Judicial Review of the Compensation Law in Hungary

Peter Paczolay
Hungarian Constitutional Court
JUDICIAL REVIEW OF THE COMPENSATION LAW IN HUNGARY

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In 1989, Hungary and other East European nations entered a new period in history. They began the transition to democracy and free markets, a transition that is proving to be a very difficult, complex, and unprecedented task. The twentieth century has seen other European countries, such as Germany, Italy, and Spain, evolve from dictatorial political regimes into democratic societies, but in Eastern Europe this transition will be different. In Eastern Europe, former socialist countries must reorganize state-owned and centralized economies. Economic changes, contrary to the view held by Richard Epstein,1 will provide new and interesting experiences.

One of the most important issues raised by this complex economic and legal transition is the question of property rights. This question encompasses the reformulation of property rights in the Civil Code, land reform, and privatization, as well as compensation for nationalization and injustices under the Communist regime. It is extremely important that all former socialist countries begin to address these pertinent problems. In most East European countries, these complex questions have been addressed through legislation. Hungary is the only country, however, where the legislative acts have passed the scrutiny of judicial review. This article analyzes the Hungarian Constitutional Court's decisions regarding a specific problem of property rights, namely the Compensation Law. It does not attempt to examine the details of broad subjects such as property rights or privatization.

THE ROLE OF THE CONSTITUTIONAL COURT IN THE LEGAL TRANSITION

The Hungarian transition to democracy is peculiar in that the Constitutional Court is playing an important role in the revision of the entire legal system. The socialist theory of the state rejected the idea of separation of powers and refused to entrust the protection of consti-

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tutionality to an independent organ such as the Constitutional Court. The Communist government wanted to preserve the supremacy of Parliament and aimed to create a Constitutional Court with only limited jurisdiction. It intended to withhold from the Court the right to annul Acts of Parliament. During recent years, it became obvious to Hungarian reformers that an independent Constitutional Court would be necessary in the new political and legal system.

In the summer of 1989, the independence of the Constitutional Court became a central issue in negotiations among political groups. The issue was discussed extensively during the Opposition Round Table talks. At this time, the framers of the new constitutional order could not foresee the oncoming dramatic changes in the other countries of the Soviet bloc. The opposition feared that the key positions in the political system would remain in the hands of the Communists; at that time, seventy-five percent of the members of Parliament belonged to the ruling Communist Party. In addition, the Cabinet was Communist, and Imre Pozsgay, a prominent figure of that party, was expected to be elected President of the Republic.

The opposition submitted two basic proposals. The first was that every citizen should have the right to challenge the constitutionality of the legal norms before the Constitutional Court. The second was that the Court should also review the constitutionality of legislative acts. These proposals were elaborated by László Sólyom (who at the time of the roundtable talks was a member of the Hungarian Democratic Forum and later became the first President of the Constitutional Court) and Péter Tölgysessy (present head of the Alliance of Free Democrats). Communist Party experts argued against acceptance of the opposition's proposals, but the head of the government's delegation ignored the warnings. Thus, the opposition easily managed to realize its goals concerning the expansive role of judicial review.

Act No. 32 creating the Constitutional Court was enacted in October 1989, and soon after Parliament elected the first five members of the Court. On January 1, 1990 the Constitutional Court commenced its functions. Five additional members were elected by the new,

The jurisdiction and power of the Court, even by international comparison, is very broad. For instance, the Court can review the constitutionality of legal drafts before their legislative enactment and has the right to review both legislative acts and sublegislative norms, declaring them null and void in case of unconstitutionality. The Court also gives advisory opinions at the request of high State officers. In the first two years of operation, the Court proved its powerful role in the new political system by delivering a series of very important decisions that pertained to capital punishment, the interpretation of human dignity, equal protection, tax issues, the compensation acts, presidential powers, abortion, and lifting the statute of limitations for political crimes.

Meanwhile, the actio popularis (the right for all citizens to seek assistance from the Constitutional Court) resulted in a flood of requests on the part of citizens, which in turn created a tremendous overload for the Court. Nonetheless, judicial review essentially functioned well in Hungary, despite the lack of tradition and experience in that field. The Court's property rights decisions, in particular, provide insight into the basic characteristics and problems of judicial review in Hungary.

PROPERTY RIGHTS UNDER SOCIALISM AND THE PROBLEM OF CONFISCATION

Hungary's stormy history created a very complicated legacy for the new regime. Citizens were embittered over the offenses they endured under Communism, and they expressed a need for justice. In order to fulfill these expectations, the new government had to compensate people for the illegalities of the previous political regimes.

Confiscations for political reasons go back as far as 1939, when the so-called "Second Jewish Law" violated the property rights of Jewish citizens. After the "liberation" of 1945, long overdue steps were taken to solve the agrarian problem. Unfortunately, the land reform was mixed with political revenge. On March 18, 1945, the Provisional Government issued a decree abolishing the great estates and transferring the land either to peasant families or to State and communal property. This land reform has been accurately described as "one of the most radical redistributions of land carried out anywhere after World War II." 4 The land of war criminals, members of fascist orga-
nizations, and “traitors of the fatherland” was simply confiscated, and the land of others was taken without paying the compensation required by law. In addition, under the terms of the Potsdam Agreement, approximately 240,000 of Hungary’s ethnic Germans were expelled to Germany. Nationalization programs also began in 1945, greatly affecting various industrial, real estate, and retail-trade systems.

The inevitable “seizure of power” by the Communists occurred in 1948. On August 20, 1949 the socialist constitution of Hungary was promulgated, declaring the priority of public property. The emerging dictatorship continued to confiscate the property of the “class enemies.” Specifically, property rights were regulated in detail by the Civil Code, enacted in 1959. This Code reaffirmed the priority of public property, listing in conformity with Article 6 of the Constitution that resources such as minerals, forests, water, mines, means of transportation, banks, and postal services are exclusively State or public property. Likewise, many provisions clearly favored State or public property (i.e., the property of cooperatives or so-called social organizations).

