspapers in Budapest alone, covering every possible political viewpoint, as well as a multitude of new political parties. The first elections saw a large turnout and a lot of enthusiasm for the new political changes. But the Parliament quickly fell into squabbling about the new symbols of state, spending a huge amount of time fighting about whether the Holy Crown of St. Stephen should be part of the national seal while leaving much structural change on the back burner. There was a public disillusionment with politics almost immediately, and the popularity of the first government plunged accordingly.

On the economic side, the transition brought the tremendous influx of foreign capital, along with a tremendous influx of foreigners. But the transition also brought a startling drop in family incomes for those who were not part of the new globalized economy. The transition also created a sharp rise in inflation and unemployment. For those on fixed incomes, the shock was severe. While in the socialist times there was not much opportunity to take upside risks, there was also little chance that one would experience a severe downside risk. Life may have provided few economic opportunities, but it also protected everyone against sudden economic shocks. For Hungarians, there was no gradual transition to the world in which everyone was left to scramble for themselves economically. The bottom rather

²⁴ For a thorough and excellent account of the Roundtable Talks in English, see Rudolf Tökes, *Hungary's Negotiated Revolution* (Cambridge University Press, 1996). For more on the Roundtables in Hungary and elsewhere in the post-communist world, see Jon Elster (ed.), *The Roundtable Talks and the Breakdown of Communism* (University of Chicago Press, 1994). The transcripts of the Hungarian Roundtable have since been published (in Hungarian) in András Bozoki et al. (ed.), *A Rendszerváltás Forгатókönyve: Kerekasztal-Tárgyalások 1989-ben* (Magvető, 1999) in four volumes.

suddenly fell out of the world as most people knew it. There might have been a more robust politics, but there was also an increasingly desperate economics going on at the same time.

Into the middle of this picture in which politics did not live up to its advance billing and in which economic expectations were dashed came the Constitutional Court. The Court had spent its first few months before the first election and a substantial amount of its case load shortly after the first election dismantling many of the dysfunctional leftovers of the communist state. The Court required that the ministry of justice no longer control the court system and that there be judicial review of every administrative decision. The Court required a dismantling of the state surveillance system by mandating that there could no longer be a personal identifier number to which all state records would be attached and by introducing a strong system of data privacy. The Court abolished the death penalty and some late communist-era taxes that were particularly controversial. The Court required that the state not be allowed appeal cases against the wishes of the parties to a lawsuit. The Court was very active in a great many different areas, and in general its decisions were both followed and respected.

But the Court did not stop by striking down communist era laws as inconsistent with the new constitution. The new legislation coming out of the newly elected Parliament fared little better. Looking over the Parliament's effort to return farmland to its previous owners, the Court refused to go along. Instead the Court required that reprivatization of or compensation for previously nationalized property, if it were to be done at all, had to treat all former owners identically, thereby taking the issue out of the area of special pleading in the Parliament where the farmers had the government's ear. Ditto with the Parliament's effort to bring former communist officials to justice for violating the rights of political opponents. The Court said that Parliament could not take political revenge on the former communists who preceded them because retroactive punishment violated the new rule of law. The Parliament tried to hang onto the state-owned media to use it to propagandize for the new government. The Court demanded that the government give up control of the broadcast media in the name of freedom of the press.

The Constitutional Court Act gave Hungarians virtually barrier-free access to the court to ask that laws be stricken as unconstitutional, so nearly every one of the major new laws was challenged. The Hungarian Constitution says that "anyone" may file a petition with the Constitutional Court of Hungary if she believes that a law is unconstitutional. There is no requirement of standing, the demonstration of a particular injury, or any personal connection with the challenged law at all. A person does not even have to be a citizen to file a petition with the Court, nor does the petitioner need to have a lawyer represent her before the Court. In a country of 10.5 million people, the Court received between 1500 and 2500 petitions a year, some with many signatures. (One case alone in 1990 had 35,000 signatures on the petitions challenging a new tax.)

Moreover, the Court adopted what I call the “while we’re at it” doctrine, which meant that once a law was challenged in a petition, the Court would examine the whole law and not just the challenged clauses, as long as they were looking at the statute’s constitutionality anyway. A number of the Court’s early decisions went far beyond the petitioners’ narrow requests as a result.²⁵ In addition to this extraordinary activism, the Court had been given (or took by implication) extraordinary powers in the Constitutional Court Act, which itself was one of the first pieces of “transition” legislation passed by the outgoing communist parliament. The Court had the power to review laws before and during their discussion by the Parliament, upon request by appropriate governmental parties, so the Court was free to give advisory opinions in the midst of the legislative process.²⁶ And once a law was passed, *anyone* could challenge it, whether they had a personal stake in the challenge or not. Perhaps most surprisingly, the Court was also given the power to declare that Parliament was acting “unconstitutionally by omission,” which meant that the Court was able to declare that Parliament had violated the Constitution by *failing* to pass a law that the Constitution required the Parliament to pass. The Court could therefore order the Parliament to pass a law.

The Constitutional Court decided roughly 300 cases per year, which meant that it had a presence great and small in many areas of political life. By contrast, the first elected Parliament was quite visibly stalled on starting the process of passing new laws to make a symbolic and real break with the communist past because it was caught up in symbolic politics that quickly made the Hungarian public cynical. Moreover, the parties that were in the governing coalition, the Hungarian Democratic Forum, the Christian Democratic Party and the Smallholders, shifted their political stances as the first elected Parliament went on. While the Democratic Forum ran in the campaign as a broadly representative party that was in favor of political pluralism and economic reform, it soon turned into a more narrowly vengeful party that reserved much of its legislative energy for trying to redress past grievances and bring back old pre-communist symbols of state. They were elected as political liberals, but they governed as nationalists. They barely began economic reform and did little to reform the state apparatus, still unchanged from the communist time. The media remained in state hands, as did most economic assets. Reforms that had been promised at election time didn’t even make it onto the agenda of the Parliament.

As a result, the first elected government engaged in reform efforts usually (and sometimes only) at the prodding of the Constitutional Court, which used its substantial powers to order the Parliament to pass new laws on a wide range of topics. The Parliament was ordered to pass a law on minority rights,

²⁵ There were even a number of petitions written by various friends and relatives of Court staffers, and also quite a few written by people who later went to work for the Court, so some of the questions that the Court took up it did on very nearly its own initiative.

²⁶ The Court later decided this was a bad idea and got the Parliament to change the law.

on freedom of the broadcast media, on environmental protection. If the Parliament was tied up in internecine struggles, the Court tried to break the deadlock.

By the time of the second election in 1994, the public was quite fed up with the government that it had previously elected. The Democratic Forum went from being the dominant party in the Parliament to being one of its smaller fractions. The Christian Democrats nearly disappeared. Only the Smallholders survived, and then because that was a party that alone had tried to cater to its base, the small farmers. If they hadn't been successful, it wasn't because they hadn't tried. The Democratic Forum and the Christian Democrats, however, nearly lost their base altogether. Instead, the former communists (the Hungarian Socialist Party) won an absolute majority of the seats in the Parliament. Even though they didn't have to, they went into coalition with the liberals (the Free Democrats) and so together the two parties had 72% of the votes in the Parliament. Surely with this strong majority, the elected branches could act.

