Constitutional backsliding in Hungary

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Introduction

The constitutional developments in Hungary since the 2010 elections marked by the adoption of the latest constitution in Europe, have generated numerous reflections and scholarly analyses some welcoming the changes, others supporting some of the changes and rejecting others, and again others fearing for the demise of constitutionalism some 20 years after the 1989 regime change. This article looks specifically at developments which could be characterized as representing a step backwards from the achievements of post-1989 Hungarian constitutionalism by lowering the potential of Hungarian constitutional law to fulfil its basic protective and controlling functions. Its analysis is based on the premise that despite claims made to the contrary, the Hungary emerging after 2010 cannot make do without strong normative constitutional rules duly enforced against the government in an attempt to confine government action through constitutional law. The realities of government have demonstrated that in Hungary abuses of public powers through legislative or administrative action blatantly ignoring constitutional safeguards are hardly excluded and that in the absence of effectively functioning parliamentary controls the enforcement of constitutional safeguards offers virtually the only option for scrutinising government action and holding the government accountable. With this background, the developments in Hungarian constitutional law can be assessed as indicating backsliding from the prevailing constitutional standards.

Following a short overview of the most relevant changes under the newly adopted Fundamental Law affecting the ability of the constitution to fulfil its expected normative role,[1] the article focuses on the performance of the Constitutional Court – the main constitutional organ available for the enforcement of constitutional safeguards – in the review of legislation implementing government economic policy in a period characterized by
grave economic and social difficulties arising, in part, from the global finan-
cial and economic crisis. While the socio-economic circumstances of the
decisions examined were indeed exceptional, the economic constitu-
tion emerging through these decisions allowing nearly unfettered discre-
ction to the government in regulating the economy by lowering the most
fundamental constitutional standards represents, in our view, an unjusti-
fiably regressive development in Hungarian constitutional law. A general
judicial assumption that post-crisis recovery in Hungary requires constitu-
tionally uncontrolled economic regulation seems nearly arbitrary, espe-
cially when the detailed reasoning of the decisions failed to maintain the
link between the new constitutional approach and that particular prem-
ise. So far, the jurisprudence has not explained why meeting the most
fundamental constitutional requirements of economic governance would
hinder effective policy action, whether the rolling back of constitutional
standards would actually be necessitated when addressing local crises in
globalized markets, and why the alternative choice of maintaining and po-
tentially increasing constitutional protection would not have benefited not
only individuals but also government policy by allowing better considered
action.

Constitutional backsliding and the Fundamental Law

After the fall of communism, the new democracies of Central and Eastern
Europe, in order to secure the democratic transformation process, typical-
ly adopted rigid constitutions with a strong legal character and with en-
forceability in courts. In Hungary, this was aided by the consciously
active engagement of the Constitutional Court in developing a culture of
constitutionalism. Its jurisprudence, relying on the core constitutional
norms of human dignity and the rule of law, developed a matrix of consti-
tutional limits and controls for governments executing their policies
through legislation. This period of strong legal constitutionalism in
Hungary seems to have ended in 2010 when the new political and consti-
tutional order of the National System of Cooperation (hereinafter, NSC)
began to take shape. In the NSC, the emphasis was moved from the legal
to the political nature of constitutional rules, and it has clearly been favor-
ing effective over constitutionally confined government. The idea behind
these changes is that Hungary is now a mature democracy where the
former strict formal constitutional constraints on public powers are no
longer needed. This was made apparent in the new 2012 Fundamental
Law in which the previously more robust controlling competences of the
Constitutional Court were reregulated and in which the 2010 suspension
of the review powers of the Constitutional Court on matters of public finances were maintained in the interest of a constitutionally much less confined economic and fiscal governance. The suspension was first introduced into the constitutional text in Act 2010:CXIX. It is now regulated under Article 37(4) of the Fundamental Law. The suspension introduced in Act 2010:CXIX was a political reaction by the government holding supermajority in Parliament to a preceding decision of the Constitutional Court annulling an Act imposing retroactive tax obligations (Decision 184/2010 of the Constitutional Court). See further Sonnevend, Jakab and Csink 2015. These developments should not be assessed automatically as indicators of constitutional regression. A shift from strong constitutional legalism towards a politically more open constitutional order could indeed be justified by the consolidation of democratic politics and the necessity for the judicial protection of constitutional safeguards could, in principle, decrease when robust practices of constitutional government are exercised consistently. The realities of government in post-2010 Hungary, however, seem to contradict this fundamental premise capable of justifying these constitutional changes. The practice of amending the constitutional text – which is supposed to have the character of a fundamental law – for the sole purpose of the government defying the Constitutional Court’s condemnation of government policies is itself a sign that raw political power can be the preferred choice of instrument allowing the government to swipe away opposing or competing considerations. Maintaining the suspension of the review powers of the Constitutional Court, far beyond its alleged economic policy necessity, indicates that government is not particularly interested in restoring normal constitutional operation and is ready to take advantage of fiscal policy being freed from constitutional controls. The state of democratic politics in Hungary does not become any more reassuring when the actual possibilities in the Hungarian Parliament for the scrutiny of government policies and for the holding of government accountable are taken into account. With the rise of private member’s bills even in the most complex policy areas, legislation can be passed without a transparent and accessible process of preparation and without substantial expert control by the administration. Economic regulation scrutinized in the Constitutional Court decisions examined below shows keenness in government for sidestepping basic constitutional guarantees and for ignoring the adverse consequences of its policies for individuals. There are clearly documented practices of excessive or even arbitrary uses of public powers, favouritism in economic regulation, and of direct political interferences with press freedom. With this backdrop, the departure from the arrangements of the 1989 constitutional order, especially that of judicially enforced constitutional control over government, for a new constitutional settlement, where the government in

