Constitutional Courts and the Limits of Economic Policy: Reflexions on the Hungarian Experience

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Modern institutional and constitutional economics have contributed significantly to our understanding of how legal and political institutions interact with economic processes; more specifically, how different constitutional arrangements affect – and are affected by — economic development and the regulation of markets. No serious analysis of the process of economic growth is possible without assessing the nature and functioning of institutions and norms framing economic processes.[1] On the other hand, the instrumental (consequentialist) view of law has played a varying but nonetheless significant role both in legal scholarship and legal policy in recent decades. Besides theoretical insights, numerous cross-country studies have provided empirical evidence on the economic effects of various characteristics of legal rules and institutions such as electoral rules, the degree of government centralization, human rights, judicial independence, competition policy, direct democracy, supreme audit and central bank independence.[2]

A crucial insight in this respect is that constitutions contribute to economic growth not only by providing for an institutional infrastructure for investment, production, cooperation, distribution etc. but also by setting limits to the regulatory power of legislative majorities. Arguably this constraint-setting role of the constitution motivated the framers of the Constitution of the United States. Indeed, the early history of the American constitutional

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1 For a particularly useful introduction to economic problems from this perspective see Dasgupta 2007. For a more formal overview see Acemoglu, Johnson and Robinson 2005.

2 See e.g. La Porta et al. 1998; Persson and Tabellini 2003 (for discussion and critique see Acemoglu 2005; Blankart and Koester 2006; Alesina, Persson and Tabellini 2006; Blankart and Koester 2007); Blume and Voigt 2005; Tabellini 2005.

doctrine shows that the Constitution originally intended to limit the confiscatory and regulatory powers of temporary majorities and the restraints it imposed were enforced until the early 20th century. In the post-Lochner era, however, these constitutional restraints on economic regulation have become extremely weak. Especially from 1937 on, the Supreme Court has been deferent to Congress with respect to economic policy as long as fundamental rights are not concerned, even when legislation is clearly motivated by special interests.[3] In Europe, despite some influence of the ordo-liberal theory (which can be seen not only in post-war Germany but in the formation and early development of the European Communities as well), this limiting role of the constitution on economic policy has remained marginal as an idea and had little influence on the legal system.[4]

To summarize many complex processes in a dangerously short way: the last century witnessed in the Western world (1) the rise of the regulatory and administrative state; (2) the juridisation of welfare claims as social and economic rights both in national constitutions and international human rights documents; (3) later, due to demographic changes, increased mobility and a couple of further challenges, the crisis of the welfare state and the decline of the nation-state as the ultimate regulator of the economy.

After the fall of Soviet-type socialism in Central and Eastern Europe, the 1990s have confronted the transition countries with essentially similar political, legal and economic challenges as the West had experienced during the previous half century or so – with the

[3] See e.g. Rapaczynski 2004: 214: "The US Constitution was originally one of the few constitutions that contained a number of provisions attempting to control the economic powers of democratic majorities. But most of them had fallen by the wayside by the middle of the 20th century. [...] The main problem with these efforts at constitutional protection of the market ordering of economic relations was the difficulty of legitimating judicial control over the economic policy decisions made by the elected branches of government. The judicial determination whether a particular piece of legislation is in the public interest or the result of political favoritism is explosive." The result has been the repudiation of judicial control of economic issues on the one hand, the growth of the budget and the expansion of the welfare state on the other. On the different constitutional treatment of economic and other rights in the US see Macey 1992. While infractions of noneconomic liberties are given rigorous scrutiny by the Supreme Court, there is virtually no protection accorded to economic liberties. Macey argues that the Court's refusal to respect economic liberties and its staunch protection of noneconomic rights pushes human activity away of the realm of the market and into the political sphere; it thus increases the demands of interest groups for legislative wealth transfer from Congress. For a different view on the American experience and how it can provide an example or benchmark for the post-communist transition, see Bruszt 2002. In his view, the US fulfills three important state functions, which remain severely undersupplied in some of the transition countries. These are the creation of secure expectations especially with respect to private property, the capacity of the legislation not to give in to rent-seeking demands of powerful private interest groups, and its capacity to deal with the competing interests of various groups in a balanced manner.

[4] See Gerber 1994. In ordo-liberal thought, the term "economic constitution" is understood in a functional sense, as a coherent set of legal rules which are conducive to a market-oriented economic system

difference that in the East this happened in an unexpected, accelerated and turbulent way. To be sure, the process of establishing a market economy in a constitutional democracy has been a unique experience, with a different path for each transition country.[5]

This paper focuses on the role of the Constitution and its interpretation by the newly established Constitutional Court in Hungary's transition towards a market economy from 1989 to the present. Through interpretation (implicit constitutional changes) the Constitutional Court constrains effectively the government's power over monetary and fiscal policy, economic and social regulation, taxation and redistribution. Consequently, the institutional framework of the Hungarian economy bears the mark of the Constitutional Court's decisions in crucial aspects and it continues to be shaped by Court rulings. In the following I give a selective and critical overview of the constitutional framework of the economy in Hungary.