While it was true that the second Parliament was far more effective than the first in terms of passing laws that substantially reformed the political and economic structures and in carrying through on those laws, it is also the case that the socialist-liberal government also rather quickly moved away from their political base as well. The socialists (the ex-communists) had campaigned on a platform of "expertise in government" and it was clear that the people who voted for them did so because they missed the good old days when things were more stable. Their constituency wanted reform – but they also wanted a guarantee of a social safety net and a restoration of order as it had been. But inflation continued to be high; unemployment came down in Budapest but not in the countryside. There was a growing gap between rich and poor, and a growing number of poor. The new government started to look more eagerly toward radical reform, though this had not been their mandate. And they too had mixed success at the Court. The Court knocked down the Parliament's attempt at a lustration act but upheld the Parliament against a complaint from local governments on a law that made it easier for poor apartment dwellers to buy their houses. (The latter was at some cost to the right to private property, therefore alienating the liberals who were by that time in the government.)

During this time, the Constitutional Court maintained its activism by striking down laws and ordering the Parliament to draft new ones that it had not yet gotten around to working on. But in interviews I conducted between 1994 and 1996, it was clear that the other branches of government were quite willing to defer to the Court, even in cases where the government or Parliament disagreed with the policy choices implicit in the Court's rulings. There were virtually no voices of dissent within the other government branches from the proposition that the creation of a rule of law state required that all Court decisions be promptly and completely followed. "We are a country of lawyers," said one leading

member of the Parliament whose favorite new law had just been struck down, going on to state that the rule of law required that not a single decision of the Court go unenforced.

As a result of these extraordinary developments, the Court moved into a position where it was for all intents and purposes running the country. If one looked at the Parliament's agenda at any given moment, a large fraction of it was taken up with mandatory revisions or with demands for new laws that the Court had thrown the Parliament's way. On a whole range of issues, the Parliament's first attempts to set policy were struck down as unconstitutional, forcing the Parliament to go back to the drawing boards.

In the first six years of the Court's operation, the Court nullified about *one-third of all the laws* brought before it for examination. Some of the early decisions struck down communist-era laws; the later decisions struck down the new laws passed by the elected parliaments at about the same rate.

In creating the Constitutional Court, the Roundtable had effectively created a new governmental system that was not presidentialism or parliamentarism (the usual two choices), but instead a "courtocracy." Through the early 1990s, the Constitutional Court was for all intents and purposes running the country. Or at least the Court had as much power in the Hungarian system as the President has in France or the Parliament in the UK. Neither governs alone, though each has the last word. If presidentialism identifies the president as the strongest power in government, and parliamentarism identifies the parliament as the institution that has the most weight in policy making, courtism (or courtocracy) identifies the judiciary as the branch with the most power and the final word. Though in Hungary only the Parliament could make the laws, the Constitutional Court always had the last say, and the Court struck down laws early and often, sending them back to the Parliament with explicit instructions on how the laws had to be rewritten. Moreover, since the Court had the power to order Parliament directly to pass laws on subjects that it had not yet considered, a great deal of the Parliament's agenda turned out to be simply complying with Court decisions. Hungary was more nearly a country run by a court than it was a country run out of any other institution.

This is what I mean to point to when I say that presidentialism and parliamentarism are not the only forms of democratic system on offer, as the political scientists customarily claim. It is logical to think that the third branch – courts – could also be as dominant in some sorts of democratic governments as presidents and parliaments can be. What seems to get in the way of this idea, however, is the persistent view that courts are undemocratic, therefore unsuitable for being the lead institution in a democratic polity. But, as I will argue, whether a court is democratic or not is an empirical question, not an a priori claim.

As a result, I would like to argue that in many ways the Hungarian Constitutional Court turned out to be a more democratic institution than the Hungarian Parliament was for a number of structural and

historical reasons. To see how this process worked, I will take up in more detail the most pressing and controversial set of cases that arose for both the Parliament and the Constitutional Court in the mid-1990s because it is in the interplay between Parliament and the Constitutional Court in specific cases that one can see why the Court was arguably more democratic than the Parliament. In the example I will discuss, the “Bokros package cases,” the Constitutional Court’s decisions were critically important because the shape of the transition hung on the answer.

Parliament v. the Court: Democracy under Pressure over Social Rights

Hungary’s constitution, written in 1989 and 1990, included a lot of social rights. While some commentators have asserted that these were “leftovers” from Hungary’s soviet-era constitution, it turns out that many of the social rights provisions were new. They had been copied from international human rights documents (particularly from the International Convention on Economic, Social and Cultural Rights) into the new Hungarian constitution in 1989 by the lawyers working on the constitutional subcommittee of the Roundtable process. The main social rights provisions in Hungary’s constitution are:

Article 17. The Republic of Hungary shall provide for the indigent through extensive social measures.

Article 66. (2) In the Republic of Hungary, mothers shall be given assistance and protection according to separate provisions before and after childbirth.

Article 70/D. (1) People living within the territory of the Republic of Hungary shall have the right to physical and mental health care of the highest possible level.

(2) The Republic of Hungary shall ensure this right by organizing labor safety, health institutions and medical care, by ensuring opportunities for regular physical training, as well as by protecting the artificial and natural environment.

Article 70/E. (1) The citizens of the Republic of Hungary shall be entitled to social security; they shall be entitled to provision necessary for subsistence in case of old age, illness, disablement, widowhood, orphanhood, and unemployment through no fault of their own.

(2) The Republic of Hungary shall implement the right of people to such benefits through social insurance and the system of social institutions.

With this constitutional language, the Court has a lot of text to back up a claim that government spending to provide for certain social rights is constitutionally required. With that text as its mandate, the Court entered a battle with the Parliament in 1995.

As I have already mentioned, a great many Hungarians lost out in the immediate aftermath of the transition. A gap between rich and poor opened up; unemployment became not only possible but rampant; people who had never had to worry about whether they would survive economically suddenly had to watch every forint. Inflation was high; jobs that used to pay a living wage no longer did. While it

used to be that people had money with nothing to buy, suddenly people found that there were plenty of goods but no money.