The two forms of socialized ownership were State ownership and group (mainly cooperative) ownership. To justify State ownership, a rationale was advanced that it “is linked with workers who do not own the enterprise but, as citizens, have a share in the social ownership of the totality of the means of production.”

State or public property, in the terminology of socialist law called “social ownership,” was protected by Civil and Criminal Codes as the highest category in the hierarchy of ownership.

The economic reforms initiated in 1968 under the name of the “New Economic Mechanism” also affected property rights, but the hierarchy of ownership remained the same. The reforms changed the management of state property, as the regulations gave more and more rights to the managers of state-owned enterprises to make and carry out their own decisions. Also, after 1984, employees had a considerable voice in the basic “strategic” decisions of enterprises, as more than seventy percent of the enterprises were led by self-managed councils.

In 1989, the fundamental change in the political system cleared the

5. Art. 4. (1) of the 1949 text of the Constitution provides: “In the Hungarian People’s Republic the bulk of the means of production is owned, as public property, by the state, by public bodies or by co-operative organizations.” A Magyar Köztársaság Alkotmánlya [Constitution] of 1949, art. 4(1) (Hung.) translated in CONSTITUTION OF THE HUNGARIAN PEOPLE’S REPUBLIC 4 (1949).

way for a complex transformation. In the process of redefining the role of the State, the area of property rights has also undergone gradual yet fundamental changes. The basic revision of the Constitution was promulgated on October 23, 1989. It contains the basic principles of property rights. These important provisions are:

- the Property Rights Clause — Art. 13. (1) “The Republic of Hungary shall guarantee the right to property;”
- the Equal Protection Of Property Clause — Art. 9. (1) “The Republic of Hungary is a market economy where public and private ownership shall enjoy equal rights and equal protection;”
- the Takings Clause — Art. 13. (2) “Property may be expropriated only exceptionally and out of public interest, in cases and in the manner determined by an Act, with full, unconditional and immediate compensation.”

On the basis of these constitutional provisions, the legislature was obligated to review entire branches of the legal system in order to abolish the hierarchy of ownership and restrictions on private activities. By 1991, the chapter on property rights of the Civil Code was completely rewritten. These legal reforms, however, have created only the framework for a real market economy based on private ownership; to have true private property, privatization of the state sector must occur.

**Privatization and Historical Justice**

In Hungary, various economic reforms were directed at state enterprises to encourage self-management and to drive them toward a market economy. The modest success of this reform program urged the Communist government to hasten the pace of the reforms. The Economic Associations Act (passed in October 1988) provided for the privatization of state-owned enterprises by converting them into joint-stock companies and allowing them to issue shares which are sold to individuals. This step led to spontaneous privatization and made it possible for managers to take over firms. Even today, Hungary is the only country that does not curtail the practice of spontaneous privatization by managers or outside investors, yet clearly rejects privatization through mass distribution of shares to citizens.  

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8. On the different methods of privatization of state enterprises, see ALAN H. GELB &
In several East European countries, the issue of privatization, which is in itself a very difficult and complicated task, is directly related to the question of compensation for past injustices. Different solutions pertaining to the procedures and ranges of compensation have been offered. One clearly defined approach would be to grant no compensation at all, whereas the opposite solution would be an in-kind return of expropriated goods. An intermediate solution requiring limited compensation in the form of vouchers, however, is the one most likely to be followed.

Other East European countries also have attempted to deal with the compensation issue. In the former East Germany, more than one million property restitution claims have been filed by private individuals. The Polish government is presently seeking a resolution for the compensation of expropriated former owners. Czechoslovakia's legislators enacted two statutes dealing with the restitution of expropriated property. First, the Restitution Law, passed on October 2, 1990, provides for the reprivatization of some 70,000 smaller businesses and properties nationalized by the Communists between 1955 and 1961. A second statute, the Law on Extrajudicial Rehabilitation, was passed on February 21, 1991; it makes restitution possible in the form of in-kind return of property for individuals only (thus excluding political parties and churches). It covers only property confiscated from February 25, 1948 to January 1, 1990. Financial compensation in the form of either cash payments or vouchers will be made in exceptional cases when considerable improvements to property were made and the former owners are not able to pay their expenses.9 On February 18, 1992, the Czech legislature approved an amendment to the law on the regulation of ownership relations to land and other agricultural property, which waived the upper limit of 250 hectares for the restitution of plots. Under this amendment, aristocratic classes such as the Lobkovic, Kinski, and Schwarzenberg families can claim back large forest areas.

In Hungary, the Independent Smallholders Party raised the issue of reprivatization when it had essentially no other issue to advance during the electoral campaign in the spring of 1990. After the election the Smallholders became the third largest party in Hungary; they not only participated in the coalition government, but also succeeded in forcing it to draft a bill on the reprivatization of agricultural land. (The original political program of the largest party, the Hungarian

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Democratic Forum, had not even mentioned reprivatization.) In order to clear up the situation, in 1990 the prime minister, József Antall, asked the Constitutional Court for an advisory opinion on the constitutionality of the reprivatization.

COMPENSATION CASE I - AN ADVISORY OPINION

The prime minister asked the Court whether it constitutes discrimination according to Article 70/A of the Constitution for compensation procedures to provide for certain people's former property to be reprivatized (i.e. returned in kind), while other people's property would not be returned to them. The petition explained the compensation policy of the Government: it considered privatization to be the basic goal of the transformation of the ownership system. The general principle of privatization was to sell state property to new owners in exchange for payment, while giving former owners, whose property was expropriated during the Communist regime, partial compensation. The settlement of land ownership would have been an exception to these principles.

The first question raised in the Government's petition was whether it constitutes discrimination among the former owners if the kind of property (the basic distinction being between land and other kinds of property) determines whether the property was given back. The second question raised by the prime minister was whether it is constitutional to take land from the cooperatives without expropriation proceedings and compensation. According to the plans of the Government, those lands in the possession of cooperatives which were not acquired in a "normal" legal manner determined by the Civil Code would serve without any compensation as the basis for reprivatization.