First, I discuss economically relevant elements of the constitution, including the protection of property rights; freedom of contract and enterprise; social and welfare rights; and the power to tax, as interpreted by the Constitutional Court. Then I move to some general considerations on the economic consequences of Constitutional adjudication. As we shall see, the Hungarian experience raises more general questions as well, *inter alia* about the interrelations of law and economics and the role of economic reasoning in judicial review.

Legal-economic transition in Hungary

Hungary was a forerunner in adopting pro-market legislation from the mid-80s. The introduction of a two-tier banking system, a new tax system including sales and personal income taxes, liberalisation of foreign investment, adoption of the Companies Act and the Transformation Act (providing a legal framework for state-owned enterprises to convert into new forms of business), as well as the first reopening of the stock exchange in post-war Eastern Europe has all happened in the last years of the so-called reform-socialist regime.[6] Similar to other transition countries, in the last two decades, thoroughgoing economic and

[5] It is also questionable (and has been indeed widely discussed in the transitology literature) whether and to what extent these different paths meet or should meet (see e.g. Stark and Bruszt 2001). For the CEE countries that have become members of the European Union, both questions have been answered to the affirmative, at least as far as economic issues are concerned.

[6] For an overview of the beginnings of the economic transformation see Kornai 1990.

social reforms have been introduced in at least four areas: (1) privatization, de-nationalization, termination of most state monopolies; (2) introduction of new forms of business and their regulation: banking, insurance, insolvency, securities, tax law; (3) unleashing of market forces, deregulation, convertibility of the national currency, accompanied by serious austerity measures; (4) provision of a "safety net", social welfare legislation, measures against unemployment.

According to a late 2005 assessment by the EBRD, Hungary has achieved and maintained the highest economic transition rating among the 27 transition countries analyzed.[7] As to the "extensiveness" and "effectiveness" of commercial and business law, the EBRD has found, however, that "improvements are still needed in some areas crucial to the business environment and to foreign investment, in particular in the field of insolvency and concessions."[8]

Economic issues in the Hungarian Constitution

The 1949 socialist Constitution had economic provisions of two different kinds: some articles provided dogmatic support for the planned economy and the economic policies of the centralized state; others provided a constitutional basis for ambitious social welfare provisions. (It should be noted, however, that while the socialist state promised a sort of cradle-to-grave support, welfare claims were not judicially enforceable rights.) From a normative constitutional perspective, what should have happened to these provisions in an ideal setting? For the development of an open market economy, the former should have been deleted and replaced by some basic rules for a market economy. As to the latter, these should have been changed and adapted in accordance with a new "social compact" reached by the constitution makers representing the various democratic forces in society.

Although the constitutional underpinning of a planned economy were abolished indeed and the entire constitution has been rewritten, the roundtable negotiations in 1989 concentrated on political issues: the establishment of the rule of law, fundamental rights and the design of a democratic constitutional state. The extensive modifications of the

[7] EBRD 2005: 3.
[8] EBRD 2005: 1.

Constitution have been enacted by the last communist Parliament in October 1989.[9] The unsystematic and provisional nature of the current Constitution is the result of these "birth circumstances."

Economic issues were considered secondary compared to political ones during the roundtable negotiations. Many economic issues were already decided prior to the negotiations on a sub-constitutional level. There was no serious attempt to reach a consensus on socio-economic issues before the free elections. Also, the negotiations were dominated by lawyers; economic experts were virtually absent from the negotiations.[10] In consequence, the Hungarian Constitution does not have a separate chapter on economic rights or any detailed provisions on economic policy or even state finance. Still, it contains several unclear and sometimes inconsistent provisions on economic and economically relevant matters.[11]

Due to its wide ranging competences, the ambitious judges of its first term (1990-1999) and a few other circumstances, it has become the task of the Constitutional Court (henceforth, HCC or CC) to interpret these provisions.[12]

In the next four sections, I analyze how the respective economically relevant provisions of the Constitution have been interpreted by the HCC. In each section, I quote the relevant constitutional provisions at the beginning.[13] I will not provide a comprehensive analysis of the constitutional jurisprudence interpreting each provision, rather present the

[9] Formally, the Republic of Hungary still has the 1949 Constitution - with a completely new content. Since 1989 the Preamble refers to the provisional (transitional) nature of the Constitution. The Preamble reads as follows: "In order to facilitate a peaceful political transition to a constitutional state, establish a multi-party system, parliamentary democracy and a social market economy, the Parliament of the Republic of Hungary hereby establishes the following text as the Constitution of the Republic of Hungary, until the country's new Constitution is adopted." From time to time the issue of the need for a new constitution is raised. However, in view of the current political setting the adoption of a new constitution is improbable and the interim modifications as well as the doctrinal work of the Constitutional Court make it less necessary.

[10] Vörös 2002: 205-6.

[11] Gadó 1992, Vörös 1993, Halmai 1996, Vörös 2002, Drinóczi 2005.

