

The Hungarian Judiciary: A Guardian in Need of Rescuing?

A study of judicial independence in Hungary since the transition to democracy in 1989



Sunniva Christophersen Haugen

Master's Thesis

Department of Comparative Politics

University of Bergen

June 2014

Abstract

This thesis investigates the state of the Hungarian judiciary, in terms of judicial independence and authority, asking how this has developed since the transition to democracy in 1989-1990, and why. The focus is on both the ordinary judiciary and the Constitutional Court, which is a separate institution, led by its own administrations. Judicial independence is a scholarly field that has received renewed attention in Hungary after the victory of Fidesz in the general elections of 2010, which brought fundamental changes in Hungarian constitutionalism, and the conditions and functioning of the judiciary. Much of the attention has been given on Hungary's Constitutional Court, which from its beginning in 1990 developed a rich and extensive jurisprudence, giving it an international reputation as a powerful and important court. However, the waves of post 2010 constitutional amendments and the new 2012 constitution, negatively affected the Court, changing its selection process, composition, jurisdiction and procedures. The ordinary judiciary, which took longer time to establish its independence after the 1989 transition, has also recently undergone reforms, ostensibly aiming to make it more efficient and suitable for a democratic society. The changes to the judiciary have been criticized by the European Union, who claims that some of the changes contravene European standards.

Through an exploratory case study, the thesis examines the processes, events and changes that have shaped the development of judicial independence in Hungary, and seeks to identify the underlying causal mechanisms that have led to the current situation. The study is based on key informant interviews conducted during fieldwork in Hungary, November 2013, supported by secondary sources.

The main findings in this thesis are: firstly, that the sweeping victory of Fidesz in the general elections in 2010, and the subsequent constitutional changes, left the Constitutional Court weakened, with limited jurisdiction and a diminished role in the state organization. Secondly, that the new system of justice administration introduced to the ordinary judiciary in 2011, and in particular the broad powers of the President of the National Office for the Judiciary, which are unprecedented in European practice, threatens judicial independence in Hungary.

Acknowledgements

Writing this thesis has been an interesting journey, and from the early beginning in August 2013 and until today, this project has gone a long way.

I would never have been able to finish this thesis without help along the way. First of all, Siri Gloppen, my supervisor at the Department of Comparative Politics, has been invaluable. Thank you for your enthusiastic interest in the theme of my project, honest feedback, and advice and support along the way – especially when I was preparing for my fieldwork. I would further like to thank all my respondents in Hungary for the time and effort to speak with me for my thesis – I could never have done this without your enthusiasm and willingness to share your knowledge and thoughts with me.

In addition, I thank Sigbjørn Spurkeland and Ingvild Thue Hvattum for taking the time to proofread parts of my thesis, and give me valuable feedback. A special thanks to Ingvild, for being such a good moral support, and best friend, throughout the entire process of writing this thesis. Thank you for travelling all the way to Budapest to keep me company during the last week of fieldwork, and thank you for always reminding me that there is a life outside Sofie Lindstrøm. I would also like to thank all my fellow students: these two years would never have been the same without good friends, fun trips and memorable parties.

Last, but not least, a special thanks to my family. Mum and dad: thank you for your support, care, love and patience – I could never have done this without you.

And to all of you who patiently listened to me when I told you that I would never survive this year: you were right, I survived.

Sunniva Christophersen Haugen

Bergen, June 2, 2012

TABLE OF CONTENTS

| | |
|---|----|
| CHAPTER 1 – Introduction: judicial independence in Hungary | 1 |
| 1.1 Setting the Scene: the Case of Hungary | 3 |
| 1.1.1 The Democratic Transition..... | 4 |
| 1.1.2 The Constitutional Court | 6 |
| 1.1.3 The Ordinary Judiciary..... | 7 |
| 1.2 Contributions to Existing Literature..... | 8 |
| 1.3 Structure of the Thesis..... | 8 |
| CHAPTER 2 - Methodology: qualitative case study research using interview data..... | 10 |
| 2.1 Qualitative Case Study | 10 |
| 2.2 Case Selection | 12 |
| 2.3 Data Collection: Methodological Triangulation..... | 12 |
| 2.3.1 Qualitative Interviews | 13 |
| 2.3.2 Other Data Sources: Data Triangulating using Documentation | 16 |
| 2.4 Data Availability: Validity and Reliability..... | 17 |
| 2.4.1 Validity..... | 17 |
| 2.4.2 Reliability | 18 |
| CHAPTER 3 - A Theoretical Framework..... | 20 |
| 3.1 The Judicial Independence, Authority and Accountability Function of Courts: A Framework for Inquiry | 21 |
| 3.1.1 Judicial Independence | 21 |
| 3.1.2 Judicial Authority | 23 |
| 3.1.3 Accountability Function of Courts | 24 |
| 3.2 The Dependent Variable: The Judicial Independence and Authority of Courts..... | 26 |
| 3.3 Explaining Judicial Independence, Authority and Accountability: A Conceptual Framework for Comparative Analysis | 27 |
| 3.3.1 The Formal Framework: the Institutional Structure | 27 |
| 3.3.2 Actor-Based Explanations: the Corporative Culture | 30 |
| 3.3.3 The Social, Legal, and Political Context | 34 |
| 3.3.4 A Combined Explanation of Judicial Behavior..... | 35 |
| 3.3.5 The Pendulum Effect..... | 36 |
| 3.3.6 Institutional Change..... | 37 |
| CHAPTER 4 - Empirical Analysis..... | 39 |
| 4.1 The Beginning: Dealing with the Past and Moving into the Present..... | 39 |
| 4.1.1 Building a New Constitutional Structure: a Road to the Rule of Law | 40 |

| | |
|---|-----------|
| 4.1.2 Powers and Actions of the Hungarian Court | 43 |
| 4.1.3 Building a Legal State: the Act of 1990 | 45 |
| 4.1.4 Organizational Transformation of the Legal Status: the Act of 1997 | 48 |
| 4.1.5 Consequences of Judicial Dysfunctions | 50 |
| 4.2 Developments since 2010: A New Constitution and a Storm of Constitutional Amendments ... | 51 |
| 4.2.1 The Amendment Rule: A Slippery Slope? | 52 |
| 4.2.2 After the 2010 Elections | 54 |
| 4.3 Consequences for the Constitutional Court | 57 |
| 4.3.1 Changes in the Nomination Process | 58 |
| 4.3.2 Fiscal and Budgetary Laws | 62 |
| 4.3.3 An Increase in the Number of Seats | 65 |
| 4.3.4 The Removal of Actio Popularis | 66 |
| 4.3.5 Constitutional Complaint..... | 69 |
| 4.3.6 Abolishing the Age Limit..... | 70 |
| 4.3.7 The Fourth Amendment | 71 |
| 4.4 A New Beginning for the Judiciary: the Act of 2011 | 73 |
| 4.4.1 The Three-Level System | 74 |
| 4.4.2 The President of the National Office for the Judiciary..... | 76 |
| 4.4.3 The Nomination of Judges..... | 79 |
| 4.4.4 The Age Issue | 80 |
| 4.4.5 The Transfer of Cases..... | 84 |
| CHAPTER 5: Conclusion – What is the State of the Judiciary?..... | 86 |
| 5.1 Efficiency at the Expense of Independence in the Ordinary Judiciary?..... | 86 |
| 5.2 Has the Constitutional Court Surrendered?..... | 88 |
| 5.3 What is the State of the Judiciary? | 90 |
| 5.4 Concluding Remarks: limitations of the data material and suggestions for further research | 92 |
| BIBLIOGRAPHY | 94 |
| Appendix 1: List of Respondents | 97 |
| Appendix 2: Interview guide | 99 |