Act No. 32 of 1989 makes it possible to ask the Constitutional Court for advisory opinions. The Court is obliged to interpret the provisions of the Constitution relating to the requests of certain institutions (the Parliament or the cabinet) and high State officers (e.g., the President of the Republic or the Chief Justice of the Supreme Court). The advisory opinion is one of those decisions that may, and usually does, involve the judiciary in political questions. It is also dangerous because of the general nature of precedent. The same questions may come to the Court again regarding specific situations, and then the judges are bound by their previous decisions. The Justices of the United States Supreme Court rejected the idea of advising the other

10. I use the word 'Government' in this Article in the sense commonly used in parliamentary systems: it refers to the prime minister and the cabinet ministers.
branches on general questions as early as in 1793. The advisory opinion had an unfortunate history in West Germany, and that jurisdiction of the West German Constitutional Court was abolished in 1956. The fact that some constitutional courts may be asked for advisory opinions clearly reveals that European constitutional courts are not solely judicial organs, but often have extrajudicial and even political tasks.

Such tasks confronted the Hungarian Constitutional Court when it was required to issue an advisory opinion in response to the prime minister’s petition. Later, the firm language of the advisory opinion created difficulties for the Court when the Compensation Law was challenged again, and the issue came back to the Court. In another case, the Constitutional Court narrowed its jurisdiction in this controversial area and successfully resisted an effort to become involved in the affairs of the legislature. There, the finance minister asked the Constitutional Court to interpret several provisions of the Constitution with regard to the drafting of a law raising mortgage interest rates. The petition also presented three different versions of the draft. The Court pointed out the dangers of a broad interpretation of its power to give advisory opinions, stating that this might easily lead to a situation where the competent legislative organs would request “constitutional interpretation” from the Constitutional Court before the drafting of acts or even before making administrative decisions. “This would inevitably result in that the Constitutional Court assumes the responsibility of the legislative and even of the executive branch, and this would create a sort of government by the Constitutional Court.”

This would contradict the constitutional principle of the separation of powers.

EQUAL PROTECTION AND REVERSE DISCRIMINATION

The first question raised in the government’s petition was whether it constitutes discrimination among former owners if the kind of property determines whether the property was given back. The Court analyzed this question under the General Equal Protection Clause of the Constitution. According to this clause, the Republic of Hungary

13. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution], supra note 3, ch. XII, § 70/ A.
shall ensure for all persons in its territory human and civil rights without discrimination on account of race, color, sex, language, religion, political or other views, national or social origins, ownership of assets, birth, or any other grounds. The Constitutional Court also took into consideration both the Property Rights Clause and the Equal Protection Of Property Clause.

This was not the first case in which the Court faced the problem of equal protection. As early as April 1990, in its decision No. 9/1990 (IV.25), the Court had outlined its interpretation of the Equal Protection Clause regarding the constitutionality of reverse discrimination. Interestingly enough, a majority of Hungarian citizens prefer a strictly formal interpretation of the Equal Protection Clause. They have a perception of equality as the formally equal distribution of benefits and burdens. They consider it unconstitutional if somebody is in a better position than they are. This concept is a result of the continuous propaganda of the value of equality under the socialist regime.

In this earlier reverse discrimination case, the petitioner challenged the constitutionality of a provision of the Income Tax Law that granted special tax benefits to families with at least three children or to single parents with two children. The Court rejected the claim, arguing that "the ban on discrimination does not mean that any discrimination, including even discrimination intended to achieve a greater social equality, is forbidden." Moreover, the Constitution itself allows the positive or reverse discrimination aimed at eliminating inequalities of opportunity.

In addition, the Court gave a broader interpretation to the Equal Protection Clause. Equal protection in this broader sense means the "equal right to human dignity." Although human dignity is one of the most flexible and vague concepts of constitutional law, the Constitution lays down an inherent right to human dignity. The drafters must have borrowed this concept from the German Basic Law.
Court, by referring to the "equal right to human dignity," set up a procedural scrutiny for equal protection. "The ban on discrimination means that all people must be treated as equal (as persons with equal dignity) by law. That means that the fundamental right to human dignity may not be impaired, and the criteria of the entitlements and benefits shall be determined with the same respect and prudence, and with the same degree of consideration of individual interests."\(^{20}\) Thus, the Court transformed the requirement for equality into the requirement that all persons be treated with equal dignity.

The language of the Court's argument is clearly related to Ronald Dworkin's explanation of affirmative action cases.\(^{21}\) Dworkin differentiates between two different sorts of rights. The first is the right to equal treatment, which is the right to an equal distribution of some opportunity or resource or burden. The second is the right to treatment as an equal, which is the right to be treated with the same respect as anyone else, not the right to receive the same distribution of some burden or benefit.\(^{22}\) The Court combined the right to be treated with the same respect and the concept of human dignity, thus transforming Dworkin's conception into the right to equal dignity.

Actually, the scrutiny of treatment as an equal is a sort of final limit on reverse discrimination. Otherwise, reverse discrimination is acceptable. "If a social purpose not in conflict with the Constitution, or a constitutional right may only be achieved if equality in the narrower sense is not met, then such a positive discrimination shall not be declared unconstitutional."\(^{23}\) This means that the achievement of an important social goal or the realization of a fundamental right justifies reverse discrimination which obviously hurts the principle of equality in the narrower sense of the (quantitatively) equal distribution of assets and choices.

In responding to the first question of the prime minister in Compensation Case I, the Court examined how the privatization program of the Government could fit the scrutiny of treatment as an equal. The Court found that the program does not give any justification for the

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21. The procedure of the Constitutional Court is that the President of the Court assigns the case to one of the judges who prepares the draft of the decision. Then the draft is circulated and the judges are asked to make their written comments on it. Finally, the session of the Court discusses the draft. Hence the final text of the decision is mostly the result of a common effort. Nevertheless, the judge preparing the draft usually has a decisive impact on the final text. Therefore, since 1991, at the end of the decisions it is noted who delivered the opinion of the Court. In the present case this was not noted yet, but the draft was written by Chief Justice László Sólyom, and he also elaborated the theory of "the right to equal personal dignity."  


preferred position of former land-owners and, in general, reflects conceptual uncertainty concerning the relationship among privatization, reprivatization, and partial compensation. Therefore, the Court tried to clarify the meaning of these terms. In the interpretation of the Court, privatization involves the assignment of state property to private ownership, whereas reprivatization is the return of assets formerly possessed by private persons but presently in the possession of the State. The Government used the term compensation in a special sense: the sole legal basis for the partial compensation was fairness. The "fairness argument" became crucially important to the further history of compensation.