The people hardest hit in all of this were the pensioners and others who were dependent for their livelihoods on social benefit payments (for example, family allowances, sick pay). Social benefit payments were not indexed to inflation so they were eaten away quickly in the 1990s. While of course many citizens were very upset about the declining real value of social benefits, in most cases social benefits were not being cut in Hungary as rapidly as they were being cut in other countries working their way out of state-party systems under the watchful eye of the international financial institutions. In Hungary, the commitment to providing social benefits had been renewed after 1989 and the government did attempt to keep up their payments on them. The "családi pótlék," the system of state payments to parents giving them money with which to raise their children, was actually made universal only after 1989; before that it had come as a benefit through the workplace, which meant that only those people with regular workplaces received monthly state payments for each of their children. Some provisions of the complicated system of pregnancy benefits, maternity leave, infant benefits and the like were also increased after 1989 as a way of encouraging more women to have children. (Hungary had had a negative population growth rate for more than 20 years and the first freely elected government had pronatalist tendencies.) The expansive initiatives came from the Parliament, and the Court basically went along with them, siding at first largely with the government against challenges from citizens (primarily pensioners) who said that their real income was declining because pensions had not been raised with the level of inflation. So until the spring of 1995, massive legislative cutbacks of social benefits had not been a feature of transition in Hungary, though inflation meant that the benefits were cut anyway without benefit of legislation. In this first phase of the political transition, the Parliament and the Court had mostly the same ideas about policy. Neither the Parliament nor the Court thought social benefits should be cut, but neither thought that inflation necessarily had to be taken into account in determining benefit levels.²⁷

But then the political background for the Court's social rights decisions changed dramatically. While before that time, rampant inflation and major economic instability wreaked havoc with the *real* values of pensions, the *nominal* value of pensions had stayed the same. And the Court had held in a

²⁷ Actually, this is not quite true. For the first five years of the Court's operation, there was a steady group of four dissenters (out of 9 judges at that time) who resolutely stood up for social rights and who believed that the Court should order pensions, in particular, to be increased so that they could keep their real value. The dissenters kept losing, but just barely. So the majority view of the Court was not unanimous. The social rights cases before the Bokros cases (that are the subject of this section) had a large number of 5-4 decisions, something that was quite unusual in the Hungarian Constitutional Court which tended to have unanimous opinions about nearly all other matters.

series of cases that as long as the Parliament didn't *cut* benefits, it was constitutionally required to do no more. Starting in 1995, however, the *nominal* value and even the very existence of all social benefits came under attack. The attack on social rights followed from a rather heavy-handed threat of the International Monetary Fund to shut down its office in Hungary and leave the country unless the new socialist/liberal government passed an economic austerity program that began to get a handle on Hungary's massive debt and the ever-accumulating deficit.²⁸ Since it was a large fraction of the state budget in Hungary, social benefits had to be included in the cutbacks.

At first, the new socialist-liberal government refused to cave in to IMF pressure. This government elected in spring 1994 was very strong, controlling 72% of the seats in the Parliament. The majority party in the coalition (the Socialists) had run on a platform promising to slow down the economic transition to care for the economic needs of the reeling population. The liberals had campaigned on economic reform, but they were the minority party in the coalition so they had not been expected to get their way. For about six months, the government held out against the IMF threats and tried to proceed on a course of slow but steady economic change. Through that time, the government maintained its public support. The government's strategy was to encourage the growth of small private businesses while restructuring and selling off state-owned companies, but to do this while keeping the system of social security payments in place. Current deficits were justified in terms of investing in future growth and having compassion for a panicked population. But this rationale was not persuasive to those giving the loans.

When the IMF's patience ran out at the end of 1994 and the shutdown of their Hungarian office was imminent, the Hungarian government did the only thing it could do under the circumstances -- it began to talk compromise. Since Hungary had the largest per capita debt in Eastern Europe when the changes occurred in 1989 and since it had refused to renege on its commitments to pay off that debt, it needed a steady infusion of loans from the West to keep itself solvent. The socialist/liberal government's first finance minister resigned rather than bite the IMF bullet. But the new socialist-party finance minister, Lajos Bokros, was a born-again free marketeer with relentless determination to get the budget in line with international expectations. By March 1995, the government had proposed a new budget that took aim at social programs in a major way.

²⁸ One note about Hungary's debt, which was the largest per capita debt in Eastern Europe in 1989. It had been run up through a policy of serious deficit spending in the 1980s. Hungary has religiously paid all payments and interest on its international debt since the changes of 1989. Some Hungarian economists claim that the current Hungarian budget would be in balance, even with all the transfer payments, if there were no payment on the foreign debt. But Hungary has not succeeded in getting any of the international lenders to reschedule or forgive any of its debt. So, as some Hungarian economists have argued, it was not the social welfare benefits that wrecked the state budget in the 1990s, but instead the foreign debt.

Leading the list of cutbacks was a near-total repeal of the popular system of child supports, starting with pregnancy benefits, continuing through infant benefits and state-supported maternity leave for new mothers in the first three years after they gave birth to a child, paying a child care allowance until the child reached school age, and then guaranteeing every family regardless of income a regular monthly payment for each child below the age of 18 living in the family (the *csaladi pótlék* system).²⁹ The government proposed that such benefits be subjected to a means test, though they were quite unclear about how such means tests were to be conducted or what the level was below which such benefits would be guaranteed.³⁰ In addition to this, sick-leave benefits, once state-supported, were to be largely cut from the state budget and not paid for by the state until after an employee had been sick for 25 days. Employers were ordered to make up the difference, again with no time to adjust.

The new package, nicknamed the “Bokros package” after the very visible and photogenic finance minister, was proposed in March, passed in May, took effect in June and the immediate and harsh cutbacks were scheduled for 1 July 1995. The law, consisting of 157 paragraphs each amending another preexisting law, went through the Parliament so fast that it is doubtful that many MP’s understood what they were voting for on the final ballot. Certainly, the interest groups one would expect in a well-functioning democracy were nowhere to be found. There were almost no organized public protests; the bill sailed through Parliament with very few organized objections. The radical cuts came so much out of the blue that no one was organized to fight the changes – except those affiliated with the very political parties that were now under such pressures from international financial institutions to knuckle under and cut social benefits. Pensioners, poor families, people with chronic illnesses, pregnant women and others had a good reason to lobby the Parliament to spare them the changes. But the bill went through the Parliament quite quickly even though the majority party in the Parliament had campaigned less than a year before that it would never do this. The President of Hungary, who at that time was just about to be reelected to the job by the Parliament, was in no position to challenge the Parliament right at that moment,

²⁹ The reaction of most Westerners to this generous system is often incredulity. But the incredulous should know that Hungary has no tax breaks for families as do most West European and North American systems, and so much of this subsidy for children might be thought of as a different way of accomplishing a state subsidy to families with children. There was no parallel plan in Hungary to institute tax breaks for families with children to compensate for the removal of child allowances when the cuts were proposed.

³⁰ Means tests were very difficult to do in Hungary since people’s official income and their real income often were very different. Because marginal tax rates were so high (48% for private sector employees), people had great incentives to keep their incomes out of any official registry. This of course complicated the problem of tax payments and budget deficits, since money earned off any official books couldn’t be taxed and therefore the state was always tempted to raise taxes on that small fraction of income that it could see, further driving people to get paid off the books. And of course, those limited sources of revenue limited the state’s ability to pay for social benefits to people who seemed, from their official records, to be poor. Means testing was the obvious answer, but also a symptom of the problem. Those most successful at avoiding state taxes would appear to be most deserving of state relief.

so he signed the bill immediately. Right after the package became law, it was immediately brought to the Constitutional Court for review by a number of petitioners.