[12] On the HCC in general, see Sólyom 1994, Sajó 1995, Babus 1999, Sólyom-Brunner 2000, Sólyom 2000, Dupré 2003.The de iure independence of the HCC is high, compared to other institutions of the state but it is relatively low when seen in a comparison with other constitutional courts, even with the Courts in other CEE countries. This is mainly due to the procedure of nomination and the possibility of the reelection of the judges. But constitutional courts are in general more political than normal judiciary, both at the nomination and that they serve for a given period of time (9 years in Hungary) and are not life-tenured, except for the US. That the service period is renewable in Hungary is also quite exceptional, and even more problematic than life-tenure because it forces judges to be or look loyal. Although in the first period from 1990 to 1999, no judge was reelected, in 2006 one judge has been reelected in the court. The de facto independence is more difficult to measure but generally, the HCC is considered independent from the current majority. See Salzberger – Voigt 2002, Gavison 2002: 24, n. 49.

[13] The English translation is from the webpage of the HCC, http://www.mkab.hu/en/enpage5.htm

main tendencies and give some illustration.

Property right

Article 13. (1) The Republic of Hungary guarantees the right to property. (2) Expropriation shall only be permitted in exceptional cases, when such action is in the public interest, and only in such cases and in the manner stipulated by law, with provision of full, unconditional and immediate compensation.

Philosophers and lawyers have argued for the protection of property rights in several ways. Some regard property as a realization of the personality, others as a guarantee of political freedom and a bastion against tyranny, still others as a precondition of the market economy based on entrepreneurial activity, limiting state interference with the private ordering of economic life. Economic rights are the core of some of the most important and fundamental disputes on Western moral and political theory. Any system of economic rights will have deep implications for the liberty, self-expression, and privacy of those who live under it. Nevertheless, the current legal discussion on economic rights goes in utilitarian or efficiency terms, while other basic liberties are considered more closely linked to individual dignity and autonomy.[14]

The HCC has played a key role in the decision between reprivatization and commercial privatization by declaring the latter constitutionally allowed and the former not constitutionally required. According to the first President of the HCC, "this was as decisive for the character of the whole transition as was the concept of legal continuity".[15]

Although Art. 13 is technically not a specially protected constitutional right, the court extended the status of fundamental rights to property. This implied that property right also has an "inviolable essence" or essential content which can be restricted only under exceptional circumstances. In the first few years, property right was understood in the civil (private) law sense, with its components possession, use and disposability. The unusually strong protection of property against taking has been interpreted in accordance with the Strasbourg standards, even before Hungary incorporated the European Convention on

[14] According to Jonathan Macey (1992), this is a false and harmful dichotomy.
[15] Sólyom-Brunner 2000: 26.

Human Rights and Fundamental Freedoms.[16]

In the Decision 64/1993 on local government apartments, the HCC has interpreted the protection of private property again, in a somewhat new way. The decision has two important aspects. First, it went beyond the civil law notion of property right and extended property protection to rights and entitlements of economic value. Second, the HCC made clear that the protection of property is not absolute. Restrictions on property are constitutionally allowed in the public interest, in certain cases even without compensation. Property as a constitutional right is protected by the "guarantee of value" or to put it in a different terminology, ownership is protected against public regulation by liability rule and not by property rule.[17] For public purpose, property can be taken when full compensation is payed. And the CC "requires no stricter 'necessity' than public interest, which the Court will not review except in borderline cases such as those in which invoking the public interest is obviously unfounded".[18]

Referring back to the philosophical justifications of property, the HCC took the position that "property is afforded constitutional protection in its capacity as the traditional means of securing an economic basis for the autonomy of individual action".[19] As the Court argued, with social changes, this autonomy-related function has been fulfilled by other entitlements and assets. Consequently, property-like protection has to be extended to these entitlements as well. This functional notion of property made it possible for the Court, to construe as diverse things as the limitation of social security benefits in an austerity package (Decision 43/1995) and the exclusion of building technicians from the Chamber of Architects equally as violations of property rights (Decision 35/1994). The difference has been that the former was judged to be unconstitutional, the latter, however, was accepted as a restriction in the public interest.

The constitutional notion of property right has been thus extended, but its protection become relativized: "socially motivated restrictions imposed on property made constitutionally permissible a far-reaching restriction on the autonomy of the property-owner".[20]

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16 Sajó 1995: 259-260.
17 For the terminology see Calabresi-Melamed 1972.
18 Sólyom-Brunner 2000: 28.
19 Ibid.
20 Ibid.

Market economy, freedom of competition, right to enterprise

Article 9. (1) The economy of Hungary is a market economy, in which public and private property shall receive equal consideration and protection under the law.
(2) The Republic of Hungary recognizes and supports the right to enterprise and the freedom of competition in the economy.
Article 70/B. (1) In the Republic of Hungary everyone has the right to work and to freely choose his job and profession.