The very definite language of the decision underlined the principle that the former owners have no constitutional or subjective right to compensation, and the State has no obligation to compensate them. Compensation is a gratuitous act of the State, based exclusively on its sovereign decision. This argument of the Court had two far-reaching political effects: it gave the Government a free hand to determine the measure of the compensation and, to the great disappointment of the former owners, diminished their claim to a sort of morally justified right with no legally binding force. Thus, the decision upset the Smallholders, but gave the prime minister protection against the Smallholders' claims and pressure.

The Court then examined whether the discrimination among former owners and non-owners is in conformity with the Constitution. The argument followed the line designated by the above-mentioned former decision, namely applying the right to equal dignity test. "The constitutionality of the discrimination depends on whether the discrimination between owners and non-owners is realized in a procedure where the interests of former owners and non-owners have been weighed with the same degree of prudence and impartiality."24 The justification for discrimination within the group of former owners would be the purpose of achieving a more complete social equality, for the Constitution permits the positive discrimination only in order to promote the attainment of equality.

The ruling of the Court pointed out that there are at least two instances of unconstitutional discrimination in the Government's program: first, the discrimination among the former owners and non-owners in the process of privatization, and second, the discrimination among the former owners according to the type of the property. The

position of the Constitutional Court was that "in this particular case
differentiating on the basis of the type of the property becomes dis-
crimination against persons since it relates to the acquisition of prop-
erty." The Court concluded its interpretation of Article 70/A of the
Constitution by stating that "it is a discrimination against persons if
certain persons' former property is reprivatized, while other persons' property is not returned to their possession, therefore, the Constitu-
tional Court proclaimed this discrimination unconstitutional."26

THE TAKINGS CLAUSE AND NEUTRAL PRINCIPLES

The second question raised by the Government's position is
whether it is constitutional to take land from the cooperatives without
expropriation proceedings and compensation. The Takings Clause of
the Hungarian Constitution is very firm: it permits expropriation only
subject to very rigorous conditions, and it requires full, unconditional,
and immediate compensation. The unusually stark language of this
provision must be a reaction to the unlawful expropriations during the
socialist era. The spirit of the problem was whether the Court should
apply these very strict provisions to the cooperatives. The Court took
the position that the Constitution must apply to all cases and to all
persons, implicitly endeavoring to set up neutral constitutional princi-
pies in the interpretation. Neutrality in this sense means that the con-
stitutional principles and provisions apply equally to everybody, and
the past does not justify discrimination or other violations of the
Constitution.

This implicit position of the Court provoked sharp criticism from
some political groups, mainly from those that suffered severe injustices
under the Communist regime. The critics even questioned the very
legitimacy of the Constitutional Court; some stated that judicial re-
view is not a necessary element of a constitutional State or of the rule
of law. According to these critics, the Court acts contrary to the pop-
ular will expressed by the parliamentary majority. In the second ques-
tion raised by the Government's petition, the real issue was the
reprivatization of land owned by agricultural cooperatives without ex-
propriation and compensation procedures. This was a delicate issue
because these cooperatives were formed not voluntarily, but by using
coercive measures against peasants and smallholders. This coercion
also was used in the incorporation of private land into the coopera-
tives. The standpoint of the former smallholders was that these

25. Id.
26. Id.
properties were stolen, and, therefore, the protection of property rights should not apply to them.

The Court, after some hesitation, took a formal, normativist position. It considered the Constitution as a strict norm which should be enforced under any circumstances, where past injustices would not influence the present position of the constitutional institutions. The test of the cooperatives' constitutionality is voluntary association, irrespective of the history of their formation. Under Hungarian law, the only organ competent to decide whether a cooperative exists on the basis of voluntary or involuntary association is the general meeting of the members of the cooperative. The legal rules effective at the time of the decision allowed for both the closing down of a cooperative upon the decision of the general meeting and the departure of a member, but did not allow the distribution of the cooperative's property. Recently, however, the regulation has changed: the new regulation on the cooperatives makes it possible for the members of the agricultural cooperatives to leave the cooperative, and the cooperative must assign them their proportion of property.\(^2\)

The Court's formal argument concluded with the strict protection of the cooperatives' property. In the Court's interpretation, the Property Rights Clause of the Constitution means that "the Republic of Hungary guarantees the right to property including the right of agricultural cooperatives to the arable land they own."\(^2\)\(^8\) The taking of property from cooperatives without immediate, unconditional, and full compensation violates the Takings Clause of the Constitution, and is therefore unconstitutional, according to the ruling of the Court.

The ruling of the Court was formal and normative in terms of constitutionality, and it formulated the Court's policy on the strict observation of the rule of law. In contrast to such decisions of the Court, the acts of the legislature are the result of freely raised political arguments and concurring interests. If the Court accepted the same arguments, and made decisions in a similar way, arbitrarily taking into consideration the different principles, policies and interests, it would become a second legislative chamber. The role of judicial review, however, is not political deliberation but the control of constitutionality. Therefore, the Constitutional Court must adhere to objective stan-


\(^{28}\) Decision No. 21/1990, supra note 24.
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standards\textsuperscript{29} in the interpretation of the Constitution. Accordingly, the Court in Compensation Case I, and in other cases as well, properly made efforts to define objective standards and follow those neutral principles.\textsuperscript{30}

**COMPENSATION CASE II - SELF-RESTRAINT OR ACTIVISM?**

During the ongoing discussion on the draft of the Compensation Bill, fifty-two parliamentary representatives (all members of the largest opposition party, the Free Democrats) proposed that the Constitutional Court review the constitutionality of some provisions of the bill. The resulting decision of the Court consists of two sharply different parts. The first part deals with the nature of preventive norm control and rejects the request to review the provisions of a bill which had not been decided yet by the Parliament. But the Court, contradicting its position in the first part of the reasoning, adds a second part. This second part enters into the discussion of the challenged provisions and gives guidelines to the legislature. Thus, the decision illustrates the Court’s wavering between reasonable self-restraint and activism.