In fact, it wasn't just the surprise attack on social benefits that generated this pattern of little protest in the Parliament but a huge surge in complaints to the Constitutional Court. This pattern was common for major legislation in Hungary. It shows why the Court is arguably more democratic than the Parliament even though the judges are not directly elected. Hungarians understand that they have to be mobilized in large numbers to affect the Parliament and even then they are not likely to be successful. But, mostly because of the difficult economic conditions, Hungarians have no time to volunteer to work for interest groups that would defend their interests. They are too busy working six jobs to have time for something that doesn't pay them. Therefore, the most organized interest groups are the political parties themselves because they are the only groups that have money to pay a staff to organize political support for various causes. But the political parties change once they come to power, partly because they run vague or unrealistic campaigns and partly because the strongest pressures once they get into office are either from the minority parties that enable the coalition to govern (as in the 1990-1994 period) or from external institutions that have some leverage on Hungarian domestic policy (as in the 1994-1998 period). Either way, the majority parties in Hungarian governments since 1989 have found that they have to compromise their election platforms to keep their governments from falling, and that means doing something other than what they said they would do. The political parties in power are often, as in the Bokros package cases, allied with the very side of the policy issue that they campaigned against. Where is an alienated public to go?³¹

This is where the Constitutional Court has come in. It is relatively easy for people to approach the Court to knock down a law that reflects something other than what they wanted. All that is necessary to activate the court's jurisdiction in the case of an already enacted statute or other legal regulation is for someone – literally, in the Constitution, “anyone” – to write a letter to the Constitutional Court that challenges this legal regulation in light of some provision of the Hungarian Constitution. This does not require a lot of mobilization or great numbers. Lone individuals can file petitions without

³¹ Of course, one place that the public can go in the longer run is back to the ballot box to throw the unaccountable politicians out. And this is what the Hungarian public has done in each of the three elections that have occurred since the political changes of 1989. The public elected the anti-communist opposition in 1990, then elected the anti-communist opposition coalition's own opposition by bringing back the ex-communists in 1994. Then the Hungarian voters voted against the ex-communists by bringing in a different center-right party (one that had been frozen out of the coalition in 1990 and so had never governed before). By now, however, Hungarians have run through all of the available options and so there is no real new face in the crowd for the 2002 elections. Hungarians will have to vote for parties who have already taken their turn at governance and failed to deliver on their promises. Each time a new national election comes around, however, there has been diminished turnout and more skepticism about whether elections will fix the problem that the government doesn't ever seem to do what it was elected to do.

demonstrating any broader constituency. Sometimes there are petition drives and the Court gets petitions signed by a great many people. More often, petitions come from people acting alone, even though an upsurge of petitions to the Court demonstrates that a lot of people are angry about a particular government action. Regardless of whether a petition has the force of number behind it or not, the Court is mobilized to act because it has no discretion to refuse to hear a validly posed constitutional question even if submitted by a single person, writing alone.³²

The Bokros package was challenged by nearly all of the opposition political parties, by a number of individuals, and by a series of nascent interest organizations representing interests that had been affected by the law.³³ But unlike a campaign to get the Parliament to resist the IMF's pressure, a petition at the Court requires neither large numbers nor extensive political organization. Instead, a single letter will do. The Court has no discretion to refuse to hear the case, so within hours of the passage of the Bokros package, the petitions were at the Court.

The Court sprung into action, dividing up the petitions among the judges so that almost all the chambers were working on a piece of the Bokros package case at the same time. They did this because there was only a two-week window between the time that the law passed and the time that benefits would have been cut to nothing. The flurry of activity and the division of the case across all justices' chambers was in contrast with the usual practice of giving all the petitions challenging a single law to one judge without a strict time limit. Staff members cancelled holidays; everyone in the building worked overtime.

³² The Court has discretion in two other senses, however. 1) The Court can refuse to see the constitutional challenge in a badly framed petition, and therefore turn it down for failing to state a constitutional question. Or the Court can reach for a constitutional subject in a petition that doesn't quite say it, thereby allowing themselves to reach issues that they are eager to address. There is some interpretive room for the Court to construct its caseload by reading petitions literally or generally. 2) By far the most commonly used tactic, however, was putting petitions that the Court did not want to reach at the bottom of a pile in someone's office, not formally rejecting it, but not exactly getting around to it either. Some cases that the Court doesn't want to decide could sit there for years without anyone in the building even starting to work on them. There was no legal regulation that said that Courts had to decide cases in the order in which they came in, or even by some definite time limit.

³³ I wasn't able to get a good count of the letters that came in because they were immediately put into the Bokros case files and sent around to judges without having separate petition files constructed in the general secretary's office where I would have had access to all of them. The only way I was able to see the letters was to go around from office to office seeing what parts of the case had been assigned to different judges' staffs. It was clear, however, that an unusually large number of petitions came in on this law and that the Court, even before the petitions started arriving, knew that they would eventually look over every paragraph of the law. Also, the newspapers reported immediately that the case had already been submitted to the Constitutional Court, so it may have been that people who would have signed petitions to the Court did not do so because it was clear that the Court was going to rule on the matter without further intervention. Additional petitions, everyone knew, would not make a Constitutional Court ruling more or less likely to find the law unconstitutional.

Drafts flew among the chambers; the judges met in very long debating sessions to work out their rationales and to try to reconcile disagreements.³⁴

Usually, once the Court gets a petition, the court can and does often seek information from the government, from ministries, from experts or from the petitioners that will aid it in deciding the case. But generally, the most important part of any case consists in examining the language of the statute and the language of the Constitution in light of the Court's own interpretive practices. If there is *any* interpretation of the statute that conflicts with the Constitution, then the court is obliged by its own prior practices to strike down the law as unconstitutional.³⁵ Because this case had to be decided quickly if it was to have an effect on benefit cuts that would begin within two weeks of the passage of the law, the Court bypassed its usual consultations for its first round of decisions.

In only two weeks after the final passage of the law, the Constitutional Court judges reviewed as much of the law as they could. But since the cuts to social benefits were due to take effect on 1 July, the judges decided to announce the first round of decisions while petitions were still coming in and before they had had a chance to review the entire law. The Court called a rare public session to announce its first set of decisions on 30 June 1995, on the eve of the Bokros package cuts. So the judges donned their robes, paraded into the Court's auditorium and read the decisions from the bench.³⁶ Drama in the room was substantial; the media were out in force to cover what the Court would say about the austerity package. In five separate decisions, the Court struck down major parts of the austerity program unanimously while upholding the law only against a purely procedural challenge to the form of its enactment. Two of the decisions were constitutionally uncontroversial, one saying that budget shortages could not count as a reason for failing to enforce the Court's prior decisions about the abolition of the personal identity number³⁷ and another saying that people could not be made to pay taxes into the social

³⁴ My information here comes from the fact that I was working in the building at the time and had a chance to observe these processes at close range.