LIST OF TABLES AND FIGURES

Tables:

| | |
|--|----|
| Table 1: A Summary of the Theoretical Framework..... | 38 |
|--|----|

Figures:

| | |
|---|----|
| Figure 1: The Composition of the Constitutional Court of Hungary..... | 43 |
|---|----|

| | |
|--|----|
| Figure 2: A Three-Level System of Judicial Administration..... | 75 |
|--|----|

LIST OF ABBREVIATIONS

HCC – The Hungarian Constitutional Court (the Court)

NCJ – National Council of Justice

NOJ – National Office for the Judiciary (the Office)

NJC – National Judicial Council

CHAPTER 1 – Introduction: judicial independence in Hungary

”The Constitutional Court has become something as unusual as a guardian in desperate need of rescuing. As a dissenting opinion formulated it: The Court has put down their gun – and surrendered”

(Tóth, B 2013 [interview])

Why is the Hungarian Constitutional Court – which in the 1990s was hailed as the strongest and most independent Court in the world (Polgari 2013 [interview]) – in such a precarious state? This thesis aims to trace the trajectory of judicial independence in Hungary in the post - 1989 era, and contribute to a better understanding of the dynamics at play.

In this study I will argue that the judicial development should be seen on the basis of the important event that took place in April 2010, when Viktor Orbán and his political party Fidesz won an overwhelming victory in the Hungarian parliamentary elections. With 68 percent of the seats in parliament and a two-thirds supermajority, Fidesz was able to change the constitution with respect to crucial features of institutional design relating to the structure of government and fundamental rights. The first year of office included no less than twelve amendments to the constitution. Many of these changes were designed with a sole purpose to weaken institutions that should, and could, check what the government was going to do next (Bánkuti et al., 2012b: 242). The first amendment removed the last restraint on a government with a two-thirds majority: an amendment that required a four-fifths vote of parliament to approve the rules for writing a new constitution. The heightened supermajority rule was designed in order to ensure that a future constitution would enjoy broad political consensus. Fidesz did not have the necessary four-fifths of the parliament, but since the four-fifths rule itself was not subject to special requirements, it could be changed by the normal amendment process. Since this only requires a two-thirds majority, the government was able to eliminate the four-fifths rule from the constitution – and was free to write a new constitution on its own (Bánkuti et al., 2012a: 139). Which they did.

The Basic Law of 2012¹ went into effect on January 1, 2012 with a great deal of public fanfare, and marked the final end of the Hungarian transition which begun in 1989 by

¹ Also referred to as the Fundamental Law of 2012

completely replacing the constitution established at that time. Parliament never adopted a new constitution at the beginning of the democratic era. Instead, most of the provisions in the communist constitution of 1949 were amended, and thus, only in its formal framework did the constitution of 1989 remain the same as the one from 1949. The understanding was that those amendments would be followed by a final constitution, as promised in the preamble of the 1989 document. Though, the new constitution of 2012 did not become the final entrenchment of the democratic state of Hungary as promised. Instead it has caused waves of criticism from both inside and outside of Hungary, and a rapid acceleration of European attention regarding consequences of the new constitution, as well as its amendments, is a signal that Hungary has hit a European nerve (Scheppelle, 2012). Most of the criticisms concern the structure of government that the new constitution is creating, and the assessments are harsh. While the 1989 Constitution ensured a constitutional framework with checks on power, multiparty participation and a substantial role for minority parties, the Basic Law of 2012 is criticized as the constitution that dismantled this delicate system and turned Hungary into a constitutional democracy only in its name (Bánkuti et al., 2012b: 238).

While the Constitutional Court played a prominent role in the two first decades after the transition as the primary check on government and the guardian of the constitution, the ordinary judiciary took longer time to establish itself as an independent institution under the new Constitution. Today, as I will demonstrate later in this thesis, the Constitutional Court has apparently lost power, and its activity is limited to a minimum, while a radical reform of the ordinary judiciary has caused international attention and allegations of impaired judicial independence.

My research was born out of a puzzle: what can explain the apparent decline of the Hungarian judiciary and the country's celebrated Constitutional Court? How are the changes related to the political developments in the country? My focus will be on both the ordinary judiciary and the Constitutional Court. The two institutions are completely separated, and led by separated administrative units. Thus, my research question is as follows:

What is the state of the judiciary in Hungary in terms of judicial independence and authority, focusing both on the ordinary judiciary and the Constitutional Court, and how and why has this developed since the breakdown of communism in the 1980s?

The aim of this thesis is to assess the current state of the Hungarian judiciary, and to investigate the development of judicial independence in Hungary since the transition from communist rule in 1989. The research question is examined through an analysis of the development of the Hungarian judiciary since the breakdown of communism in 1989. I will further seek to understand the causes for this development as well as the implications for democracy. The thesis is a qualitative study, based on interview data collected during fieldwork in Budapest in November 2013.

The following section provides a brief introduction of the Hungarian case.

1.1 Setting the Scene: the Case of Hungary

The fundamental idea of a constitutional democracy is a belief that citizens can exercise their participatory right to choose who is going to rule on their behalf, for a certain period of time. However, for this to function effectively, there need to exist an institution that can secure the rules of the game - including the electoral system itself. Hence, an independent judicial institution, which is professionalized and endowed with clear responsibilities, is central to the functioning of a modern democracy, and the development of an independent court that can function as a horizontal accountability channel is an important step in a democratization process (O'Donnell in Schedler, Diamond and Plattner 1999: 29-30).