In order to analyze this case, it is necessary to understand the procedural peculiarities of judicial review in Hungary. The jurisdiction of the Constitutional Court includes both preventive and repressive norm control. Repressive norm control is the constitutional review of enacted laws; this is the most frequent and important jurisdiction of the Constitutional Court. It gives the Court the right to adjudicate the constitutionality of laws passed by Parliament. This is the most significant check on the supremacy of Parliament. This authority is further strengthened by the possibility that anybody can initiate the repressive norm control of parliamentary acts.

Preventive norm control, on the other hand, means the constitutional review of laws before their enactment. The Law of the Constitutional Court specifies the norms that are subject to preventive control. These are:

- bills,
- enacted but not yet promulgated statutes,
- Standing Orders of the Parliament, and
- international treaties.

\textsuperscript{29} See generally Kent Greenawalt, *Law and Objectivity* (1992) (discussing the question of objectivity in the domain of law).

The review of these special norms can be initiated by the following government authorities:

- the Parliament, any one of its standing committees, or fifty Members of Parliament,
- the President of the Republic, and
- the Government (in the narrower sense of the Executive Branch’s Cabinet of Ministers).

The initiation of the proceedings, in all cases, is of a discretionary character.

The following four different procedures are included in this jurisdiction:

- On the motion of Parliament, any one of its standing committees, or fifty Members of Parliament, the Constitutional Court shall examine the constitutionality of any “contestable” provision of a bill. If the Constitutional Court declares unconstitutional the contestable provision of the bill, then Parliament or the person or organ having submitted the bill shall amend it to eliminate the unconstitutionality.

- Parliament, prior to approval, may convey its standing orders, indicating the contestable provision, to the Constitutional Court in order to examine its compatibility with the Constitution. If the Constitutional Court declares the contestable provision of the standing orders unconstitutional, Parliament shall amend it to eliminate the unconstitutionality.

- On the motion of the President of the Republic, the Constitutional Court examines the contestable provision of any act that has been enacted by Parliament but has not yet been promulgated. If the Constitutional Court declares the contestable provision unconstitutional, the President of the Republic shall not promulgate the act until the unconstitutionality is eliminated by Parliament.

- Parliament, the President of the Republic, and the Government have the right to request that a contestable provision of an international treaty be examined for constitutionality prior to the ratification of the treaty. If the Constitutional Court declares unconstitutional the contestable provision of an international treaty, then it shall not be ratified until the unconstitutionality is eliminated by the organ or person concluding that treaty.

Under the Constitution, only the President of the Republic faces a time limit for submitting items to the Constitutional Court. The President of the Republic, when deeming any provision of an Act unconsti-
tutional, shall convey the provision to the Constitutional Court within fifteen days—or, if declared urgent by the Speaker, within five days—from receipt. There is no time limit for a decision by the Constitutional Court.

These detailed procedural rules were enacted by the legislature in October 1989. The drafters of the regulation, combining all possible ways of preventive norm control in a rather incoherent way, grasped too much. The shortcomings of the entire concept of preventive norm control came to light when the first demand for such control arrived at the Court in April, 1991. The Court, practicing considerable self-restraint, rejected the claim. It investigated the nature of preventive norm control from a comparative perspective. The Court pointed out that it may make sense to review the constitutionality of a bill which is already disputed during the legislative procedure, because preventive norm control may prevent the annulment of an already-promulgated legal rule which has been put into practice. Furthermore, this type of procedure protects the prestige of the legislature. In countries where there is preventive norm control, the review is most often formal; that is, it is aimed exclusively at examining the constitutionality of the legislative procedure.

The Court quoted the text of foreign constitutions permitting the exercise of preventive norm control. These included Article 61 in the French, Article 278 in the Portuguese, and Article 26 in the Irish Constitutions. Article 127 of the Italian Constitution makes similar provision for the review of enactments which have yet to be promulgated, in the event of violations of legislative power. Spain provides for the preventive norm control of international treaties. Article 78 of the Spanish Act on the Constitutional Court requires that the text of the treaty be previously finalized; similar conditions and regulations applied to the preventive norm control of bills until 1985, when the Spanish Constitutional Court’s jurisdiction to intervene in the legislative process was annulled.

The Hungarian regulation does not constrain the Court’s jurisdiction to the final text of the bill, but makes review possible at any stage of the legislative process. The Court declared that adjudicating the constitutionality of some provisions of a bill, the text of which is not definitive, could possibly mean involving the Constitutional Court in the everyday legislative process. The Constitutional Court is not an advisory organ of Parliament; its task is to judge the result of the legis-

lative work. Therefore, the actual regulation of the preventive norm control of bills is incompatible with the principle of separation of powers.

The Court essentially refused to exercise its jurisdiction and thus, by implication, declared some provisions of the Act on the Constitutional Court as conflicting with a fundamental principle of the Constitution, namely the principle of separation of powers. Thus, after restricting its power to give advisory opinions, the Court also curtailed its power in another critical area. Both Compensation Cases corrected the inconsistent concept inherent in the Act on the Constitutional Court. These decisions, however, do not mean that the Court definitely took the road of self-restraint, though some commentators maintain that the Court became more sensitive because of the scholarly and political attacks on the legitimacy of judicial review in a representative democracy. Rather, what the Court really did was to eliminate unreasonable or absurd duties.