In the early 1990s, a large number of petitions were made to the Court arguing that a market economy is incompatible with all state intervention. In response, the HCC made clear that not state encroachment can also exist in a market economy, although the decisions reflected the Court's view that these interventions are only temporary, i.e. justifyied by their purpose of building a market economy: once the market economy is finally established, the interventions are not more constitutionally justified. This rather naïve view has changed, however, as years passed by

In the Decision 21/1994 on the licensing of taxis, the HCC has interpreted the constitutional meaning of a market economy. The Court argued that "the Constitution does not provide for any specific substantive model of the market economy, [...] neither the degree nor the intensity of state intervention can be inferred from it." The Court would only intervene in extreme cases like a large-scale nationalization, otherwise it does not replace the lawmaker's notion of the optimal degree of regulation by its own notion.[21]

Neither the market economy nor the freedom of economic competition are protected as fundamental rights, they are state goals. In contrast, the right to enterprise (Art 9(2)) is a true constitutional right. It is considered as a special case of the right to work (Art. 70/B (1)). At the same time, the socialist notion of the right to work has been abandoned: nobody has the right to have a particular job or a workplace. Neither was the obligatory membership in the chamber of commerce considered an encroachment upon Art. 9.

Social and economic rights

Article 16. The Republic of Hungary shall make special efforts to ensure a secure standard of living,

[21] Decision 21/1994, see Sólyom-Brunner 2000: 27, 292-297

instruction and education for the young, and shall protect the interests of the young.
Article 17. The Republic of Hungary shall provide support for those in need through a wide range of social measures.
Article 18. The Republic of Hungary recognizes and shall implement the individual's right to a healthy environment.
Article 54. (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.
Article 66. (1) The Republic of Hungary shall ensure the equality of men and women in all civil, political, economic, social and cultural rights.

(2) In the Republic of Hungary mothers shall receive support and protection before and after the birth of the child, in accordance with separate regulations.

(3) Separate regulations shall ensure the protection of women and youth in the workplace.

Article 67. (1) In the Republic of Hungary all children have the right to receive the protection and care of their family, and of the State and society, which is necessary for their satisfactory physical, mental and moral development.
(3) Separate regulations shall establish the responsibilities of the State with regard to the situation and protection of the family and youth.
Article 70/B. (2) Everyone has the right to equal compensation for equal work, without any discrimination whatsoever.

(3) All persons who work have the right to an income that corresponds to the amount and quality of work they carry out.

(4) Everyone has the right to leisure time, to free time and to regular paid vacation.

Article 70/D. (1) Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health.
(2) The Republic of Hungary shall implement this right through institutions of labor safety and health care, through the organization of medical care and the opportunities for regular physical activity, as well as through the protection of the urban and natural environment.
Article 70/E. (1) Citizens of the Republic of Hungary have the right to social security; they are entitled to the support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own.
(2) The Republic of Hungary shall implement the right to social support through the social security system and the system of social institutions.
Article 70/F. (1) The Republic of Hungary guarantees the right of education to its citizens.
(2) The Republic of Hungary shall implement this right through the dissemination and general access to culture, free compulsory primary schooling, through secondary and higher education available to all persons on the basis of their ability, and furthermore through financial support for students.

Like many other constitutions in Central and Eastern Europe, the Hungarian Constitution mandates the protection of a wide range social and economic rights. As mentioned above, socialist constitutions reflected the ideology of cradle-to-grave support by the state. Maybe the roots of paternalism and reliance on the government go even deeper. In this region, private charity and social solidarity are weak, a considerable part of the national income escapes taxation. Together with the increase(d visibility) of poverty, these factors make a constitutionally required and centrally provided safety net both humane and necessary for political stability. Consequently, the extent of social rights and redistribution can not be designed freely. Still, "the task of the social state can be normatively determined in very different ways ranging from the Zorro model (the state as defender of the poor) to the Caterpillar model (creating a level playing field of equal opportunity)."[22]

In the early 1990's the constitutional protection of positive rights (social and economic rights) in the new Central and Eastern European democracies has been the subject of some academic controversy. For instance, the American law professor Cass Sunstein argued against positive rights, criticizing Eastern European constitutions for containing a rich array of welfare entitlements and failing to make distinctions between the public and the private spheres.[23]

One goal of the transition has been to undo the culture of dependency, a sense of entitlement to unconditional state protection. Positive rights work against the need to diminish the sense of entitlement to state protection and to encourage individual initiative and self-reliance. Also, positive rights establish governmental interference with markets as a constitutional duty – but this is not an argument against the constitutionalization of these rights but their granting in any form.

There were several points of disagreement in the discussion.[24] First, are positive rights judicially enforceable? Some (equal pay, minimum wage, non discrimination, right to strike) are enforceable as individual rights. Others (health care, education, social security) need government programs, and the reallocation of budget but once they are in place, their administration is already enforceable. Another heavily debated issue has been whether the non-enforceability or non-enforcement of (certain) positive rights has a detrimental effect on

[22] Wagener 2002: 39.
[23] Sunstein 1992, 1993.
[24] Schwartz 1992.

the negative rights.