8 The suspension was first introduced into the constitutional text in Act 2010:CXIX. It is now regulated under Article 37(4) of the Fundamental Law. 
9 The suspension introduced in Act 2010:CXIX was a political reaction by the government holding supermajority in Parliament to a preceding decision of the Constitutional Court annulling an Act imposing retroactive tax obligations (Decision 184/2010 of the Constitutional Court). See further Sonnevend, Jakab and Csink 2015. 
10 See Sólyom 2015 and Sonnevend, Jakab and Csink 2015. 
12 See Smuk 2015. 
14 See, for example, the investigations at Okotárs Alapítvány in charge of the distribution of the EU-Norway Grants (https://www.regjeringen.no/en/aktuelt/raid_eea/id2000182/), the judgment of the EU Court of Justice in Case C-385/12 Hervis ECLI:EU:C:2014:47, the state aid procedure initiated in the case of the Hungarian advertisement tax (SA.39235 (2015/C), or the Freedom House Reports on press freedom (https://freedomhouse.org/report/freedom-press/2015/hungary#VW7-EazarM8g).
Parliament is trusted to a much larger extent with the enforcement of the constitution, emerges as an unfortunate constitutional development. Constitutional backsliding could also be measured against the prevailing European constitutional standards. This has numerous pitfalls. Criticisms can be muted by pointing out that contemporary Hungarian constitutionalism can be different as it represents the legitimate choices of the local political community. For instance, the rebalancing of the rights of individuals with their responsibilities and the stronger emphasis on communitarian as opposed to individualistic values in the Fundamental Law seem to be legitimate components of a constitution adopted by a Parliament controlled by a supermajority of conservative political forces.

Furthermore, individual constitutional provisions, taken out of context, can be defended by indicating that they have counterparts in other national constitutions or even in European constitutional documents, such as the EU Charter of Fundamental Rights. However, the close scrutiny of European bodies of Hungarian constitutional changes, including the amendments of the Fundamental Law, its Transitional Provisions and some of the special cardinal laws enacted under the new constitutional framework, suggests that regression may indeed be established with reference to European standards. In the political arena, the European Parliament was particularly active in scrutinising and condemning, where necessary, the constitutional order emerging in the NSC. The EU Commission initiated two infringement procedures of constitutional relevance. In the resulting judgments, the breach of EU law was found both in the case concerning the compulsory retirement of judges and in the case dealing with the independence of the Data Protection Supervisor.