The case of Hungary is interesting: the Hungarian Constitutional Court had a strong and important position in the beginning of the 1990s, ushering in the transition to democracy while overseeing the creation of a new constitutional architecture. The Court managed to stay strong and powerful for more than two decades – a factor that contributed to it being famous all over the world (Uitz, 2013: 2). At one point it was even characterized as “the most active court in the world” (Dupré, 2003: 6). This is not the case any longer. The Hungarian Constitutional Court has apparently lost power, and although the Court still exists, it has largely disappeared from the political landscape. While some explain the development as a natural development in which democratic standards have reached the appropriate level and therefore left the Hungarian Constitutional Court with a diminished role in the political and judicial sphere of the Hungarian society, other see it as a direct result of extensive measures aimed at an institution that was created to check and balance the government. Critical voices claim that the Court has been a prominent victim of Hungarian constitution-making (Uitz, 2013: 1-3). What is beyond question is that the Court’s development has occurred in parallel

with political actions and events, for instance the establishment of the Basic Law of 2012, which has caused the international society to ask questions concerning the quality and viability of the Hungarian democracy.

The ordinary judiciary has gone through similar developments, and reforms in both 1997 and 2011 sparked waves of criticism regarding the independence and authority of the judiciary (National Office for the Judiciary, 2014). A reform in 2011 concentrated all powers in the hands of the president of the newly established National Judicial Office, and introduced a system that Europe had never seen before. The powers of the president of the NOJ are unprecedented in European practice for their expansive scope, as well as for the inability of the affected actors to question the president's actions. These changes contradict European standards, and questioned the judicial independence of judges (Scheppele, 2012). The fierce criticism was further reinforced by new legislation forcing the retirement of 274 judges and public prosecutors from the ordinary judiciary, caused by an immediate reduction in the mandatory retirement age for these professions from 70 to 62. The European Commission closed infringement procedure on the forced retirement, and there were calls by the Commission for Hungary to comply with the judgments as soon as possible. Hungary therefore took the necessary measures and changes to bring the legislation in line with EU law. A new law lowered the retirement age to 65 over a period of 10 years, rather than lowering it to 62 years over one year, as the former law suggested (The European Commission, 2013). But most of the judges and prosecutors who were forced to retire before the infringement procedure chose not to return to their previous occupations. The forced retirement of judges and prosecutors was heavily criticized by both internal and external voices, who saw this as another attempt by the government to curb the judiciary.

1.1.1 The Democratic Transition

The Hungarian transition out of communism began decades before 1989, and resulted in one of the most politically stable and economically prosperous democracies in the post-communist world. Among other post-communist countries, Hungary soon came off as the very definition of a successful transition to democracy and social market economy, and throughout the 1990s, other eastern European countries would look to Hungary for inspiration when they went through similar transitions (Bozóki and Simon, 2010: 208-212).

Between 1948 and 1989, Hungary was a strict one-party dictatorship. However, only 10 percent of the population belonged to the communist party. The remaining 90 percent were

perceived as potential enemies of the regime. The regime provoked resistance and protests among students and intellectuals on several occasions, and in October 1956 an organized peaceful mass demonstration took place. The demonstration led to the outbreak of the revolution on 23 October, which is seen as the first anti-totalitarian revolution in history (Argentieri, 2008: 218). A reform-oriented communist leader, Imre Nagy, took over as prime minister, and the cabinet was reorganized on a coalition that included representatives from all political parties. Unfortunately, the democratic surge was short-lived. Soviet troops invaded Hungary on 4 November, and the fight escalated with a bloody fight with younger people on the streets of Budapest. Thousands of people were killed, and the civil protests were massive. Nagy and his cabinet were removed, and later imprisoned and executed. The revolution in itself did not result in a regime shift, but the inauguration of János Kádár as Prime Minister of Hungary changed the form of communism. With him the basic attitude of the government shifted from the totalitarian dictator Rakósi's "whoever is not a follower is our enemy" to Kádár's "whoever is not against us is with us" – a substantial change of the very foundational principle (Kinander, 2011: 13-14).

Kádár led the country away from a classic totalitarianism to a post-totalitarianism regime, in which political passivity was recommended. More relaxed and tolerant social and economic policies characterized everyday life and the shift of the basic principle involved considerable freedom of expression, much more than in other countries and regimes in the region. However, from the mid-1970s, Hungary had high foreign debt as a consequence of loans aimed at financing an acceptable living standard. The communist leadership was aging, and the regime could no longer cope with the external and internal challenges. The period between 1985 and 1989 witnessed a long erosion and disintegration of the communist regime, and the foundations of the old regime were questioned (Bozóki and Simon, 2010: 206-208).

The transition from communism to democracy in 1989 was both peaceful and coordinated, and was the final result of the trilateral Round Table Talks between the ruling communist party and opposition groups. The peaceful negotiations introduced revolutionary outcomes, as democratic institutions replaced what had previously been an authoritarian regime. It also marked a new era of Hungarian constitutionalism (Uitz 2013: 6-7). The Stalinist constitution of 1949 was changed by the outgoing Communist parliament, but compared to the rather speedy political transformation of the country; the text of the Hungarian constitution was changed and amended only gradually. The thought was that these amendments, created in

1989-1990, would be followed by a complete constitutional overhaul. Nevertheless, they still created the legal framework of the new democracy, with all the main institutions characteristic of constitutionalism: a representative government, a parliamentary system, an independent judiciary, an ombudsman who could guard the fundamental rights of the Hungarian people – and a Constitutional Court that could review the constitutionality of laws and interpret the temporarily or transitional constitution, while waiting for the final constitution that were promised in the preamble of 1989 document (Kovács and Tóth 2011: 183-184).

1.1.2 The Constitutional Court

Constitutional courts are seen as arguably the most important institutions to maintain the constitutional balance of powers (Kovács and Tóth 2011: 185), and were therefore introduced all over post-communist Central and Eastern Europe as the main symbol of transition to democracy. The courts carried with them a promise – a mandate to usher transition to democracy and to administer and lead the necessary and profound constitutional transformation. Furthermore, these courts were entrusted with what had previously been an unseen task of constitutional review; a task that was not bestowed upon already existing institutions. The constitutional courts were given a responsibility in overseeing the establishment of a new constitutional architecture, in which the judiciary had to build their jurisprudence and reputation and other democratic and independent institutions had to be established, so that the contours of a new system of government could be refined further (Uitz 2013: 1-2).

One of the main themes of the Round Table Talks was the establishment of the Constitutional Court of Hungary² that was instituted in conjunction with the democratization processes (Guarnieri 2014: 2). The Court was a major premise for the development of constitutional institutions, and the purpose of the Court was to monitor political and judicial processes tainted by years of illegitimate practice. The Court was created and came into effect already before the first free elections, giving them the opportunity to supervise the election process (Kinander, 2011: 16). The Constitutional Court did not have an institutional antecedent in Hungary, and the court was therefore seen as a fresh start for the constitutional democracy. The court's main task was to serve as a check on political branches and the ordinary judiciary, including the parliament, which was given the opportunity to pass constitutional amendments with a two-thirds majority (Uitz 2013: 7-8). Furthermore, the court was considered to be the

² Hereinafter the HCC or the Court

guardian of fundamental rights and an international guarantee of the separation of powers (Kovács and Tóth 2011: 185).