In criticizing the extension of constitutional rights in transition countries, Richard Posner even went further than Sunstein.[25] Referring to the costs of enforcing rights, Posner argued that priority should be given to the protection of property right and basic political rights. For positive rights but even with respect to negative rights, a cost-benefit analysis suggests less protection is desirable then in Western states. Thus, for instance, in his view in a poor society it is a bad strategy to attach much importance to such rights as the right against police brutality in pretrial detention, protection from custodial abuse in public psychiatric hospitals and the provision of competent defense attorneys to indigent criminal defendants.[26]

Both relevant and inconclusive, this discussion has been largely theoretical and speculative. It raised such abstract questions as: Is there a place for "aspirations" in the constitution? Is the constitution merely a legal or also a social, political and moral document? Arguably, there is a difference between what a good constitution (as a legal document) should guarantee and what a decent society should secure to its members. Also, in the academic discussion several empirical claims were made without providing systematic evidence.

Nonetheless, without referring to them, transition countries largely followed the academic suggestions and proved responsible in interpreting social and economic rights. They have found legal techniques to bring aspirations in balance with the opportunities. Even if such things as the right to a healthy environment are not attainable completely, such a provision imposes political and legal obligation on the state to take steps. The Hungarian CC has construed a special nature to this right, different both from subjective rights and state goals. It decided that the level of protection of the environment can not be reduced: the state has a duty to maintain the status quo with respect to protecting nature.[27] This duty, however can be also overridden if "this is unavoidable in order to enforce any other fundamental right or constitutional value".[28]

Poland provides another good example how this very controversial theme was handled on the constitutional level. The 1953 constitution contained a vast catalog of social

[25] Posner 1995.
[26] To make justice to Posner's claims is beyond the scope of this paper. For a fairness-based critique see Kis 1995.
[27] Sólyom-Brunner 2000:24-25.
[28] Decision 28/1994 AB. See Sólyom-Brunner 2000: 25.

and economic rights with no enforcement measures. Nevertheless, people in Poland took these rights for granted. In the new constitution, there is a clear division of social rights into two categories. Judicially enforceable are only five rights: education, safe working place, minimum health care, freedom of choosing a job, social security for those who need it for reasons beyond their control. The other rights are not individually justiciable: they are "economic, social and cultural tasks of public authorities". In Hungary, the issue remained to be solved by the Constitutional Court.

As the drafters of the new Constitution did not make a clearly compelling choice, the Constitutional Court had to answer the question, how extensive the constitutional protection of social rights should be; how large is the discretion of the legislature to change the status quo. As to the extent and enforceability (justiciability) of social rights, the Constitution is unclear as well. The HCC faced the most sensitive issues in interpreting the positive rights provisions of the Constitutions – these are among its most controversial decisions.

One can observe two contradictory tendencies in the adjudication: as to the basic social rights provided in the Constitution, the Court exerted self-restraint. On the other hand, with regard to the current social security services granted by ordinary legislation, the Court provides an effective protection through classical basic rights and constitutional principles. Thus the CC protects the reliance on law and legal certainty and not a certain level of social protection which could be deduced from the Constitution and enforceable.

More precisely, the Court ruled that right to social security only guarantees the minimum livelihood necessary for human life, and this also mainly based on the right to life and human dignity (Art 54 (1)). The content of the right to social security is the institutional requirement that the State should establish and maintain a social security system but the extent of its provisions are left to the discretion of the legislation. It is important to note as well, that the irreversibility requirement has not been introduced here, in contrast to the "right to a healthy environment" (Art. 70/D (2)).

For instance, the support of the youth and those in need are only general goal for the state (Art 16 and 17 are in the chapter on general provisions) – they do not provide justiciable rights. There is no obligation on the legislation with regard to specific institutions etc.

Similarly, non-justiciability applies to the social rights in the chapter on fundamental rights – these only make the legislator obliged to establish certain types of social protection.

Even though formulated as subjective rights, they are not enforceable against the state. This applies to the right to health, social security, education (Art. 70/D-E-F). More precisely, as ruled in Decision 54/1996, the protection shall be in accordance with the economic situation and opportunities of the state. What is considered possible is not a function of the state of art in medical practice but depends on economic and organizational factors.

The constitutional provisions do oblige the legislation but only to establish and maintain an institutional framework: these institutional guarantees leave a large discretion to the legislation. Still, individuals are entitled to all the services that are granted by ordinary legislation. Parliament can change and reduce the scope and level of these provisions, but the Government has to provide the services granted in ordinary legislation as long as this is in force.

There is only one substantive enforceable subjective right, the right to a minimum subsistence. The basis of this right, however is not clear – not simply social protection but human dignity too. The sum of social provisions should guarantee this subsistence, the level of which is also relative, ie. changing with time and place.[29]

The HCC faced a somewhat different problem when the modifications (curtailing) of welfare benefits has become a serious political issue. An austerity package has been passed in June 1995 which gave rise to several petitions and shortly afterwards a number of unprecedentedly quick CC decisions. The 43/1995 Decision[30] has been the flagship of a series of cases dealing with the austerity package.