³⁵ Because the Court has no power to review concrete cases (that is, cases in which the allegation is that an otherwise constitutional law is being applied in an unconstitutional manner), the Court has adopted this standard for judging the constitutionality of statutes. The adoption of this standard is one major reason why the Court strikes down so many laws as unconstitutional, but it is their only check on the constitutional operation of state bodies, including the ordinary courts.

³⁶ Normally the judges simply instruct that a decision be published and they issue a press release describing the decision. Only one or two decisions a year warrant this sort of robed formal announcement where the decision is literally read from the bench.

³⁷ The Bokros package included a number of quite extraneous and irrelevant budget cuts, which happened to include axing the money for compliance with a number of court decisions that the president of the court felt particularly strongly about. The fact that cutting money to enforce Constitutional Court decisions was even in the budget at all as a separate item (when it had never been so before) indicated to some observers that the Parliament set up the law *precisely so that* the Constitutional Court would strike it down. Though I could not get any of the MPs I talked to

security system if they could not then get the benefits out at some later stage. That left two decisions, one dealing with the system of child supports and the other dealing with the sick leave question, that outlined the beginnings of a theory of social rights. Nine other decisions were to come later in the fall, but the first round of decisions set the tone the Court would take when dealing with the cutback of social rights.

The most important of the first set of decisions focused on the system of child supports (43/1995 [VI.30]) which was the most broadly based set of social benefits under threat from the Bokros package. The Court declared that the Bokros package provisions cutting these benefits was unconstitutional primarily because the cuts violated the central constitutional principle of *legal security*. The Hungarian Constitution does not mention the principle of legal security explicitly, but the Court in its prior decisions had said that the principle of legal security is the most important idea contained within the broader concept of the rule of law which *is* contained in the Hungarian constitution. Legal security implies that the law must be predictable, that it cannot be changed without following appropriate procedures, and that it not be used to unsettle expectations without adequate warning. In the case of the Bokros package, it meant that the government had to stop right on the eve of cutting social benefits. The system of pregnancy benefits, maternity leave, childcare supports and child payments had to be kept intact precisely because people counted on them, and if the government were to change these benefits on which people relied, the government had to give notice, introduce the changes gradually and give people a chance to adjust their lives to the new reality. These changes had been enacted in an improper manner.

Of course deciding the case on the basis of the legal security provision of the Constitution was not the same as deciding the case as a matter of social rights. But it did succeed in winning a unanimous decision from the Court, something that was politically important in light of the international pressures under which the government found itself. But given the disagreements on the Court over the extent and basis of social rights, this represented one of the avenues that could be agreed upon. Benefits, once awarded, could not be easily or lightly or arbitrarily taken away. The majority decision of the Court was, significantly, coauthored by President Sólyom (who had been a previous opponent of strengthening constitutional claims to social rights) and Justice Kisényi (one of the previous dissenters from the Court's decisions since he wanted a broad reading of social rights).³⁸

to admit it, I must say I share the suspicion that the Parliament, with its back to the wall, very much wanted the Constitutional Court to strike down this law. That complicates the analysis about democracy in this paper, but I don't think this is fatal to the argument.

³⁸ I might also add here that President Sólyom had been a member of the opposition roundtable and was generally associated with dissident causes at the end of the soviet period. He had been very active in creating rights of action for environmental damage, growing from his expertise in tort law. The environmental movement, particularly after Chernobyl, was one of the most active parts of the late-communist opposition. Justice Kisényi, however, had been a loyal member of the communist part right up until the bitter end, when he was deputy justice minister. He had also worked in the Institute for State and Law of the Hungarian Academy of Sciences, where his last book before the

(T)he State has wide-ranging rights with respect to changes, regroupings and transformations within welfare benefits depending on economic conditions. The right of the State to change, however, is not unlimited . . . The Constitutional Court notes that the constitutional criteria for changing welfare benefits through the law are in part independent of what benefits those eligible would be entitled to under Article 70E of the Constitution. In judging which of the benefits actually enjoyed can be withdrawn constitutionally, and how such benefits can be withdrawn, social rights have a role insofar as the benefits may not be reduced below the minimal level that may be required under Article 70E. The constitutionality of the individual changes, however, also depends on whether or not they clash with other constitutional principles and rights, thus whether or not they are contrary to the principle of legal certainty, the ban on negative discrimination, and, if the benefit has an insurance element, to the protection of property.

While the principle of legal security prevented the state from cutting benefits quickly, then, certain other constitutional principles also imposed constraints. In particular, the Court had now unanimously acknowledged that the Constitution carries a right to a social minimum level of material provision as well as a more strict guarantee for protection of social benefits provision that have anything like an insurance aspect because it was, in the view of the Court, a species of property.

Justice Zlinszky, while agreeing with the opinion in its holding, also added another note, one which would have supported stronger protection for social rights in general. He noted that the “transition” required downsizing the state, but noted:

(C)are must be taken to ensure that the material assets of the State be used in such a way that they serve the public interest in a proportionate manner: the market economy brings about a situation whereby the individuals better able to adjust to the market may have outstanding advantages in the enforcement of their financial interests -- but it is a requirement of a constitutional state that the use of funds covered by the common sharing of the public burden -- that is, the funds of the State -- be legal and serve the interests not only of individuals, but also of the public as a whole. . . . The Constitutional Court does not wish to tie the hands of the legislature in search of the appropriate solutions. . . but the Court must note that the legislature can expect the agreement and cooperation of the society, which is the necessary precondition for the success of the reforms, only if it chooses and requires restrictive solutions which meet the moral perceptions and sense of social justice in society.

In other words, Justice Zlinszky was arguing that it was the moral, even if not the legal, requirement of the State to consider what was happening to the least well-off sectors of the society. But, most importantly, Justice Zlinszky, in retreating from his previous constitutional arguments to a moral one, paved the way for the Court to reach a unanimous judgment about the social rights.³⁹ On a subject where

1989 changes had been called *Parliamentarism and Government in a One-Party System*. From this one can see that Sólyom and Kilényi were unlikely allies on these questions.

³⁹ Here, too, it may help to know something about Justice Zlinszky. Justice Zlinszky was not only a justice of the Constitutional Court, but he also served simultaneously as dean of the Pázmány Péter University Law School, Hungary’s only Catholic law school. Justice Zlinszky is a very religious man who often relies on Catholic natural law arguments in his constitutional reasoning. In addition, because he is an academic expert in Roman law, he often brings in Roman legal conceptions to Hungarian constitutional law as well, as we will see with one of the later Bokros package cases where the Court relies on the Roman law conception of *laesio enormis*.

the Court had split 5-4 against upholding social rights on numerous occasions, the Court in this particular set of cases issued its most far reaching social rights decision unanimously.