In Compensation Case II, the Court did not stop at rejecting the possibility of preventive norm control. The justices supposed that the public would consider such cursory treatment to be escaping the issue. Therefore, they outlined a controversial opinion on the questions at stake (they called it the "theoretical stance of the Court"). In the abstract language describing this theoretical stance, the Court loosened the strictness of the scrutiny set up in Compensation Case I. The Court pointed out that the legislature has excessive freedom in making distinctions in the details. They stressed the jurisdiction of Parliament and the government in deciding the concrete method and measure of the compensation. They also stressed the difference between the projects of the Government that had been adjudicated in Compensation Case I and the proposal admitted to Parliament. The Court recognized that the proposed bill abandoned the idea of reprivatizing land and intended instead to remedy through a unified "partial property compensation" the "unjust" damages caused in private property by the enumerated legal rules within the given period of time. The general justification of the bill emphasized that the State acted solely out of moral obligation, and that the extent of compensation may not be full.

The permissive language of the ruling could be considered an example of self-restraint, suggesting that within the broad limits of constitutionality it is the responsibility of the legislature and not the

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Constitutional Court to deal with political questions. Nevertheless, merely entering into the evaluation of the challenged proposal contradicted the first part of the ruling. Under the circumstances, the statement that the legislature must decide the question meant that the majoritarian standpoint would prevail, and the proposal of the Government would become law. Finally, the reasoning approving the proposal led the Court to disregard certain elements of the first decision.

COMPENSATION CASE III

Finally, in April 1991 the Compensation Law was passed by Parliament and was sent to President Árpád Göncz for signature. As mentioned above, the President of the Republic has the right to ask the Constitutional Court, before signing a law just passed by the legislature, to review the constitutionality of its provisions. This was the first time that the President exercised this right. His move was in harmony with the Court’s position that review of constitutionality is possible only when the final text of the law is approved by the legislature. The President formulated six concrete questions; furthermore, he asked in general for the review of the entire Compensation Act. In answering the six questions, the Court upheld the provisions of the law in three cases, while in the other three cases it declared them unconstitutional.

The first question the Court answered referred to the entire concept of the Compensation Act as defined in the first Article of that Act. This article entitled all those natural persons to partial compensation (indemnification) whose property was violated as a result of enforcing legal provisions after June 8, 1949. (The compensation for the confiscation of church property was defined by Law No. 33 of 1991 passed by the Parliament on July 10, 1991.) The preamble of the Compensation Act also referred to the scope of the law by setting up a double purpose: first, the remedy for damages caused unjustly by the past regime, and second, the settlement of property questions.

The Court, after summing up its previous ruling on the subject, introduced a new element into the reasoning, stressing the extraordinary conditions and characteristics of the moment in which private property would be restored. Therefore, it upheld the constitutionality of the Compensation Law because it imposed a moral obligation to compensate the former owners. The key word in the Court’s opinion was “novation” or “renewal.” Actually, this novation has little to do with novation in the traditional legal sense of the word (“[s]ubstitution of a new contract, debt, or obligation for an existing one, between the
same or different parties." Here, the emphasis is on the point that the new regime has no legal obligation to compensate the former owners, only a moral one. Therefore, the new legal obligation defined in the Compensation Law creates an independent source of obligation. "The system of novation excludes the references to older legal titles. Since the novation is constitutionally permissible, there is no reason to review further, whether there were or could be claims for reprivatization in the scope of the effected proper damages."35

This gives the State great discretion in deciding on the method and measure of the compensation. It is interesting how this controversial linguistic invention tries to harmonize the special character of the transition with the concept of legal continuity. Because of all the extraordinary circumstances and considerations, the Constitutional Court considered the novation of the obligation and its fulfillment by partial compensation to be constitutional. This allowed the State free play, limited only by certain minor constitutional conditions. As put by the Court: "The novation may not violate any constitutional rights or principles."36 Therefore, the government, even when acting on the grounds of this specific novation, has the obligation to act in such a way that "no affected party is put into a disadvantageous position."37 This required, in other words, the application of the Equal Protection Clause to the present case.

Under this analysis, the Court held the Compensation Law to be constitutional. "The Act creates a uniform legal basis for compensation claims for those affected under the Act." According to the ruling of the Constitutional Court, the provision that violated the principle of equality was the one which arbitrarily set the starting date of the compensation at June 8, 1949. The Court investigated the entire process of compensation, reviewing both its content and its timing. The Court suggested as a possible remedy for the unconstitutional arbitrariness "that the Compensation Act determines those legal rules, whose application before June 8, 1949 caused the same type of damages as the ones compensated by the present Act, and indicates the final deadline, within which an Act of Parliament on the compensation related to those shall be drafted."38

36. Id.
37. Id.
38. Id.
The Court also rejected another provision of the Act by referring to equal protection. Under the Act, the extent of a claimant's compensation depends upon whether the entitled person claims arable land as compensation or requests only the issuance of a compensation voucher. According to the general rules, the extent of the compensation is equal to 100 percent up to a damage of 200,000 Forint. If, however, the basis for compensation is land, and the person entitled to compensation requires this in the form of arable land, the extent of the compensation is equal to 100 percent up to the value of 1000 gold-crown. The multiplier of the damages in the case of arable land is 1000 Forint per gold-crown; therefore, the maximum compensation, 1 million forints, is five times more for those who formerly owned land. (Gold-crown, a currency used in the Austro-Hungarian Monarchy, is still the measuring unit of arable land in the Hungarian land records, and it reflects the net income of the land.) The government justified the differentiation with the additional costs and burdens pertaining to the land compared to other goods.