Although both budget and balance-of-payment deficit were dramatically high, the HCC rejected the Government's reasoning that an "economic emergency situation" would justify the lifting of constitutional guarantees. Although there is no subjective right to social security based on Art. 70/E, there are constitutional principles that function in a way similar to subjective rights – these principles apply to the reduction or abolishment of social rights. In these highly controversial decisions,[31] the Court worked out a method of judging the constitutionality of cutting off social benefits, based on three principles: the protection of

[29] The German and Swiss constitutional jurisprudence is similar. In Germany, the state has to provide the minimal conditions of human life, in case of necessity through social provisions. A consequence of this is that the subsistence minimum wage cannot be taxed. For references see Sonnenvend 2000.

[30] See Sólyom – Brunner 2000: 322-332.

[31] Sólyom-Brunner 2000: 37, ... For commentaries see Sonnenvend 1996, 1998, 2000, Küpper 1996, Sólyom 1998, Dupré 2003: 146-147.

duly acquired rights, reliance interest and legal certainty. In addition, as mentioned above, the HCC extended property-like protection to social insurance claims which were based on individual contribution. Thus rights based on previous material provisions by the individual concerned – pension, some of the social security services – enjoy property-like protection. When the individuals concerned by the restrictions had made existentially important decisions in reliance on the statutory provisions, their aquired rights or expectations are protected through the principle of legal certainty, which the HCC derives from Art. 2(1), the provision declaring Hungary a rule of law state. To be sure, this protection is not unlimited. The longer the time period of the social provision, the more the recipient should expect changes in its amount or conditionality or availability. The shorter the lifespan of the allowance and the larger its importance for the recipients, the more it is protected. In general, the HCC has made it difficult for the lawmaker to change the status quo in the short run, i.e. without allowing for an adequate time of preparation.

One of the most fervent critiques of these decisions has been formulated by Hungarian constitutional law professor András Sajó. He put the critique in a formula: "welfare rights + constitutional court = state socialism redivivus".[32] If we look at this (and his arguments behind) today, as a prediction this has proved unwarranted, as an evaluation it was somewhat unjustified. Still, Sajó was not alone to warn that the rule of law may have perverse effects in a poorly designed separation of powers system and that there is a tension between constitutional rights protection and economic modernization. Constitutional social-right provisions may help to perpetuate the inherited status quo, including state socialist institutional and organizational arrangements. The dilemma, as mentioned above, is that the constitutionalisation of welfare rights in relatively poor countries either leads to stagnation, eventually to economic collapse or if the rights are not enforced, the credibility of the constitution is undermined. In the last decade or so, there has been massive resistance against the reform of the health care and pension system not only in Hungary but in many European countries too. Recently in Hungary, changes in the higher education system as well as the 2006 austerity package have been subject to Constitutional review as well.

The legal certainty-based test has been used to adjudicating the constitutionality of other legal changes as well, unrelated to social or welfare rights. The tax reliefs to foreign

[32] Sajó 1996: 31. The paper has been republished as Sajó 1999, where a footnote referred to later changes.

companies investing in underdeveloped regions, which has raised harmonization issues during the accession to the EU, has been also subject to reliance interest and legal certainty test.[33] This leads us to the constitutional limits of one of the most basic empowerments of the state: taxation.

The power to tax (the obligation to contribute to public revenues)

Article 70/I. All natural persons, legal persons and unincorporated organizations have the obligation to contribute to public revenues on the basis of their income and wealth.

The Hungarian Constitution sets, in principle no substantive limits to economic policy. As already mentioned, during the 1990's the Constitutional Court was deferent to the legislator, especially with regard to taxation: the choice of the tax base, the tax rate and the taxing technique, as long as it does not amount to confiscation or extremely burdensome.

There are some limits on the power to tax, based on equal treatment (the prohibition of discrimination, Art. 70/A) or, as mentioned, legal certainty (time to adaptation). Tax should be imposed by an Act of Parliament. All these rules left a large range of discretion for the legislation.[34]

Recently, however, the Court has worked out various doctrines limiting the government's power to tax in a detailed manner. In a February 2007 ruling, the CC annulled an amendment to the Corporate Taxation Act. The Court argued that corporate tax and dividend tax are to be regulated by the legislator in accordance with a constitutional standard. The elements of this (newly introduced) standard are fourfold: (1) taxes (public dues) shall correspond to the income and wealth of taxpayers; (2) there shall be a direct relationship between the tax and the taxable income or wealth; (3) only the income or wealth actually acquired by taxpayers may be taxed; (4) the tax shall be proportionate to the tax-paying capacity of taxpayers.

The occasion for this ruling was the minimum corporate tax introduced in order to curb tax evasion and bring more corporations into compliance. Under the tax, which went into effect 1 January, a minimum corporate tax base equal to 2% of all revenue, reduced by

[33] See e.g. Sólyom – Nagy 2002.