The Constitutional Court of Hungary is separated from the ordinary judiciary and the judicial system, and has unique constitutional interpretative authority. Under the 1989 constitution, it was known for a very broad competence: the abstract constitutional review of legal rules, *Actio Popularis*, which established the right for anyone to bring an action without limitations. There were no deadlines, and the applicant was not required to show any impact or other legally protected interests. A great majority of the court's proceedings in the two first decades of the court fell within this category (Kovács and Tóth 2011: 185-186). The Hungarian Constitutional Court became known for standing up against the other political branches, and the court had, from its early years of operation, an excellent international reputation due to its strong and active presence. It's jurisprudence on transitional justice and capital punishment was known all over the world, and the court was, at one point, characterized as "the most active and powerful constitutional court in the world" (Kinander 2011: 2).

1.1.3 The Ordinary Judiciary

In conformity with the socialist state model, the judiciary and the executive were closely interwoven during communism. The political transition in 1989 therefore created the basis of rule of law in Hungary, and gave rise to a new and independent judiciary established through gradual reforms. The result was a judicial system that started to resemble the classical Western European judiciary, with new regulations and provisions that were more compatible with a democratic regime (Sajó, 1993: 293-295).

When the transition to democracy began, the administration and control of courts were given to the Minister of Justice. As there was a need to remodel and reorganize the judicial system in order to make it a more effective and modern, compatible with European standards, an act was introduced in 1997. The Act of 1997 provided the establishment of an organizational transformation of the legal system: a completely new organization of the judiciary was developed, and the National Council of the Judiciary was formed. All rights regarding the administration of courts were transferred from the Minister of Justice to this Council, which acted as an independent institution from the government and the legislative branch. The establishment of the council brought an end to the control of the government, and was believed to increase the independence of the judiciary (The Curia of Hungary, 2014).

1.2 Contributions to Existing Literature

The thesis has two goals. In terms of theory, the goal is to contribute to an understanding of the factors that make some courts act more independent than others, and possess stronger judicial authority. I will do so by systematizing existing research findings regarding the nature and functioning of judiciaries, and how they hold other branches and state officials to account when they overstep their powers and the legal mandate given to them, and build a coherent framework, applicable to empirical evaluation of real-world judicial institutions. The framework will be applied and “tested” in an empirical analysis of the Hungarian case.

Empirically, the aim is to understand the judicial developments in Hungary. Guided by the theoretical framework, the Hungarian judicial institution will be analyzed in a comprehensive manner, with a particular focus on its development since the end of communism and the consequences of extensive reforms for the judiciary’s independence and authority mechanisms. Finally, by merging these contributions, the systemic characteristics of the Hungarian judiciary will be discussed in terms of criteria of independence and strong authority functions, in order to illuminate the development of the judiciary.

I will argue that my thesis can contribute to expanding academic knowledge about judicial independence. The field of judicial independence in Hungary, with notable exceptions, such as Kovács and Tóth (2011), Uitz (2013) and Bánkuti et al. (2012b), is characterized by outdated analyses, mostly stemming from the years before the enactment of the Basic Law of 2012. Furthermore, most of them focus mostly on either one of the institutions, and not both. There is a need for new research on the field in order to identify mechanisms that underlie the recent development of the Hungarian judiciary. In general, there are few theoretical and empirical contributions that emphasize the declining role of courts and judicial independence within the context of a democratic regime. I will try to contribute to a better understanding of this – and how the legal institution of a country is challenged when democracy is threatened by authoritarian tendencies. The goal is to improve the existing theory by attempting to provide a deeper understanding of what happens when a court is weakened, and the factors that contributes to this weakening.

1.3 Structure of the Thesis

While having established the scene, and explained why my research question is worth the attention of a year’s work, I will in the next chapter explain how my study is done through a methodology chapter. Here, I argue that doing a qualitative case study of Hungary, based on interview data, provides the depth that is necessary to give a reliable answer to the research

question. Through collecting interviews with centrally placed political, bureaucratic, juridical and academic persons I have been able to gather information that can help to explain the phenomenon under scrutiny. Interviews are of course complemented by other sources of data, such as documents and secondary literature.

Chapter 3 provides the theoretical framework for my study, drawing on literature on judicial independence, authority and accountability functions. The theoretical framework helps build a structure, based on existing academic knowledge that tells me where to look when gathering data, and what to look for.

Chapter 4 presents an empirical analysis, built on the data gathered while doing fieldwork in Budapest. In short, the main findings are that both the Constitutional Court and the ordinary judiciary are seriously weakened, and that the judicial independence of both judges and the institutions as a whole is questioned. While the latter still has an undisputed place in the state organization, the Constitutional Court's role is diminished to a minimum. These developments have happened in parallel with abrupt political events, and the findings show that there are clear correlations between changes at the constitutional level, introduced by the governing majority since 2010, and the judiciary's development. These findings are discussed and analyzed in light of the theoretical expectations that were highlighted in the theory chapter. I show how a set of structural and institutional factors, such as appointment procedures in favor of the governing majority and the lack of protection of judge's tenure, work to give Fidesz a clear advantage, and thus weakens the judiciary. Changes in the nomination process, which originally were designed to protect and insure the independence of judiciary, contributes to an increased risk of appointing unqualified persons – selected primarily on the basis of political preferences. The trend is further accentuated by a culture in which judicial decisions seem to be a function of the political preferences of the judges. Moreover, I discuss how a powerful court can be perceived as threatening to other political institutions, and therefore cause changes at the constitutional level with an aim to undermine the court. This is what has happened in Hungary: the pendulum has swung from an independent and strong court, to a weaker legal institution, much more exposed to abuse from other institutions. Finally, I show how the Hungarian judiciary has gone through gradual institutional changes, eventually changing the institutional basis for judicial independence.

The last chapter in this thesis concludes and summarizes the findings, and includes some concluding remarks about the limitations and representativeness of my findings.

CHAPTER 2 - Methodology: qualitative case study research using interview data

The choice of research method has implications for the result of the study. It is therefore crucial that one is critical of, and argues well for, the choice of method and data collection. The thesis is a case study aiming to investigate “a contemporary phenomenon in depth and within its real-life context” (Yin, 2009: 18). I seek to investigate and uncover how the judiciary has developed in Hungary since the breakdown of communism in 1989, in terms of judicial independence and authority, focusing in particular on the weakening of the judicial institution and its independence. The study is furthermore exploratory since the main aim is to uncover new evidence that has not been studied before.

A main reason for my choice of doing interviews as the method of data collection is that few have collected the information that I was looking for – hence I had to go collect it myself. The Hungarian judiciary has received considerable attention over the last decade, both by international and national scholars, but, as mentioned before, most of these focus on the years before the Basic Law was adopted in 2012, and seeks to explain the strength of the judicial institution, rather than its weakening.