The Hungarian cases before the European Court of Human Rights, which addressed post-2010 changes concerning the recognition of churches, dismissal from employment without providing the reasons, lifetime imprisonment without a compulsory review, the premature termination of the mandate of the President of the Supreme Court, and a ban on the parliamentary right of expression, all ended with establishing a violation of Convention rights. The Venice Commission kept a consistent line in its opinions of recognising the overall necessity of some of the changes but criticising their actual legal formulation and suggesting the incompatibility of core provisions of new Hungarian constitutional law with European standards. The Fourth Amendment of the Fundamental Law received the sharpest criticisms. It included legal provisions (e.g., on student contracts, the acknowledgement of churches or on the concept of family) which enacted at a lower level had been or would likely have been condemned by the Constitutional Court. Controversially, it excluded the substantial constitutional review of the amendments of the Fundamental Law.
Law and it *repealed* every Constitutional Court decision adopted since 1989 before the entry into force of the Fundamental Law. It risked an open violation of EU law in its regulation of election campaigns and by raising the possibility of introducing special taxation to finance the monetary consequences of court rulings (i.e., of the EU Court of Justice). This latter provision was repealed by the Fifth Amendment following the criticisms of the EU Commission.

**Constitutional backsliding and the economic constitution**

The economic constitution of the Fundamental Law, as it emerged from the jurisprudence of the Constitutional Court, provided a particularly important area of constitutional change in post-crisis Hungary. The NSC’s socio-economic order required novel constitutional arrangements which was marked most visibly by the omission of the constitutional objective of a competitive market economy from the new constitutional text.20 What came in place were constitutional provisions which granted the executive (and Parliament) virtually unrestrained discretion in economic policy matters and weakened further the traditionally not particularly robust constitutional controls of economic policy making.21 These, together with the earlier mentioned weakening of constitutional controls, paved the way for the ‘unorthodox’ – as labelled proudly in political communication – economic policies of the consecutive governments after 2010 bringing increasing state ownership and state economic presence in revenue creating sectors, such as public services and financial services, the special taxation of predominantly foreign owned ‘non-producing’ sectors and with it a higher taxation of foreign investment, and practices of economic favouritism in the form of measures promoting domestic economic operators and nudging, rather directly foreign economic operators to reconsider their medium- and long-term plans in Hungary.22 Predictability and stability in economic regulation was replaced by a rapidly changing and uncertain regulatory environment – which was as much the consequence of poor regulatory quality as of fervent economic lobbying – and transparency in economic policy making and economic regulation was kept as low as possible.23

These developments followed from an ethos of strong executive governance necessitated, in particular, by the pressures of the global financial and economic crisis. Also, most of the measures enacted under the new constitutional framework can be linked – some to a lesser, others to a much larger degree – to valid public policy grounds. These include addressing the economic and social impact of the global financial and economic crisis, restructuring economic sectors vital for the national economy, lowering the exposure of the national economy to uncontrollable

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20 Article M of the Fundamental Law. Contrast with Article 9(1) and (2) of the 1989 Constitution.
21 See Varju 2012
foreign influences, diversifying to the benefit of consumers the supply side of the retail sector or the services economy, and giving effect to domestic social policy objectives. The ideational foundations of Hungarian economic policy seem to have reacted to genuine concerns about the negative impacts of economic globalization and regionalization, the potential devastating consequences of unregulated markets, and about the damages caused by the global financial and economic crisis. Curbing back the market and reconsidering the weight of individualistic rights exercised in the marketplace, such as property and freedom of enterprise, as agendas met social expectations that the state should provide a safety net for individuals in the turbulent period after 2008. With these in mind, the enabling of effective government action in the new economic constitution could be classified as progressive, rather than regressive, developments in post-2010 Hungary.