[34] On the HCC jurisprudence on fiscal law see Tersztyánszkyné 2006. On the political economy of fiscal law in Hungary see Bönker 2006.

the cost of goods sold and income from foreign permanent establishments, applied to companies with an existing corporate tax base less than 2%. Tax rate was 16%. A number of companies had applied to the Constitutional Court to have the tax ruled unconstitutional, claiming that the minimum tax, which applied even to loss-making companies, was not proportionate with income. The HCC ruled that the corporate tax on "expected" income fails to meet this constitutional standard. By imposing a tax liability on income (profit) not actually acquired but only presumed, it is not directly related to the taxpayers' income.

In this specific case, the Constitutional Court has established the unconstitutionality of a particular way of economic regulation which was motivated both by the still low level of tax morale and the high level of budget deficit. The Court, however, has not addressed the economic rationale behind the regulation – it has rather set a rigid general standard which limits taxation power in a problematic way. But as the two dissents make it clear, the majority of the Court has interpreted "income" in an unduly restrictive way (as net income, i.e. revenue minus expenses). The majority decision itself noted that its judgment is not prejudicial on the constitutionality of a newly intruduced kind of tax, based purely on revenue. As the CC has already found revenue as a tax base constitutional in a local tax case and in view of the fact that several kinds of taxes are not income taxes in the technical sense, the decisions seem to be unnecessarily formalistic in classifying the new tax base incompaltible with an income tax. Interestingly, this formalistic approach makes it necessary for courts to deal with substantive economic issues, despite their limited expertise.

Economic reasoning and consequentialism – in the decision, in the commentaries, neither or both?

Shortly after the above mentioned Decision was published, calculations were made for the increase in budget deficit due to the abolishment of the minimum tax: HUF 55 billion. Usually, however, the HCC accounts for the often significant macro-economic effects of its rulings in an unsystematic and improvisatory manner. While it is less clear that the Court should become more responsive to direct economic arguments or not, the intended and unintended economic consequences of the decisions should be assessed in light of economic theory and other social sciences in public commentary. To the extent possible, these effects

should be quantified as well.[35]

The decisions of the Hungarian Constitutional Court do not follow any single well-established line of economic policy or principle. The Court explicitly refuses to take over such pragmatic decisions from the legislative and the executive. When judging about abstract conflicts between fundamental rights or rights and constitutional principles, on the doctrinal level there is an ambivalence between right-based and consequentialist arguments. The court sometimes takes the economic consequences into account in various ways: in "reasonability" tests, in exceptional cases when referring to the economic capacity of the state, etc. In the constitutional law literature it is disputed whether this cost-benefit analysis should be more explicit and more systematic or not. There are good reasons that Court should not take over substantive policy decisions but rather set objective, principled limits to the government's (viz. the majority's) power. These principles, however, cannot be completely non-consequentialist, at least when they lead to absurd or otherwise highly undesirable results. ("The constitution is not a suicide pact.") On the other hand, the actual decisions show that the judges do take economic and other effects of their decisions into account within these extreme limits too. This not only raises the question of expertise but that of accountability as well. In a constitutional democracy, even the Constitutional Court should be controlled (checked and balanced) in some way. As for systemic reasons the final word on the reasonableness of the individual decisions should better not be taken away from the court, accountability has to be guaranteed in more indirect ways. The most important of these is through the open public discussion about pending and decided constitutional cases on various academic and non-academic forums. This provides a feedback to the Court which, on its own part is obliged to provide (consistent) arguments for its decisions. The public deliberations, of course, are dominated by vested interests and partisan analyses of the consequences. Serious academic commentaries are also published but they are often merely doctrinal (analyzing the consistency of the body of decisions). In Hungary, compared to other European countries and the US, the decisions remain under-theorized in doctrinal legal commentaries too.

I am not aware of any quantitative analysis of the consequences of the decisions of the HCC. Even the theoretical analyses are in their infancy. As the editors of a volume

[35] On similar problems regarding the US Supreme Court, see Breyer 2004.

consecrated to closely related topics lament, constitutional political economy had only marginal influence on the understanding of the transformation in Central and Eastern Europe: "It is conjectured that this irrelevance can be explained by two facts, little available positive knowledge on the working properties of alternative constitutional rules on the one hand and an underestimation of the role of the state in the transformation process on the other."[36]

The Constitutional Political Economy of Constitutional Courts – a research agenda and some conclusions

From a positive perspective, constitutional political economy can explain the main patterns of the constitutional court's decisions from its own policy preferences (widely understood)[37], its interaction with other constitutional players (the legislative and the executive branch) and some consistency constraints.[38] By highlighting the political economy at work in the CC, it also contributes to the critical evaluation of the often contradictory tendencies in the decisions (deference to the legislative intentions in institutional reforms; setting "social" limits to property rights; populist intervention in defense of welfare benefits). Although I have not done any quantitative analysis or constructed any model, my intuition is that the Constitutional Court has a large interpretative power - hence the patterns of its decisions. Questions that should be further analyzed in this positive constitutional political economy perspective are thus manifold.