This chapter will begin with discussing the principles of qualitative case study research, and why this method is most suitable to answer the research question of this study. I will then explain the rationales behind choosing Hungary as a case, which is followed by an argument that data triangulation with a main focus on qualitative elite interviews, complemented with other sources of documentary data, provides the study with multiple measures of the same phenomenon (Yin, 2009: 116-117) that strengthens the validity and reliability of my findings.

2.1 Qualitative Case Study

A qualitative research design is conducted when a problem or issue needs to be explored, and the aim of a qualitative study is to gather an in-depth and complex understanding of the phenomenon (Creswell, 2013: 43-44). The case study is among the array of qualitative choices, and is the research method used in this study. Gerring (2007: 19) defines a case as a phenomenon with clearly defined boundaries, either observed at a single point in time or over some period of time. He further defines a case study as “the intensive study of a single case where the purpose of that study is – at least in part – to shed light on a larger class of cases (a population)” (Gerring, 2007: 20). In my study, the judicial system, both including the Constitutional Court and the ordinary judiciary, is the case, and how judicial independence

has developed since the transition in 1989 is what is observed. Subordinate to that is the interaction between political development and judicial independence, which constitutes the variables of the study that the outcome is supposedly dependent on (Gerring, 2007: 20-21).

A case study is usually focused on the within-case variation, and typically includes several observations. The observations can be constructed diachronically, by observing the case or subsets of within-case units over time, or synchronically, by focusing on observations of within-case variations at a single point in time (Gerring, 2007: 21). Thus, like other case studies, the focus for this study is on the within-case variation. Process tracing is a method of such within-case analysis that can be a tool for causal inference. When process tracing, diagnostic pieces of evidence within a case are examined in order to support or overturn alternative explanatory hypotheses. The goal for my case is to establish whether events or processes within the case are in alignment with those predicted by the alternative explanations (Bennet, 2010: 208). By using interviews, documents and other sources of data, I can examine whether the causal process that theory implies in the case of study is evident in the values of the intervening variables of the case (George and Bennet, 2005: 6).

The case study is constructed diachronically, meaning that the variation in my dependent variable is measured over time. I am able to do this because of the data that are available, and because of information gathered through interviews. This allows me to compare judicial independence throughout time, within the case. The study aims to identify processes and mechanisms that over time causes changes in the dependent variable, and a detailed review of the empirical evidence is therefore a considerable part of the research in this thesis. Tilly (2001: 24) argues that such a way of examining the field of study differs from other because it focuses on describing prominent features of events, and with a relatively general scope attempt to identify mechanisms within them. Hence, the empirical and comparative focus of this thesis will be changes within the variables, and the reasons behind this change, more than just on the value of the variables themselves.

According to King et al. (1994: 45), an often overlooked advantage of case studies is that the in-depth study of a phenomenon may lead to more focused and relevant descriptions, even when few things are previously known about the subject. This is further emphasized by Gerring (2007: 439-43), who states that case study research is an excellent way of doing exploratory research, as it grants the researcher the advantage to generate and test a great number of hypotheses in a “rough-and-ready way”. Furthermore, Yin (2009: 9-10) argues that

“questions beginning with ‘why’ and ‘how’ are explanatory questions that are likely to lead us to the use of case studies”, as such questions deal with operational links that should be traced over time. The focus is on contemporary events, and the investigator has little control over the events studied (Yin, 2009: 9-11). Because I seek to understand how the judicial independence has developed, and why these developments have happened, a case study is the preferred method for my study.

2.2 Case Selection

George and Bennet (2005: 31-32) argues that when selecting a case to be studied, the researcher choose a case that can provide a strong possible inference on a particular theory. When I chose Hungary as a case for this thesis, I considered it a part of a population of states in which judicial independence is weakened as a result of external measures. As I wanted to uncover as much as possible about the phenomenon, drawing a case from a random sampling was never an option, as that could cause the case chosen being both unrepresentative and providing me with too little leverage into the research question. Therefore, I decided to choose a deviant case in which the level of judicial independence is supposedly lower than one would expect, given surrounding countries and the general level of democracy in the region (Gerring, 2007: 87-107). The deviant-case method is an exploratory form of analysis, and as soon as the exploration of the case has identified a variable that can help to explain the case, it is no longer deviant (by definition), or at the very least, it will be less deviant (Gerring, 2007: 105-107). The purpose of choosing Hungary is to probe for new explanations that can help to explain the development of judicial independence, and search for the variable(s) making the case deviant.

2.3 Data Collection: Methodological Triangulation

An important aspect, according to King et al. (1994: 26), is that all data and analyses should, as far as possible, be replicable, so that a new researcher are able to duplicate the data presented in a study, and trace the logic behind the conclusions. Replicability is important even if no one actually follows the reasoning process. This can further strengthen the reliability of the study conducted (Yin, 2009: 45). I will in this section provide a detailed overview of what sources where used to answer the research question, and what implications the use of those sources might have.

A major strength of case studies is the opportunity to use different sources of evidence. The use of multiple sources of evidence has several advantages, but most importantly it increase the validity and reliability of the conclusion as it develops what Yin (2009: 115) refers to as

“*converging lines of inquiry*”, which means that several sources of evidence points in the same direction. The findings or conclusion in a study based on different sources of information is likely to be more convincing and accurate than a study based on one source. Data triangulation, which encourages the researcher to collect information from multiple sources that are all aimed at corroborating the same phenomenon (Yin, 2009: 116), can generate more information to bear on the hypotheses (King et al., 1994: 26).

Yin (2009: 101) discusses six sources of evidence as the ones most commonly used when conducting a case study research: documentation, archival records, interviews, direct observation, participant-observation, and physical artifacts. Of these six sources, I utilize both documentation and interviews directly, but qualitative interviews are the primary mode of the data collection in this thesis, and I will therefore discuss this source of evidence first.

2.3.1 Qualitative Interviews

According to DiCicco-Bloom and Crabtree (2006: 314), interviews are among the most popular strategies for gathering and collecting qualitative data, and in a case study research, interviews are essential sources of information (Yin, 2009: 106). Tansey (2007: 4-5) argues how elite interviewing, which is interviews with selected people because of who they are and what positions they occupy (Aberbach and Rockman, 2002: 673), is highly relevant for the process tracing approaches to case study research. As the aim of this thesis is to analyze judicial development through process tracing, elite actors will thus often be critical and useful sources of information about the judicial processes that are of interest (Tansey, 2007: 5). Elite actors such as politicians, judicial staff and bureaucrats, academics and judges can therefore provide my thesis with crucial insights. The goal was that the interview respondents would give me valuable insights into the state of the judiciary in a way that shed light on why and how these institutions have developed, and give clues and interpretations of other important sources of evidence that I utilized.