Turning to consider the sick leave cuts, the Constitutional Court also ruled that they were unconstitutional, and for the same reason. The Bokros package mandated that the government would pay no sick leave for citizens until they had been sick for 25 days in a year. The package created a group of people who were entirely left out of the system for 25 days when they became ill. This group either was unemployed altogether or they worked for a group of employers who had been exempted from the need to pay their employees sick pay under the prior system. As to this group, the Court had something stronger to say on the question of social rights:

(T)he insured [i.e. those covered by the existing health care system] who will become unentitled to sick leave will virtually overnight be completely without any provision for a typical period of sickness widespread in the population. This would weaken their position with respect to social security, which is protected by the Constitution, to such an extent that it might lead to a violation of Article 70E. . . . [T]he introduction of the contested rules with immediate effect constitute such a substantial withdrawal of guarantees with respect to the insured that it weakens their social security to a constitutionally unacceptable extent.

From legal security to social security seems a short move, but in the jurisprudence of the Court, it represented a major change. Here, for the first time, a unanimous Court agreed that a category of beneficiaries protected under the second part of Article 70E -- the sick -- could be guaranteed a specific level of benefits as a matter of social right. Just what the level of guarantee was, the Court did not say. But on a case involving insurance (all citizens pay into the social security system through income taxes), and involving a group specified in Article 70E (the sick), the Court agreed unanimously that there were enforceable social rights.

Court Vice President Tamás Lábady,⁴⁰ a previous opponent of social rights in the Court's earlier cases, wrote the unanimous opinion for the Court in the sick-pay matter:

Employers will have to assume this increased risk [paying for 25 rather than 3 days of sick leave for all of their employees] virtually overnight, without having been able to prepare for it by setting aside the appropriate provisions. Through the immediate taking effect of the contested provisions [of the Economic Stabilization Act], the employers have become incapable of making calculations and setting aside provisions for uncertain future risks . . .

Here, too, legal security required that the state give private employers enough time to adjust to the new conditions. Otherwise, the rapidity of the change itself became a constitutional violation. The Court also ordered this provision nullified immediately on grounds that it violated the principle of legal security.

⁴⁰ Vice President Lábady had been a civil law professor before going onto the Court. He was a close associate of President Sólyom and virtually always voted with him and supported his views. Once President Sólyom had changed his mind in the social rights cases, it seemed clear that Vice President Lábady would follow.

The newspapers were full of discussion of these cases throughout the summer of 1995. Previous political supporters of the Court in the Parliament, like the liberals in the governing coalition, attacked the Court for supporting a bankrupting agenda of social rights. Previous political opponents of the Court in the Parliament, the conservative-nationalist parties, loved what the Court had done.

The general public, however, was not nearly so divided. Five days after the Court's decision, a public opinion poll found that 89% of the public had heard of the decision and that overwhelming majorities (84% of those who had voted for the parties in the government and 90% of those who hadn't) believed that the Court made the right decision in the Bokros cases.⁴¹ That same polls also showed significant distrust of politicians.

The Bokros package was brought to a halt, much to the consternation of the IMF. But the IMF, not willing to urge a government to ignore its own high court decisions,⁴² strategically backed down and settled for a budget-cutting plan that left social spending alone.

By fall 1995, the Court was ready to rule on the rest of the austerity plan. In nine separate decisions, the Court found various parts of the Bokros package unconstitutional. Some of the provisions ruled unconstitutional had nothing to do with social rights, but the most visible ones did. In September 1995, the Court ruled again on the question of sick leave.⁴³ While they had previously considered primarily whether the state could transfer the sick leave payments to private employers so quickly, now they were ready to deal head-on with the question of whether it would be constitutional for the state to transfer such a large portion of sick leave payments to employers at all. After a summer to think about the question, the Court ruled that it would be unconstitutional for the state to get out of the sick leave payment system to this extent. Citing the Roman law principle of "*laesio enormis*" in which a party could be said to breach a contract if the real value of that party's contribution dropped to less than half the bargained-for value, the Court said that here too, the value of the benefit that people could be expected to

⁴¹ Poll results were reported in the *Magyar Hírlap*, 5 July 1995. Interestingly enough, the poll also asked citizens what should be done to raise the money that the Court decision now required. 34% said to tax the rich, 30% said to decrease other state expenditures, and 25% said to decrease the income of politicians.

⁴² At least publicly. Behind the scenes, the judges at the Constitutional Court all got phone calls from the World Bank representatives in Hungary, asking whether their economists might come over and explain economics to them. While some of the judges listened, no one was affected in their views, because the Court continued the unanimous same attack on the Bokros package in the fall, as we shall see. Some of the judges were outraged by these phone calls, seeing in them a deliberate attempt to manipulate the Court. If I am any judge of the conversations that took place in the hallways and over lunch about these ham-handed attempts to change the Court's decisions, it seemed to me that the World Bank's strategy backfired. The Court became even more sure it was right to do what it was doing because it felt that the international financial institutions had no idea what it meant to have a rule of law state.

⁴³ In 455/b/1995/III/2.

get through their social security contributions had dropped to less than half their original value, and this was unconstitutional. Citing Ministry of Health and National Statistical Office figures, the Court ruled:

This state-guarantee [of sick leave benefits] was reduced without limit -- below 50% of the [initially] guaranteed services, and in fact by 75% -- the [provision of the Bokros package] also violates Article 70E of the Constitution, because it dismantles the system itself -- the system providing for the sick who are unable to earn money -- without abolishing or modifying the value of the consideration standing behind it.

In other words, the Court found that people were still required to pay into the social security insurance system at the same old rates, but that services provided in exchange for this payment had been reduced by nearly 75% from what they had previously been. So, here again on a question of a social insurance system covering a named beneficiary group from Article 70E, the Court found a violation of social rights had indeed occurred.

By October, the Court had another round of Bokros package decisions ready, and this time they focused on the substantive basis for the cuts to the system of child supports. Back in June, the Court had said that the government could cut in some way pregnancy and maternity benefits, as well as child care subsidies and child allowances (the system of “*családi pótlék*”) -- but just not as quickly as the government (or the IMF) wanted to. In October, the Court said that it was acceptable for these programs to be means-tested, as long as the government took into account the numbers of family members who needed to be supported on the income that was to be used as a basis for the calculations.⁴⁴ In other words, the means-testing had to be calculated on a basis that took into account the actual number of people who were being supported on a particular level of income.

By the time the Court had finished ruling on the Bokros package, its new conception of social rights was firmly in place. Building on the partial consensus that had been reached in the cases it had considered before 1995, the Court decided unanimously that the various social rights provisions in the Hungarian Constitution meant the following:

1. There is a guaranteed social minimum standard of living implicit in the Hungarian Constitution under Article 17 and Article 70E. All cuts in social programs have to be evaluated to ensure that they provide at least this minimal level of protection for all citizens. While the Court has not yet said exactly what this minimal level is, the Court has said that the government has to calculate the actual wealth that people have in such a way that it does not rely on

⁴⁴ In 455/b/1995/II/3.

irrebutable presumptions. In addition, the government must consider wealth in light of the number of people who must be supported by a particular income.