From a normative perspective, the basic question is whether and why having constitutional courts is a good thing. As Jon Elster put it in the title of his article 'Constitutional Courts and Central Banks: Suicide Prevention or Suicide Pact?',[39] constitutional courts (and also independent central banks) are double edged swords. These institutions can act as salutary chains on the tendency of democratic majorities to act under the sway of passion or short-term interest. On the other hand, courts or banks may, if unchecked, become dominated by sectarian ideologies that take no account on the public interest. The choice is between under-enforcement (with no judicial review, there are only

[36] Voigt – Wagener 2002: xi.
[37] The preference of the court, in turn, is the function of the preferences of the individual judges and the decision rules.
[38] On the relatively simple technique of measuring the respective interpretative power of legislation and judiciary, see Cooter 2000.
[39] Elster 1994.

political sanctions against the violation of the unwritten constitutional conventions) and over-enforcement (when constitutional jurisprudence goes well beyond the faithful enforcement of the texts). In the latter case, the claim that a court is acting as the agent of self-binding becomes ludicrous. Rather, it is acting as a "third chamber" of parliament. And when dogmatic and sectarian judges and courts emerge time to time, the costs of over-enforcement are high.

Normative constitutional economics argues that the Constitution has to provide both protection of the majority against well-organized special interest groups and protection of innovative and wealth-accumulating individuals against exploitation by the majority. Also, it suggests that Constitutional Courts should face two different issues with respect to economic policy.

The first concerns the question: what should and can they do with respect to special interest legislation. Even if we do not necessarily agree with Macey that economic liberties (meaning here property right and freedom of contract) should enjoy as much protection as noneconomic freedoms, we can still agree with him that special interest legislation is undesirable.[40] If economic legislation is not under constitutional review, the public does not get sufficient information about the public or private interest motivation because of the judicial deference and the legislature's nonchalance with reference to the latter. But as long as the public is against private special interest promoting legislation, there is still some pressure at least to rhetorically cover it. In principle, the rational ignorance and collective action problem of the citizens could be mitigated by the court checking for the public interest behind the law. When the law serves private interests, democratic majority representation in the Parliament is overridden by an interest group. However, it is extremely difficult to disentangle a complex Act of Parliament in this respect. Actually, it is in the legislator's interest to hide or cover the deal.

Moreover, it is not sure that Constitutional Courts can enforce public interest effectively without becoming involved in regular politics itself. One main function of the Constitution is to institutionalize the distinction between regular politics (the domain of a

[40] Macey 1992. To note, some law and economics scholars argue that special interest legislation should be enforced in the same way as public interest legislation. This is sometimes combined with the rather cynical ("explanatory") view that the independence of the judiciary serves to guarantee the enforceability of the bargains between interest groups and lawmakers. This is the way to make the legislatures promises credible and thus increase the income of the lawmakers from the deals.

robust democratic debate between different conceptions of the good life and between different interest groups) and the rules of the game.[41] In this view, Constitutional Courts should focus on safeguarding this distinction and enforcing the rules of the game themselves. Although economists know that there are good and bad reasons to regulate business, to know which is which (except for a few clear cases) is not a straightforward matter of factual demonstration. To be more, the legitimacy of a non-elected body in defining public interest is also controversial. Controversial public decisions should be left, *faute de mieux*, to elected political actors.[42]

When the result is a sensible (controversial but not unreasonable) economic policy decision, it should not be subject to substantive review by the Constitutional Court. But the formal tests of legality should be taken seriously. Sometimes, however, this distinction is not clear or even formal conditions of legal validity are interpreted in a "flexible way". In Hungarian law, trade unions and employers' associations have a right to be heard in certain labor-related issues before legislation. This is a clear formal right of consultation. Still, the HCC has decided that the formal validity of the law is untouched even if it was enacted without such consultation.

There are other constellations when legislation is better informed or somehow enlightened or thinks in a larger time-horizon and the public is short-sighted. This might be (although not necessarily is) the case with the reforms of the welfare system and of social rights. Here of course, the conflict which the Constitutional Court has to solve is between the long-term interest of the society and the beneficiaries of the current regime. In other terms, the dichotomy is between "economic expertise and foresight" versus demagoguery.

On matters of economic and social policy, it is not clear that courts (regular or constitutional) have a relative advantage over the legislature or that they enjoy the legitimacy required to make authoritative decisions. But the opposition (the losing side of a policy controversy) often tries to use the court in these debated issues.

In still other cases, even the majority can be double-hearted. As Salzberger and Voigt argue, Constitutional Courts can serve the purpose of strategic delegation, i.e. as a means in

[41] Gavison 2002: 1.

[42] See e.g. the legal philosopher Jeremy Waldron's writings. Of course, his are more general arguments against judicial review (in this case, constitutional review) of the legislation which are not specific about economic issues.

the hand of the government to delegate uncomfortable decisions.[43]

In sum, economic policy should be restricted by constitutional provisions. To mention another recent Hungarian example, whether the Parliament must vote every year on the state budget or a biannual or even longer term budget is constitutionally acceptable is an important issue - left unregulated in the Constitution and thus decided by the HCC. But substantive economic policy questions should not be in the CC's competence. The tests used by the Court should be formal or concerned with the protection of individual rights.

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[43] Salzberger-Voigt 2002.

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