Semi structured interviews³

Qualitative interviews have been categorized in a variety of ways, but what most scholars seem to differentiate between is unstructured and semi structured interviews, which both provide qualitative data. As I wanted a dialogue between the respondents and the interviewer, the data was gathered through semi structured interviews. Such interviews are often scheduled in advance, and take place at a designated time and location. The questions are usually

³ Similar to what Yin (2009: 107) refers to as focused interviews

predetermined and open-ended, but other questions might emerge from the dialogue between interviewer and the respondents and the questions' order will usually change (DiCicco-Bloom and Crabtree, 2006: 315). As the approach of semi structured interviews allows a less fixed sequence, allowing the respondent to formulate their own answers, while gathering in-depth information about the field of study, I decided to conduct information through this variation of interview (Creswell, 2013: 163-164). The ability to compare interviews are somewhat weakened by this way of interviewing, but that is not necessarily the goal for me. The aim was to achieve valuable insights into the research question and as much information as possible.

Finding Respondents: snowball sampling of elites and experts

When conducting interviews, it is important that the interviews are tailored to the purpose of the study and what one wants to investigate (Aberbach and Rockman, 2002: 673). An important step in the process is to identify respondents that can best answer the questions prepared (Creswell, 2013: 164). As mentioned above, elite representatives will provide valuable insights to the field of interest. They can provide crucial information about the state of the judiciary, and are of great importance in shedding light on the case. The respondents can further provide technical knowledge that they are in a better position to have access to than me, in addition to interpretative knowledge which covers their personal thoughts on the issue of judicial independence and development. This emphasizes the need for data triangulation, as the respondents can provide information that is colored by their personal beliefs (Bogner and Manz, 2009: 52).

The biggest challenge when doing elite interviews, or any type of interviewing for that matter, is finding relevant people who are willing to talk to you. I knew that my results would be affected by the people I talked to, and it was therefore important to consider wisely which respondents to contact. I wanted to talk to actors who had knowledge about the processes that I was researching, and that meant primarily people within the judicial system, judges and legal assistants, academics and politicians. It turned out to be a lot harder than expected to get a hold of people of interest in Hungary. People were busy, and generally slow in replying to electronic communication. This proved to be a general problem when trying to communicate with respondents in Hungary: there is a lot of bureaucracy, and most people do not respond

quickly via email. Web pages of judicial institutions seldom include contact information to judges and legal assistants, and are often only available in Hungarian.⁴

Though, as I was able to get in contact with several academics and secretaries in various institutions, I was able to secure some interview appointments before traveling to Budapest in November 2013. These respondents could help me come in contact with new respondents in other areas of the Hungarian state organization, and through persistence and relentless use of the snowballing as a sample strategy, in which I asked respondents if they knew, or could recommend anyone else that I should interview, I was able to conduct more interviews than I could have hoped for. I had a number of appointments, and the respondents included a wide variety of academics, law clerks, judges, politicians and journalists. When selecting the sample of the study through the snowball strategy, respondents are asked to recommend further respondents to the sample (Grønmo, 2007: 102). An important aim when selecting respondents was to include people from different political factions and organizations, in order to avoid bias. As I had to have some understanding of the core of the issue beforehand, I knew that I was especially prone to the problem of bias. Talking to people representing different factions could help me avoid unbalanced and biased information, and thus increase the internal validity of my findings (Yin, 2009: 72). One danger with such sampling is that the respondents can suggest other respondents who share some similar characteristics (Tansey, 2007: 19). However, as I focused on selecting representatives of all political factions, as well as academics writing in favor of different sides, I think I managed to ensure that the initial set of respondents were sufficiently diverse and not skewed excessively in one particular direction. Nevertheless, I sought to come in contact with all political parties in Hungary, but as the parliamentary election was coming up shortly (in April 2014), most of them were simply too busy to meet me for an interview. That can affect the reliability and internal validity of my thesis. Though, overall I felt that the set of respondents represented the breadth of state organization in Hungary.

The Interview Guide and the Interview Process

Before the interview process began, I had to obtain approval from NSD (Norsk Samfunnsvitenskapelig Datatjeneste AS) that the study could be carried out in accordance with

⁴ I am thankful for the help of Katrine Steinfeld, Political Advisor for Slovenia, The Royal Norwegian Embassy in Budapest, for translating contact information to relevant institutions and navigating me through the Hungarian “jungle” of relevant foundations and organizations.

privacy policy.⁵ The approval came just before departure to Budapest, and made it possible for me to conduct the necessary interviews.

As mentioned previously, I chose to do semi structured interviews with all my respondents. I made an interview guide, which was revised several times through the process. The guide was simple in its design, and contained only wide questions that I could use as guidelines during the interview session. Each interview had its own dynamic, and depending on whom I talked to, different parts and questions in the guide were emphasized in different interviews. When meeting the respondents I asked them to sign a consent form, in which they agreed to participate in the study. The form also included information concerning procedures for storage of data and personal information, as well as procedures for citation.⁶ I always obtained the respondents' contact information, so that I was able to contact them for clarifications, elaborations or follow-up questions.

When developing the interview guide I was very cautious as to avoid biased questions that could steer the respondents' answers in a certain direction. Though, as I often ended up asking one broad open-ended question that allowed the respondent to elaborate for a while, and then asking follow-up questions, this was not really a problem for me. Still, I kept in mind that I had to avoid leading and biased questions, and was further aware of the fact that my presence and behavior could shape the interview situation. However, I never got the impression that the respondents were trying to please me and thus formed opinions that they had not held before the interview. In fact, I was several times amazed by the directness and honesty that most respondents met me with. I conducted two interviews in which the respondent, because of occupation within diplomacy, did not want to be quoted by name.⁷ However, as their perspective was mostly in line with the perspective of other respondents, this had a limited impact on the data collection. In order to strengthen reliability, I have only used data from respondents who agreed to be quoted by name.

2.3.2 Other Data Sources: Data Triangulating using Documentation

When conducting an exploratory study, it is encouraged to collect information from various sources of evidence that are aimed at explaining the same phenomenon. Data collected

⁵ A main focus when preparing for fieldwork was to make sure that the respondents were protected in terms of privacy policy. I had to account for how the data would be stored, and for how long, and who would have access to the data.

⁶ All quotes are approved by respondents

⁷ The two respondents are not included in the list of respondents in Appendix 1, in order to ensure full anonymity.

through interviews should be compared to data obtained through other means whenever possible, as that can increase the likelihood that the researcher is on the right track. Corroborating statements from my interviews with data from other sources, such as documents, is therefore useful in order to increase the reliability of the data and to ensure that different sources point in the same direction (Yin, 2009: 115). Furthermore, when adding data from other sources of evidence to the study, it can help fill in gaps in the researcher's knowledge – being a result of forgetting to ask certain questions to a respondent or because none of the respondents mentioned that particular information.