In addressing this issue, the Court made a very interesting and controversial analysis. It did not approach the question on purely theoretical constitutional grounds, but it tried to unravel the social impact of this provision. It attempted to determine whether the justification for the discrimination prescribed by the government was backed by sociological facts. It analyzed the data provided by the Land and Cartographic Office, and it came to the surprising conclusion that

if there were no distinction between the arable land and other property assets, about 94.2% of the former land-owners would have been in the 100% compensation. The benefits of the digression limit of 1000 gold-crowns are enjoyed only by 1.5% of the land. Only 6% of the land is affected by the determination of a separate digression limit. For at least 94% of the former land-owners the differing digression limit is indifferent; therefore, for the majority of the land proprietors the extra burdens mentioned in the reasoning are not counterbalanced by the benefits provided by the differing extent of compensation. With regard to them those reasons are not valid, and because of the lack of any other justification, the Constitutional Court declares the difference existing between the 1000 gold-crown and 200,000 Ft value limit as arbitrary and contrary to Article 70/A [Equal Protection Clause] of the Constitution.39

The Court approved the provisions, ensuring that the Compensation Law provided for claims to compensation by the entitled descendants and the spouse of a deceased person. The Court also approved another provision of the Compensation Law. While the language of

39. *Id.*
Compensation Case I was explicit in protecting the property rights of cooperatives, Compensation Case II expressed a shift in the Court's standpoint. Compensation Case III made possible, to a certain extent, the compensation of the former land-owners by distributing the lands of the cooperatives. This approved the constitutionality of the Government's plan that compelled the agricultural cooperatives to set aside a certain part of their lands for the purposes of compensation.

The reasoning of the Court correctly justified this decision, but it did not really harmonize with the firmness of Compensation Case I.\textsuperscript{40} The main line of argument was that there is a compelling interest in limiting the cooperatives' property rights, namely the transformation of the property of the cooperatives. "This double task is a part of the unique historical situation, in which the change in ownership as a task determined by the Constitution takes place, and in which the consequences of a former, opposite change of regime in property relations which is classified today as unconstitutional has to be settled."\textsuperscript{41} As the cooperatives acquired their land property mostly from the State, there is no obstacle to compel them to distribute a part of it for compensation vouchers. It seems that the Court reevaluated its position toward the cooperatives that had been overly protective of their property in Compensation Case I.

In Compensation Case III, the \textit{amicus curiae} brief of a law professor (András Sajó) and a study prepared by two leaders of the Alliance of the Free Democrats (János Kis and Mátyás Éörsi) alluded to the firm position of the Court in the compensation case. It was not by chance that the only dissenting opinion in Compensation Case III was written by Justice Imre Vöröš, who considerably influenced the drafting of that part of the reasoning in Compensation Case I which deals with the protection of the cooperatives' property. (He did not take part in the decision of Compensation Case II.) His dissenting opinion considered both the entire concept of compensation and the particular provisions unconstitutional. He firmly stated that it is the State, rather than the cooperatives, that has to take responsibility for the damages.

The final text of the compensation law was approved by Parliament on July 26, 1991. President Göncz signed the amended version of the law, and it took effect on August 10, 1991. The legislature fully

\textsuperscript{40} For a thorough evaluation of the compensation cases, put into a broad theoretical context, see Ethan Klingsberg, \textit{Judicial Review and Hungary's Transition from Communism to Democracy: the Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights}, 1992 B.Y.U. L. REV. 41.

\textsuperscript{41} \textit{Id.}
observed the rulings of the Court. A new provision was inserted in Article 1 requiring that a second law be passed no later than November 30, 1991, to compensate for the illegal confiscation of property between May 1, 1939 and June 8, 1948. Under the new provisions the amount of land to be sold to holders of compensation vouchers cannot exceed fifty percent of the cooperatives' holdings. (About fifty percent of the cooperatives' land is owned by the cooperatives themselves; the other half is owned by the state or by the members.) This rule prevails even when the claims of the former owners exceed this percentage. However, several claims arrived at the Court for represive norm control, and in the future the Court will have to respond to them. But the final ruling in the series of compensation cases does not affect the execution of the law.

STATE OF EXCEPTION OR RULE OF LAW

The dilemma behind the seemingly juridical problems raised by the Compensation Cases is clearly defined by Carl Schmitt, the controversial German constitutional scholar. His concept of rule of law, or Rechtsstaat, supposed that rule of law refers only to normal conditions of the State, whereas extraordinary situations require exceptional means, namely the use of the power of exception. He believed that "only strong states can afford the luxury of being liberal democracies ... therefore, weak states must be authoritarian to ... assure domestic order." He also sharply criticized the normativism of Hans Kelsen. Kelsen, the outstanding legal scholar of our century, restricted the competence of jurisprudence to the study and description of the "pure" legal norms, and attempted to eliminate from this description everything that is not strictly law. Schmitt argued that the legal norm that played a central role in Kelsen's theory is in itself insufficient, and only the decision gives it actual force and validity. According to Schwab's interpretation in a comprehensive analysis of Schmitt's political ideas, Schmitt understood decisionism as the capacity of an individual to establish order from a chaotic situation and to safeguard this newly created stability.

It followed from this statement that the judiciary cannot be the

42. Actually, this second compensation law was passed by the legislature in April 1992.
45. HANS KELSEN, PURE THEORY OF LAW 1-23 (Max Knight trans., 1967).
46. SCHWAB, supra note 44, at 45.
safeguard of the Constitution, for the judiciary implies norms, and the observance and enforcement of norms requires a state of normality.\textsuperscript{47} The real sovereign stands above the norms; the president, with exceptional powers, is capable of performing this role. With the same impetus, he also rejected the idea of the rule of law. Indeed, he pointed out that during the stable period of the eighteenth century the concepts of Locke and Montesquieu shadowed the decisionist element in the theory of State and put legal limitations on the sovereign power.\textsuperscript{48} The concept of Schmitt, translated into the language of everyday politics, would suggest that the historical conditions of the transition make necessary the use of exceptional means and ask to ignore temporarily the strict measures of the rule of law.

\textbf{REDRESS FOR PAST INJUSTICES AND THE RULE OF LAW}

The Constitutional Court had the opportunity to outline its philosophy on the rule of law in a decision turning down a bill of Parliament. The legislature passed a bill on November 4, 1991 on the “prosecutability of serious crimes committed between December 21, 1944 and May 2, 1990 and left unpunished for political reasons.” The law aimed at lifting the statute of limitations for treason, murder, and grievous crimes. President Góncz had doubts about the constitutionality of the law; therefore, he refused to sign and promulgate it. Instead, he asked the Constitutional Court to examine the constitutionality of the law.