2. Any social program that has an insurance component -- particularly health care, sick pay and pensions -- must be maintained at a level that cannot fall below half of what had been previously provided by the state. Because a mandatory insurance program requires that people pay into a state-run system, these programs have a property component (what people have already paid in in taxes is their property) and the state is not free to let the benefits that are paid out from such a system fall in an unlimited way. The Roman law principle of *laesio enormis* provides the limit to such drops in the value of benefits.

3. Any social program that is based purely on principles of solidarity -- that is, a social program that gives out benefits to people based on their membership in a community rather than on the basis of payments previous contributed -- is optional for the state (as long as they ensure a social minimum for all). But once such a program is set up, the state may not cut people from the rolls in ways that upset their legitimate expectations and that give them no time to adjust their own personal situation in response. In addition, the state may not administer such programs in a way that violates other constitutional principles, like the anti-discrimination principle in particular.

4. Those groups explicitly listed in the Constitution -- mothers and children, the sick, the old, the unemployed through no fault of their own, etc. -- arguably have stronger constitutional claims than those groups that are not explicitly listed. In particular, a program may single out these groups without violating the anti-discrimination principle with respect to other groups.

From the early days of the Court's statements about how social rights were at best state duties and at worst merely optional, the Court had come a long way toward recognition of a substantial system of social rights.

The IMF, however, was not amused. Still, the IMF, World Bank and other international financial institutions realized that they could not play hardball with the Hungarian Constitutional Court because to do so might undermine rule-of-law values that these international institutions are also supposed to be promoting. The Hungarian budget deficit was given a little more leeway, and the cuts were supposed to come from somewhere else.

The Hungarian Parliament did not respond by changing the constitution, though that was theoretically possible as a way of getting around the Court decisions. The government in power had a

72% majority in the parliament and a one-time two-thirds vote was all that was needed to change the constitution. The government could have, but didn't overrule the court by removing the constitutional provisions on which the Court relied for its most sweeping decisions, Article 70E.⁴⁵ Instead, the government set about trying to comply with both the Court decision and the IMF by finding money from other sources to fill in the budget deficit. The government, as a result of this, speeded up the privatization program, hurrying to put state-owned property on the international market. The income generated through the sale of state assets went to pay off the international loans more quickly than the loan terms required, thus making Hungary independent of the sort of international influence that caused the government in spring 1995 to pass a radical austerity program.

The government also tried to comply with the Court's decisions by changing the social benefits program within the limits that the Court had outlined. The government was ultimately able to phase out the universal coverage of the "solidarity" programs, once they had a workable means-testing program in place to satisfy the Court.⁴⁶ Pregnancy and family benefits are now limited to those who otherwise could not afford to have and raise children. But with respect to the "contract" programs, those that require citizens pay into a fund from which their benefits are to come, reductions have not been allowed to the same degree. Clearly, however, when one looks at the 1990s in Hungary, the policy in place was set at least as much from the Court as from the Parliament and when the two disagreed, the Court clearly won. In the Bokros package cases, the Court sharply reigned in what the Parliament could do and the Parliament complied. In terms of who had the largest and most final say in Hungarian politics through the 1990s, it was clearly the Constitutional Court.

A Democracy Run by a Court

What should we make of this rather extreme case in Hungary, where the Court often struck down legislation, ordered the Parliament to pass laws and generally set the direction of state policy for nearly a

⁴⁵ Actually, though this was theoretically possible, it was made more difficult than it otherwise would have been because the government had agreed with the opposition parties on special parliamentary rules for drafting a new constitution, a process that was just getting underway. The government wanted a new constitution because the 1989 constitution said in its preamble that it was a temporary constitution, to be replaced by a permanent one after the "transition" was over. The government didn't have elaborate plans for changing the text, and certainly leaving social rights out of the text was not really a live option. But in order to get the agreement of the opposition parties to the process of drafting a new constitution, the government parties agreed on a moratorium on constitutional amendments while the constitutional drafting process was going on. Ultimately, the project to create a new constitution failed, but not for reasons having to do with the Bokros package cases.

⁴⁶ Means testing became more possible as the government took steps to keep better records of income and as the gray economy started to shrink. The gray economy started to shrink as new accounting systems made it harder for employers to pay people off the books, as systems of direct deposit of employee pay replaced the old methods of paying in cash, as the banking system stabilized and was able to keep better track of cash flows and as inflation dropped, making people less panicky about having enough money to live on.

decade? If one takes the standard democratic story, then it appears that Hungary was deeply undemocratic, since policy came from a branch with limited electoral accountability and the elected branches were constantly forced to change direction by an aggressive and activist court. Hungary was, in short, a courtocracy. But was it democratic?

I believe it was, though not on the standard democratic story. The standard democratic story presumes standard democratic institutions and a certain set of pre-existing basically guaranteed democratic values, which Hungary didn't have. In particular, I think that the standard democratic story works in places where there is a conception of democracy tied to the outcome of elections because the parties that run actually do intend to do in office what they promised in the campaign and voters are given a meaningful choice at election time. Also, I think that the standard democratic story works in places where constitutions and constitutional ideas are already entrenched. But as I have tried to argue in Hungary, what voters voted for was not what they got – not in any of the elections Hungary has had to date. And the constitution was not automatically followed (at least not as the Court saw it) in parliamentary proceedings. Some of this was because the parties were not themselves sure of what they stood for and so they kept shifting their basic positions as leadership rotated within each party. Some of it too was that no one had had a deep history of operating politics in a democratic state. Several of the parties split over major policy issues and turned into multiple political formations, all of which later failed (or very nearly did so). But some of it was that, in the absence of experience, political parties that had never governed before did not know how to make realistic promises or how to keep legislation within constitutional boundaries. They didn't know what it was like to govern or what pressures they would face once in power. Their lack of experience practically guaranteed that they would fail their constituencies and the constitution once they got into power.

As I said, Hungary had three different governments following three different elections in the 1990s. The Hungarian voters have never reelected a government yet in the post-communist period. Instead, they prefer to give new parties a chance, probably on the theory that some set of political leaders must be able to be responsive to the people who form a plurality to elect them. But these new parties always govern differently from the way they campaigned. Voters, then, go to the Court to force the government to live up to a higher vision of politics. Perhaps if Hungary's various governments actually were responsive to the democratic electorate (or at least substantial fractions of it), the Court's active involvement would not have been so necessary. The same would be true if the governments understood the constitution in the same broad rights-protective way that the Court did.