The most important source of evidence besides interviews was documentation, which basically includes all written documents that are of relevance to the case being studied. Such information is likely to be relevant to all case studies, and should be used in order to corroborate evidence from other sources. Documents are further helpful in verifying unclear information, unclear spelling and names of organizations and other facts that might have been mentioned in the interviews (Yin, 2009: 103). As my study is an exploratory one, documentation is useful in explaining the phenomenon under scrutiny, together with the data collected from interviews. I used documents prior to the field work in order to gather invaluable information that could help to prepare the interview situation, and have further relied on documents that could provide empirical evidence that otherwise would have been hard to find. Yin (2009: 102) emphasizes the importance of not taking everything that is presented in writing as a fact, and stresses the need to be aware of biased and incomplete documentation.

2.4 Data Availability: Validity and Reliability

The quality of data obtained through a research study is based on a critical discussion of two essential factors: validity and reliability. If the data that the conclusion of a study is building inference from are of high validity and reliability, then the data is of high quality (Grønmo, 2007: 219). There are four tests that can be used when establishing the quality of an empirical research study: construct validity, internal validity, external validity and reliability (Yin, 2009: 40). This section will consider these tests of quality in relation to the data collected and applied in this study.

2.4.1 Validity

Validity can be characterized as the data material's relevance to the research process, and it includes that the operationalization and choice of cases adequately reflects the concept the researcher is aiming to measure (Grønmo, 2007: 221). That means that you should always

ensure that you are measuring what you want to measure, and therefore be careful when choosing data that can answer the research question. As this study seeks to understand the development of the judicial institutions in terms of judicial independence and authority, an operationalization of relevant concepts are particularly important. I will argue that doing an in-depth single case study, based on data triangulation of different sources of data, is an advantage in order to avoid problems of measurement validity. The use of both documentation and in-depth interviews reduces the risk of errors of measurement, and strengthen the validity of the study. Nonetheless, I still need to consider all pieces of evidence before including them as a part of the study, or drawing conclusions based on them, in order to avoid evidence that doesn't investigate or enlighten the subject.

Internal validity is mainly a problem for explanatory cases studies, and concerns the threat of seeking to establish a causal relationship between the independent variable X, and the dependent variable Y, without taking into consideration that a third factor may have caused the outcome, instead of the expected factor (Yin, 2009: 40-42). However, the qualitative, descriptive approach of this study controls for most of the possible problems caused by inadequate internal validity (Gerring, 2007: 43), and when using a process tracing method the internal validity is strengthened through the thorough focus on the within-case and the number of data sourced used (Gerring, 2007: 184).

External validity deals with problems regarding whether the findings of a study are generalizable beyond the immediate case study (Yin, 2009: 43). The problem of external validity or the applicability to a broader – unstudied - population has been a focus in case studies for a very long time. The case study criticism focuses on how single case studies are less suitable for generalization than large-N studies (Gerring, 2007: 43). The scope of my research question limits the investigative reach of the study to the Hungarian case, and the generalizing strength of the thesis is therefore weak. Though, as the theory of judicial independence can help to explain other cases, the result of this study may be generalizable to some extent.

2.4.2 Reliability

Reliability is an important test when assessing the quality of a research design. The test strive replicability, which means that if other researchers were to conduct the same type of study, following the same procedures as described by the earlier researcher, their findings and conclusions would coincide. The goal of this test is to limit and minimize the errors and biases

in the study. An important prerequisite in order to make the study reproducible is the documentation of the procedures and the data that the study is based on. The guideline should be to conduct the study in such a way that another researcher could repeat the procedure and retrace the results (Yin, 2009: 45). This study is based on data gathered through interviews and documentations. The data is available through thorough transcriptions and audio recordings from the interviews. In addition, there exists data bases in which I have gathered documents containing the empirical data used in this thesis that are open for all interested. This makes the replicability of the results of this study possible.

CHAPTER 3 - A Theoretical Framework

The aim of this chapter is to offer a theoretical framework for explaining changes in judicial independence and authority, understood as the *ability* and *willingness* of courts to say “no” to the government when it oversteps its authority. I will start by clarifying and operationalizing the dependent variable, judicial independence and authority (which in the following will be referred to simply as judicial independence), before searching the literature to identify independent variables that potentially can explain the shifts, and thus help uncover the causes for the observed development in the dependent variable.

As proxy for judicial independence I propose to look at the extent to which courts deliver judgments that carry political costs for the government, and refrain from passing judgments that are deferential to the government in situations where they should have said “no”.⁸

In order to explain judicial independence, understood as “passing judgments with political costs for the government”, two sets of variables are identified: (1) the formal framework providing judges with more or less ability to act independently, and (2) factors influencing the willingness of judicial actors to act in an independent manner. The formal framework again falls in two parts: (a) the legal and structural framework that influences judicial independence through regulations regarding appointment, tenure and resources, insulating the judiciary from political interference, and (b) the formal regulation and protection of the courts’ jurisdiction that secures judicial authority. These factors affect the *ability* of courts to act independent. The factors influencing the *willingness* of judicial actors to realize the potential for independence operate in conjunction with the formal framework, and include the legal culture within the judiciary. The corporate culture, or the professional self-understanding and ‘norms of appropriateness’ guiding judges in their work, influence their willingness to use the formal framework. The corporate culture can change with new judicial personnel.

Both the formal framework for judicial independence and authority and the willingness of judges to act independently can be influenced by underlying variables, such as the political context, the balance of power in a society, the legal culture, and the presence of protective constituencies (Gloppen, 2004: 112-113). This in turn affects manifest judicial independence, the dependent variable, understood as the extents to which judges deliver judgments that carry a political cost for the government. There is also a potential feed-back loop in the sense that

⁸ This is obviously no straightforward assessment to make, and involves value judgments that will inevitably be contested, as will be further discussed below.

when the observed manifest judicial independence is high, there is increased likelihood that political authorities will attempt to reign in the judiciary through reforms limiting their formal authority and/or independence.

3.1 The Judicial Independence, Authority and Accountability Function of Courts: A Framework for Inquiry

An emerging body of works provides definitions of both the concept of judicial independence, judicial authority and accountability, which is widely considered to be important conditions for the establishment of the rule of law (Guarnieri, 2014). While judicial authority concerns the formal powers of the courts, does judicial independence include the framework that protects the courts from internal and external influence. Accountability is the courts' ability to "say no and make it stick" (Gloppen et al., 2010: 12-13). This chapter introduces a useful working concept of the terms, in order to ensure consistent use of them. The concepts are all connected, and that is why I include all three.