Nonetheless, ‘street level’ developments in economic and social policy and the grave hiatuses of economic policy making both question whether liberating the government from constitutional constraints is in fact defensible. Measures regulating the economy were enacted without establishing and explaining their rationales, justifying their suitability to deliver the promised outcomes, and without convincing the public that less restrictive and better targeted interventions were not available to the government. The complexities and the internal contradictions of the measures in question were only partially exceptionally revealed, leaving doubts as to whether they were put into practice to achieve the declared policy aim. Furthermore, the ideational foundations supporting the measures of post-2010 Hungarian economic policy were not pursued consistently and uncompromisingly. There was a lack of capacity and determination to discuss and address the socio-economic challenges of the crisis, and doubts remained concerning whether references to the financial and economic crisis were not merely blankets covering up hiatuses and deficiencies in economic regulation and in their constitutional scrutiny and suppressing positions criticising the arbitrariness and inappropriateness of government action. Ultimately, the new economic constitution failed to reassure citizens that the crisis did in fact require the lowering of the constitutional standards of government instead of enhancing the constitutional protection of individuals and augmenting the constitutional controls of measures proposing fundamental economic and social reforms.

The economic constitution which emerged from the jurisprudence of the Constitutional Court under the Fundamental Laws over the summer of 2014 is rather distant from the ideals of an economic constitution. The concept that the economic (and the social) order requires constitutional regulation follows from German ordoliberal thought which was developed

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24. The economic crisis as an argument was first raised in 2009 in Decision 775/B/2009 on the surety provided by the state for home ownership loans. For an overview of the economic crisis related jurisprudence of the Court, see Chronowski and Vincze 2015.


27. See Gado 2013a and Gado 2013b.
in equally turbulent times with the aim of confining the erratic behaviour of contemporary governments.\textsuperscript{28} The purpose of an economic constitution is to provide a binding frame for the economic order desired by the political community and to offer ‘dependable and cogent principles’ for the development and application of the legal measures executing the relevant economic policies.\textsuperscript{29} The idea also entails that the implementation of economic policy must remain constitutional: the rule of law must be observed, abusive government practices must be avoided, the rules adopted must be predictable and certain, and a neutral and objective control must be provided over government decisions.\textsuperscript{30} The rules of the economic constitution should stabilize expectations and they should provide certainty in the sense that their continuance can be trusted and that they identify conduct which will not be allowed.\textsuperscript{31} Considering the earlier mentioned erratic nature and the hiatuses of post-2010 Hungarian economic policy making, these principles should have relevance in the Hungarian context. They allow an assessment of the constitutional treatment of economic regulation under the Fundamental Law, as will be shown below through the practice of the Constitutional Court, which assessment finds the emerging economic constitution lacking in many respect.

The 2014 jurisprudence on the new economic constitution was not without forerunners. In the \textit{District Heat Market Price Regulation} decision,\textsuperscript{32} the Constitutional Court accepted that, among others, the impact of the global financial and economic crisis had necessitated the local reregulation of the public and private law framework available for determining prices in the sector, despite legitimate expectations for the previous framework to remain in place. The more local social, environmental and other policy rationales of the new price framework were, however, not scrutinized under the extremely light touch review exercised by the Constitutional Court. The Court seemed to have accepted without raising any doubts to the contrary that lowering the price through regulation of district heat services – supposedly, in order to keep the cost of living at an acceptable level – was legitimate as a sole policy objective of the regulatory reform. The Court’s approach was made even more problematic when it rejected to examine the claim that the new price framework – the policy rationales of which were neither disclosed, nor explained by the government – would have negative consequences for individuals by forcing out producers from the market without justifying its necessity. Instead of responding to the claim by examining the impact of the reform on the vested rights and expectations of economic operators in the market, the decision – without establishing why – focused on the matter whether entry into the district heating market was made impossible by the new rules. Furthermore, there was no discussion whether the new price framework would

\begin{itemize}
  \item \textsuperscript{28} Gerber 1994, p. 39; Streit and Mussler 1995, p. 5-6.
  \item \textsuperscript{29} Gerber 1994, p. 39.
  \item \textsuperscript{30} Gerber 1994, p. 47-48.
  \item \textsuperscript{31} Streit and Mussler, p. 8-9.
  \item \textsuperscript{32} Decision 3662/2012.
\end{itemize}
pursue covert, possibly arbitrary policy or political rationales (e.g., allowing the legally enhanced entry of a new, Hungarian operator to the market or to an adjacent market). Ultimately, the decision failed to establish how the pressures of the global crisis demanded such regulatory intervention in the local market.