A unanimous Court (nine of the ten judges participated in the decision) declared the law unconstitutional. The Court explained that the Compensation Law runs counter to the current penal law provision defining the applicable statute of limitations as the one in effect at the time that the crime was committed. The lifting of the statute of limitations is unconstitutional because it would create ex post facto legislation. The Court also reasoned that the fact that certain crimes remained unpunished for political reasons does not create a constitutional justification for discrimination. An additional reason for holding the law unconstitutional was the inclusion of treason among these crimes, because the definition of treason has changed several times during the past decades: for example, political changes can qualify the official politics of a State afterwards as treason.

The Court stated that the change of regime in Hungary was based on legal continuity; according to this reasoning, all legal regulations

\textsuperscript{47} CARL SCHMITT, \textit{DER HÜTER DER VERFASSUNG} 19 (1914).

\textsuperscript{48} This idea is repeatedly discussed in \textit{CARL SCHMITT, DIE DIKTATUR} (1964).
must correspond to the new Constitution, and all exceptions are unconstitutional. A change of regime in the legal sense means nothing more than that laws have to be coordinated with the Constitution based on the rule of law. As the change was based on the principles of legality and legal continuity, there is no difference between the laws enacted before and after the new Constitution. The new Constitution is the only standard for judicial review.

CONCLUSION: LAW AND POLITICS

There is much concern about the political role of judicial review. The fundamental claim is that judges and courts must stay away from politics; they should only interpret the law. But as far as judicial review gives the judiciary the power to invalidate ordinary legislation, and legislation is obviously not only a legal act but also the outcome of highly political debates, judicial review is necessarily involved in and linked to politics. Nevertheless, there is a great difference between the two systems of judicial review.

In the original American system of constitutional adjudication, which is called the decentralized type of judicial review, all judicial organs can rule upon the validity of legislation. In this system, judicial review is closely connected to the other functions of a judiciary that not only remains an independent branch in the system of checks and balances, but also maintains a distance from politics. However, it is apparent that the activity of the U.S. Supreme Court actually is highly political. The claim to remain far from politics is reflected in the ‘political question’ doctrine of that Court. The U.S. Supreme Court considers a question nonjusticiable only if it has been “committed by the Constitution to another branch of government.”

In the centralized type of judicial review, a single judicial organ is in charge of constitutional review of legislation. This system prevails in the European countries. This approach derives from a distrust of the ordinary judges in adjudicating constitutional issues; it sees them as incapable of the value-oriented, quasi-political functions inherent in judicial review. This system also clearly recognizes the political character of judicial review. Law, after all, is thoroughly political,

51. The two main systems of judicial review, centralized and decentralized, are discussed in MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 46-68 (1971).
52. Id. at 62-63.
53. Id. at 54.
despite claims that it must remain independent from everyday partisan politics.54

The history of the Compensation Cases reveals that the Constitutional Court attempted to translate highly political questions into legal ones and give them correct legal answers. That history also illustrates the limited possibility of such efforts. These cases created a complicated task for the Court because too many different interests and rationales were involved in them. Different and often conflicting issues were linked together in the complex task that the Compensation Law tried to solve.

A fundamental consideration was the economic rationality of the transition to a market economy and to a property system in which private ownership prevails. Another major issue was the moral approach to past injustices: how the State could compensate those whose property rights were gravely violated by the Communist regime. Compensation thus became the subject of a sharp political debate that divided both the society and the political parties. It is also an important part of the transformation of the legal system. Finally, in Hungary, where legislation has to face judicial review by an extremely powerful Constitutional Court, the issue also became an important constitutional question. The Court clearly strived to solve the extraordinarily complex question solely on the ground of constitutionality.

The challenge to balance so many different considerations resulted in certain indeterminations and inconsistencies in the consecutive rulings. The first of these problems was whether the Constitutional Court should take an active part in the transition of the entire legal system or limit itself to the role of a final watchdog of constitutionality. The Court, led by its President, László Sólyom, took up an activist stand, not only curtailing and invalidating the unconstitutional acts of the legislation but also developing a concept of constitutional compensation as a guideline for the legislation. Both the first and second compensation cases served that aim, and only the third case can be considered judicial review in the proper sense. But even in the third decision, the Court outlined a possible remedy for the unconstitutional provisions. Though not expressly mentioned, the Court must have been led to this activism by a peculiar historical responsibility for the democratic transition.

On the other hand, the Court practiced self-restraint in addressing some procedural questions. It would be an exaggeration to state that this led to the acceptance of a sort of "political question doctrine."

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The Court, however, narrowed its jurisdiction provided by the law and successfully avoided interfering in political debates.

The Court narrowly interpreted its jurisdiction regarding advisory opinions and preventive norm control; nevertheless, both areas have remained the most dangerous tasks of the “least dangerous” branch.\textsuperscript{5} In the charged atmosphere of political debate, the Court hardly can remain untouched by the pressure weighed on it by both the press and public opinion. In these cases, the Court became a direct actor in the interplay of political forces; it cannot ignore the possible immediate political consequences of its decisions.\textsuperscript{56} Another disadvantage of adjudication before enactment is that the Court must deal several times with the same issue, and is bound by its previous rulings. It is an additional difficulty that the Court must sometimes overrule its decisions and adjust its standpoint to the altered conditions.

Despite the difficulties of the issue and the inconsistencies of the three rulings, the Constitutional Court, after all, successfully faced the complex problems of compensation. As far as it was possible, the Court avoided the political pitfalls, and the rulings were correctly justified by legal arguments. The Court elaborated an important constitutional standard for the adjudication of equal protection and reverse discrimination. The compensation cases helped this young Court to develop a coherent philosophy on the supremacy of constitutionalism that helped it solve other hard cases (such as the statute of limitations case). In the future, the Court must further develop a comprehensive view of constitutionalism and interpretation.

\textsuperscript{55} I wonder whether this characterization of the judiciary stemming from \textit{The Federalist} No. 78, at 227 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) and made popular by Alexander Bickel is valid for the Hungarian Constitutional Court at all.

\textsuperscript{56} The Independent Smallholders Party was threatening to quit the governing coalition if the Compensation Law was not enacted.