Hungary deviated in the 1990s from the standard democratic story in other ways. I think that the standard story about how democracies are supposed to function presupposes that the electorate has an

essentially thin conception of democracy, one that has the luxury of assuming that democratic policies are whatever democratically certified political bodies create. But in a place like Hungary, where democracy was an unrealizable ideal until very recently and where a strong vision of human rights was very tied to the ideal of what it meant to be a democracy, such a thin conception wasn't good enough. Hungarians had had quite enough of nominally elected politicians doing whatever they wanted with no concern either for electorates or for basic rights in the communist time. In the post-communist time, Hungarians wanted to be ensured that rights were protected, both to affirmatively ensure that they would not be allowed to fall between the newly opening social cracks (as in the Bokros cases) and to guarantee that they would not fall back into the bad old days, when basic civil liberties could by no means be taken for granted. Whenever the new governments started to look like the communist-era government in the way they treated the citizenry (claiming laws should be applied retroactively, tampering with the media, picking out favorites for special treatment, picking out enemies for deprivations of rights), the Hungarian Constitutional Court sprung into action. It did so precisely because Hungarians wrote petitions in droves when these kinds of things happened. The Court's job was to protect democracy by protecting things that most standard democracies take for granted, except at the margins. In the Bokros cases, the speed with which the cuts would come and lack of consultation with affected groups showed a basic lack of democratically critical concern for those who would be affected. The Court, therefore, made the Parliament stop, and then reconsider.

One way to see the other meaning of democracy – as a set of substantive commitments directed to policy and not just as a set of procedures for getting there – was in daily conversation (not with lawyers, but with others). It was common in the 1990s for Hungarians to say that something was “undemocratic” when it violated basic rights. One example: I worked for some time in the 1990s to help set up a battered women's hotline in Budapest. As part of this activity, the group that I worked with organized a number of training sessions for hotline volunteers. I often heard the comment that a man who beats his wife was being “undemocratic” and it clearly didn't mean that he hadn't allowed her to vote on the matter. Instead, “democracy” was associated with a substantive set of rights to be treated decently and with respect. It was not associated with republicanism or elections. This is the conception of democracy on which I believe that the Constitutional Court was acting also.

The standard conception of democracy also requires that there be some interest-aggregating mechanism outside of political parties that can organize and bring public input to bear on policy-making. But this, also, Hungary did not have. People were too busy attempting to make enough money to live on to volunteer their time to such efforts. Such groups had no history and little money, certainly not enough to convey to a government that had no practice at listening just what various organized and interested publics would want. By contrast, the Constitutional Court's procedures were tailor-made for such a

relatively unorganized population. A single letter (which could be handwritten without special expertise from a lawyer) could start a process of challenging the government – but only after a law had already been passed. Knowing this, petitioners could afford to wait until a law got through the Parliament before they sprung into action. Only then, when the threat was really serious, would they organize to try to stop the new law. Petitioners were not always successful at the Court, however, but they knew that they would be heard, even in their small numbers, with very little effort on their part.

If the Constitutional Court had been doing things that were wildly unpopular, there was a clear solution. The Parliament could overturn the Court either by changing the constitution to alter the passage on which the Court had relied or by reenacting the law at a constitutional level. All that would take would be a one-time two-thirds vote by any sitting Parliament. But though the Court was highly active, declaring laws unconstitutional and ordering the Parliament to pass laws on a particular subject about once per week, the Parliament only overrode a Court decision in this way once. The exception proves the rule. The only parliamentary majority to overturn a court decision was the outgoing communist parliament in the spring of 1990, which overrode one of the first Court decisions requiring absentee ballots to be made available to Hungarians living outside the country for the first contested election. No other Parliament has ever made use of this power to challenge the Court, not even the Bokros package Parliament which had 72% of the seats on the government side.

From this case and many others like it, we can see that the Court acted as a more popularly responsive, democratically thoughtful body than the Parliament did in Hungary. It is not impossible to create a state structure in which a court would both be the most powerful and the most democratic institution in a new democracy. The Hungarians did it.

Coda: Requiem for the Constitutional Court

All of this said, the days when the Court actively plays this role are over. The crisis point started in 1998 with the near-simultaneous retirement of all of the founding judges on the court. The original constitutional draft had provided for an orderly succession of judges (naming five at the start, adding five after the first election and then adding five more after the second election – and allowing the judges to serve nine-year terms, once renewable). But then the Court asked that this be changed so that the number of judges be reduced to 11 overall to make the bench more collegial without it having to split into Senates. The Parliament complied and amended the constitution, which meant that four new judges who would have been named after the second election were simply never appointed. No one raised the succession issue.

Instead, just a few short years later, the succession crisis was upon the Court. President Sólyom had no doubt assumed that he would be renewed without a problem. But the political parties that had

turned against the Court at the time of the Bokros package cases still were running the government and they never forgave him for his decisions in those cases. President Sólyom then did a number of unwise things to try to appeal to them, including making a proposal to extend his term by three years and in exchange making it non-renewable. He proposed this in order to ease the transition to a new set of judges so that the court wouldn't be totally reconstructed all at once. That proposal was considered, dragged out in the Parliament and ultimately dropped as the 1998 election neared.

The new government coalition that took office in 1998 decided also to replace President Sólyom and a number of the other judges, and they had other ideas. The post-1998 government announced that *none* of the original court members would serve second terms – and by this time, with President Sólyom scrambling so hard to stay in office, even his former supporters began to think that letting him go was a good idea. Instead, the government proposed a set of nominees that generated a political consensus since they were primarily highly respected law professors with distinguished reputations (like the first set of judges) and not all apparently of one view. What the MPs who voted on these nominees probably did not know was how close many of the new judges were personally to the Prime Minister. No doubt he had picked them precisely to have a critical number of the new judges in his pocket.

When the new judges were in place later in 1998, it was immediately clear that something had changed. At first, the Court simply stopped issuing decisions. In the first year of the new judges, the Court went from issuing around 300 decisions each year to deciding only a couple of dozen cases, and most of those decisions came down late in the year. Old petitions piled up and then new petitions dropped off as it became apparent to all that the Court had simply stopped doing its job. Finally, the Court came down with two politically important decisions that supported the government in the most obsequious way even while appearing to restrain it.⁴⁷ The old Constitutional Court was dead and as of this writing (Fall 2001) nothing has yet brought it back to life.

The Court had enjoyed immunity from political pressures precisely because the judges served longer than any single government. But the appointments process combined with the unstaggered rotation system made the Court vulnerable. The Court's high levels of political support were dropping because of the efforts of President Sólyom to get his term renewed, and in this vulnerable moment, the government proposed some replacement judges who were perfectly well qualified but who had secret ties to the governing parties.

And what of the Court's democratic mandate? What could the Hungarian public do at this point? The government that did this had just come into office when they put forward the new judicial nominations; it would be four years before they faced the voters, with many intervening issues to erase

⁴⁷ See Kim Lane Scheppelle, *The New Hungarian Constitutional Court*, 8(4) *East European Constitutional Review* 81-87, Fall 1999.

what they had done to the Court. With election in May 2002, we will see whether there is any support for bringing back the Court. But given the electoral mess I have already described, it is absolutely unclear whom one should vote for to once again have a strong Constitutional Court.