The highly deferential scrutiny by the Constitutional Court was kept in the similarly construed *Slot Machines* decision. There, the Court was convinced that the immediate withdrawal of nearly every licence for slot machines was constitutional on the ground that the state has virtually unlimited discretion in organising and regulating the local market for gambling. While this, in principle, may be unproblematic, the decision should have been more circumspect in reaching this conclusion. It contained no assessment of the consequences of the government practically abolishing a market within an extremely narrow timeframe for individuals with interests and expectations in that market, and there was no discussion whether the declared policy aims of the radical regulatory change — that of addressing the negative individual and social consequences of excessive gambling — had any bearing on the government’s longer term intentions of handing over the gambling market to particular, ‘trusted’ economic operators.

In the first of the 2014 decisions, in the *Sale of Tobacco Products* case, the Constitutional Court made the level of constitutional scrutiny which the reregulation and restructuring of entire markets may receive under the Fundamental Law particularly clear. The decision, which dealt with the rather speedy abolishment of the previous, open tobacco retail market and its replacement with a market available to licenced activity only, found it suitable to examine only the manifest unreasonableness of the measure at issue in light of its general objectives. The application of this low constitutional benchmark enabled the Court to avoid addressing the consequences of regulatory change for an exceptionally large number of mainly small sized economic operators, examining whether the regulatory framework contained transparent and non-discriminatory rules, considering whether the measure in question had any connection with its declared objective of protecting public health, and scrutinizing whether the discretion available in the distribution of licences was appropriately circum-regulated and sufficient safeguards were made available for individuals.

Although the Court was entitled to defer to the policy choice of the government in regulating a lucrative and highly taxed market, for the purpose of controlling arbitrary action that may follow from the application of the measure in question and in order to ensure that the rights and expectations of individuals affected are provided at least with minimal protection it should have followed a more exacting constitutional scrutiny of a
controversial and visibly inadequately regulated overhaul of an entire market.\textsuperscript{36}

The \textit{Cooperative Banking Restructuring} decision\textsuperscript{37} further confirmed that the current Constitutional Court is prepared to trust the judgement of the government in matters of economic policy and regulation. In principle, the decision was committed to establish that sufficient constitutional scrutiny will be provided. However, its benchmarks for the justifiability, rationality and necessity of government intervention were painfully undermining. Declaredly, the Court’s approach was influenced by the social and economic demands of post-crisis economic and fiscal recovery in Hungary. The decision made every effort to establish that the Hungarian social and economic order required through political and legal action protection from the impact and risks of global and regional markets. It argued explicitly that the damages caused by irresponsible post-national economic regulation and governance can only be repaired by national states – acting in their full capacity – regaining control over market forces and securing the public goods threatened by the crisis. The power of these arguments was, however, largely weakened by the refusal of the Court to analyse why these factors required – in the context of assessing the constitutional safeguards available to those affected by the near comprehensive re-regulation of economic sectors – the further lowering of the standards of the constitutional review of economic regulation. The Court was also silent about whether the risks of the post-crisis globalized economic environment had any relevance for the original political decision to restructure the cooperative banking sector in Hungary. It seemed to have assumed that the aim of enabling through legal regulation the entry of a new Hungarian owned banking giant to the Hungarian financial services market populated by both foreign and domestically owned service providers could not have pursued other, publicly less defendable objectives.

From the perspective of the economic constitution emerging under the Fundamental Law, it is particularly troubling that the new impoverished approach of the Court presented in this decision was based on an ambiguous and somewhat resentful reconceptualization of the state in the market. The decision’s simplistic and often mistaken overview of the political economy of the state in the history of capitalism – which was supposed to provide the ideational foundations of the Court’s new approach – reads as a depressing excuse for judicial reasoning. While the Court was entitled to consider the impact of globalized markets on local constitutional rules and societal values, skimming over the extreme examples of economic regimes from ‘stateless free market capitalism’ to ‘authoritarian state economies’ is hardly sufficient to substantiate a fundamental repositioning of the state and government action in the market. The lowering of

\textsuperscript{36} See the condemning judgment of the European Court of Human Rights under Article 1 Protocol I of the same measure in Vékony v Hungary, Judgment of 13 January 2015, App. no. 65681/13, nyr.

\textsuperscript{37} Decision 20/2014.
constitutional safeguards in support of state economic policies will not reassure stakeholders and the public when it follows from discussions arguing that ‘post-crisis developments in economic regulation offer two conclusions: a) European Union and global economic regulation cannot continue to operate on the extreme pole of “laissez faire, laissez passer”, and b) when the economy operates at a transnational level, the effective protection of fundamental rights must be ensured at that level as attempts at protecting them at national level will be insufficient.’ The hiatuses of the ideational foundations of the new economic constitution also raise the possibility that the Court – in this and on other cases – could equally have assessed the threats of globalized markets and supranational economic governance as requiring not only a greater capacity for states under the constitution to defend local socio-economic orders, but also the enhanced protection of individuals by the state – through, for instance, constitutional law – from turbulent developments in society and in the market. Admittedly, the decision touched upon the values of solidarity and the protection of human and social rights, but they never materialized as actual principles governing the constitutional scrutiny of economic regulation. This was a particularly unfortunate development as their recognition and application would have enriched the economic constitution being shaped by the Court. The protection of individuals from market excesses and failure as a constitutional theme would have enabled not only the constitutional confining of government action, but also the supporting of government measures adopted with the purpose of securing economic and social stability in hard economic and social circumstances. Based on this premise, the decision, instead of deferring to government discretion based on a fairly weak ideational foundation for judicial deference, would have been able to provide a more solid foundation for the constitutional acceptability of the measure in question which was supposed to pursue the aim of creating a stable, sustainable and socially responsible cooperative banking sector. This, necessarily, would have entailed a more exacting scrutiny of the government’s actions involving the examination of the actual as opposed to the declared objectives of the measure and the investigation of how the measure actually contributed to protecting individuals in the fiscal and economic crisis.

The socially and politically highly controversial Foreign Currency Consumer Loan decision continued with the newly found deferential approach of the Constitutional Court. The case concerned the government’s most recent and most comprehensive attempt to relieve individuals from the excessive financial burdens their private loans taken out in foreign currency had become after the severe devaluation of the Hungarian currency against the euro and the Swiss franc. In the challenged measure,  

38 Decision 34/2014. See also Decision 2/2015 which confirmed the grounds decided in Decision 34/2014 and rejected further technical legal claims raised by the petitioner Budapest Metropolitan Court relating to the constitutionality of the same legislative measure.
the government – without accepting responsibility for its own policies or the policies of previous governments – placed nearly every burden following from the exchange of foreign currency loans to loans in Hungarian forint on the financial service providers affected and set an exceptionally narrow legal window for the banks to establish in courts that the loans they had provided were in fact lawful. In setting the premises for finding the compatibility of the challenged measure with the principle of legal certainty, the prohibition of retrospective legislation and the right to a fair trial, the Court asserted that the contested legislation needed to be interpreted in light of the commitment of the Fundamental Law to protecting vulnerable individuals, in particular, poor and vulnerable consumers. While this, in principle, is unproblematic, there is no evidence again that the otherwise contentious assessment of the Constitutional Court of the individual grounds would have been influenced by this position.

Concerning the claim that the limited amount of time available between the adoption and the entry into force of the measure breached legal certainty as it did not allow the financial institutions affected to make the necessary preparations, the Court held that timeframe – despite it being ‘unusually short’ – was not unconstitutional. It argued, in particular, that the measure contained nothing novel which would not have been apparent from judicial practice or from other pieces of legislation and that the act – although it introduced considerable negative consequences in law – did not contain provisions which would have required lengthy preparations. Controversially, the Court – deferring to legislative intent – stated that the legal challenges available to the financial institutions affected were intentionally restricted so as to prevent them taking a longer time period to prepare their cases. Regarding the other claim that the measure constituted a retroactive regulation of the conditions of contractual, the Court held that the relevant conditions had formed part of the Hungarian legal system since the implementation of the relevant EU directive long before the introduction of foreign currency loans in the Hungarian market. In its view, the fact that the unfairness of foreign currency loan contracts can only be established with certainty since the much more recent judgment of the EU Court of Justice in Kásler interpreting the said directive and since the corresponding 2/2014 uniformity decision by the Curia, did not challenge this position. More controversially, it argued that the vulnerable position of consumers and the information deficit favouring financial institutions should have been sufficient for the parties concerned, despite the inability of consecutive governments to take a clear position on this matter, to adopt an appropriate interpretation of what the requirement of fairness demanded in foreign currency consumer loan contracts.

The treatment of the claim on the breach of fair trial rights was particularly unsettling from the perspective of the constitutional standards expected to be followed by the Court. Since the core aim of the measure was to establish the legally constructed presumption that all foreign currency consumer loan contracts were unfair and to drive the financial institutions affected to challenge before courts within the narrow timeframe offered this legislative presumption, the reasons of the Court dealing with this constitutional safeguard were highly contentious. Without balancing it against competing considerations, the decision accepted that the special procedural order introduced by Parliament was necessary in light of the interest of the effective administration of the potential disputes. Also, instead of providing a careful analysis of the relevant standards, it ruled summarily and rather confusingly that although the procedure as a whole could be declared as unfair on the basis of the relevant provisions of statutory procedural law, its hiatuses did not reach the threshold of unconstitutional procedural unfairness. Regarding the ability of the financial institutions to prepare their case, the Court ruled that the original bill laid and discussed before Parliament enabled them to draft their submissions and that they should have anticipated (they had ‘every reason to believe’) – following the media reports on the government’s intention to settle the problem of foreign currency consumer loans – that in a matter of such social and economic importance the Hungarian state would enact new legislation. The Court was also prepared to argue that the financial institutions affected must be assumed to have adequate professional legal and financial resources which would enable them to react adequately to new legal circumstances no matter how adverse they may be. With these arguments made, the ruling was not simply overly lenient in enforcing the standards of the right to a fair trial, but it was also rather openly embracing the government’s intention to punish the financial institutions concerned through a disadvantageous legal settlement of foreign currency consumer loans.

The economic constitution of the Fundamental Law, as developed through these rulings, is hardly a welcome development in Hungarian constitutional law. While raising concerns about the failures of the global and European economic order is acceptable just as well as judicial deference to government policy discretion, the Court’s approach is unprincipled and lacks a consistently pursued ideational basis. Its observations were rushed and often mistaken regarding the problems of the prevailing socio-economic order, there were substantial gaps between the general foundations of the approach and its actual implementation in the constitutional scrutiny of the contested measures, and at times the Court seemed overly reluctant to impose controls over defective measures. In
some instances, the approach pursued was dangerously close to suspending constitutionalism while the government is ‘at work’, especially, when the Constitutional Court avoided examining the legitimacy, the rationality and the justifiability of government action and assumed its necessity and suitability without putting it to test. Basic standards of regulatory quality, as they may follow from legal certainty principle, were overlooked and the impact of economic regulation on individuals and the legal remedies available to them received only limited attention. While excessive legal interference with economic policy may be undesirable, giving a blank cheque to government policy making can be just as harmful for both the individuals affected and government policy, which latter is deprived of the possibility of becoming better framed and more appropriately executed through constitutional scrutiny.

Conclusions

Constitutional developments in Hungary since 2010, as analysed in this article, can be characterized as providing an example of constitutional backsliding. The mature democracy in which practices of good governance and good regulation are consistently pursued has not materialized to offer an unchallengeable basis for the constitutional arrangements of the Fundamental Law where the constitution is increasingly political and where the locus of constitutional power has shifted from the Constitutional Court to the government in Parliament. The new economic constitution developed under the Fundamental Law offers clear symptoms of the ailments of the new constitutional order. While the deferential approach of the Constitutional Court to matters of economic policy is justifiable, its disinterest in the negative consequences of economic regulation for individuals, its reluctance to offer constitutional protection to these individuals, and its undemanding examination of the suitability, necessity and proportionality of often rather harsh legislative intervention in the market are unwelcome developments. The case would be different when the new constitutional order could establish a convincing link between the pressures of contemporary socio-economic arrangements and the revived ethos of effective, constitutionally unconstrained government, and between the desired social order of the Fundamental Law based on solidarity and communitarian values and the unmitigated interferences of the government with the rights and expectations of individuals in the market.

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