3.1.1 Judicial Independence

The concept of judicial independence is a well-studied field, but there lacks one single, satisfactory definition that embraces the concept in an organized manner. Independence in general, at a very basic level, is related to the impartial resolution of conflicts by a neutral third party, and embedded within the notion of judicial independence is a belief that judges will not be influenced by exogenous factors while adjudicating in disputes and conflicts (Guarnieri, 2014). For the judiciary to be perceived as impartial and independent, it must not be viewed as an extension of the political branches of the government. For the public to believe that the judiciary is a legitimate component of a triadic structure, rather than a politically biased actor, it is necessary that the judiciary appears to be impartial. An independent judiciary is free to exercise judgments in legal disputes, without having to fear consequences in terms of retribution – especially in cases where the decisions are not viewed favorably by other political actors. Though, while an independent judiciary should not feel compelled to uphold unlawful actions, they should neither interfere with legitimate actions of the other political branches (Herron and Randazzo, 2003 : 423-424). Furthermore, an independent judiciary does not imply an irresponsible judiciary that act independently of the law or in disregard of important considerations, but rather, on the contrary, that the judiciary has substantial power and a responsibility to decide in cases in accordance with already established rules and procedural law. That signifies that the judiciary must be held accountable for the misuse of that power (Rosenn, 1987: 4).

Becker (1970) provides a commonly cited definition of judicial independence:

“Judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.”

(Becker, 1970: 144)

Rosenn (1987) finds that this definition needs further refinement, as it simplistically combines two complex principles: independence from political authorities and independence from other judges. When the main issue is the independence of the judiciary as a corporate body rather than internal independence of an individual judge from other judges, quite different considerations pertain. In modern legal systems, courts are typically arranged in a hierarchical order, where judges in lower courts are expected or required to adhere to the decisions of higher courts, in order to secure predictability, uniformity and judicial administration. In general, and as a practical matter, lower courts tend to follow decisions of the higher courts, and therefore, when literally applied, Becker’s definition implies that the only countries with truly independent judiciaries are those that give judges permission to ignore decisions of the higher courts. Though, judicial independence does not rely on a system in which lower courts are free to ignore the decisions of the higher courts. The definition further ignores the crucial role of the courts in finding and interpreting the facts – as well as the law. Interpretation of the law may not even matter if judges interpret and determine the facts in a skewed manner. Moreover, one last difficulty with the definition above is that it ignores the role of private actors in undermining judicial independence, through bribery or intimidation. If a judge’s vote can be purchased by money or favors, then it is hardly independent. Neither is a judge independent if the judge is motivated by fear for his personal safety (Rosenn, 1987: 5-7).

The need for improvement of Becker’s definition caused Rosenn (1987: 7) to define judicial independence in a more simplified manner:

“Judicial independence could be defined as the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice,

free from coercion, blandishments, interference, or threats of governmental authorities or private citizens.”

(Rosenn, 1987: 7)

The concept is further emphasized by Ferejohn (1998) as an idea with both internal (or normative) and external (or institutional) aspects. Judges should, from a normative viewpoint, act as autonomous moral agents, who can be relied on to carry out the public duties given to them – independent of ideological and personal considerations. In this sense, independence, or impartiality, is a desirable aspect of a judge’s character, and the idea that a judge ought to be free to decide the case before them without fear or anticipation of illegitimate punishments and rewards is therefore a central meaning of the concept. Though, another meaning of the concept is less common, but applies to courts and the judicial system as a whole. Judges are only human, and the matters they decide on are of great importance to people. It is therefore necessary to provide institutional shields against possible threats or temptations that might influence judges’ decisions – and ensure that the system protects the independence of the institutions. Judicial independence, in this sense, is a “feature of the institutional setting within which judging takes place” (Ferejohn 1998: 353). The concept is, however, a complex value in the sense that it is not something valuable in itself. Instead, it is instrumental to the pursuit of other important values in a democracy, such as the rule of law or constitutional values (Ferejohn, 1998: 355). The selection of judges is a central factor in most theories of judicial independence, and it is emphasized that judges who are dependent in some ways upon the person who appoints them cannot be relied upon to deliver decisions that are of high quality, both in terms of neutrality and legitimacy (Garoupa and Ginsburg 2009 : 201-202).

3.1.2 Judicial Authority

The court’s authority function refers to the formal powers of the court, and the ability to gain the respect of other branches. It further includes the extent to which their decisions actually influence political behavior and the policy process (Gloppen, 2004: 121). Judicial power depends on a wide variety of institutional factors, such as constitutional review, access to courts, and the status and role of prosecution. It further depends on political conditions, for instance fragmentation (Guarnieri, 2014: 6). Judicial independence is made dependent on the extent of judicial authority, but a distinction between the concepts must always be kept: the two concepts are different, although closely related. A judiciary with reduced powers can still be independent (Guarnieri, 2014: 6-7).

3.1.3 Accountability Function of Courts

While the focus of this thesis is on the concepts of judicial independence and authority, accountability is a concept that is equally important – and it is an important theme in the debate concerning courts role in a democratic system, especially as the conditions for this role is about to change.

The concept of accountability has been at the center of several scholarly debates since the early 1990s, and is an essential part of the literature on democracy, democratization, the rule of law and judicial activism, among others. The concept is broad, but a general idea is that accountability embraces different ways of preventing and redressing the abuse of political power. Accountability implies that the use of power is subject to the threat of sanctions, oblige power to be exercised in a transparent way and emphasize the importance of justifying acts. Enforcement, monitoring and justification are three aspects that define accountability, and these aspects turn political accountability into something that copes both with actual and potential abuses of power (Schedler, 1999: 18-21).

The concept of accountability is a fundamental function of courts in any modern democracy, and can be seen as both *vertical accountability*, in which people have the power to challenge, remove and replace the ruler, and *horizontal accountability*, where law and the separation of powers limit the power (Gloppen, Wilson, Gargarella, Skaar and Kinander 2010: 13). Political accountability entails a relationship of power between two actors: citizens, who are the principals with the legitimate political authority, and the rulers, who are the citizens' agents. The relationship is built on an exchange of responsibilities and potential sanctions as the basis for legitimate rule. The citizens entrust the rulers with authority, and the rulers are therefore obliged to keep the citizens (or their representatives) informed about processes and decisions, as well as to offer explanations and justification for these decisions. If the account is not satisfactory, or if the rulers fail to do what is expected of them, the citizens may impose predetermined sanctions (Gloppen et al., 2010: 13). O'Donnell (1999:14-15) defines the concept of accountability as the ability of actors to ensure that officials in government and state institutions are answerable for their actions, and associate the terms answerability and enforcement as the closest synonyms to the concept. Answerability because it indicates that being accountable to somebody implies the obligation to respond to questions, and that holding somebody accountability implies the opportunity to ask questions that can ensure that the right to receive information is upheld. Enforcement because it is necessary that the accounting actors don't just ask questions, but that they also eventually punish improper

behavior and make sure that the accountable actors bear the consequences for their actions, including eventual negative sanctions (O'Donnell, 1999: 14-15).

In a democratic context, political accountability refers to a hierarchical relationship in which the people have the power to challenge, replace, and even remove the ruler. This is what the literature refers to as *vertical accountability* – and this kind of accountability is institutionalized principally through election. There is a broad agreement on the importance of such mechanisms, and, while there of course are disagreements on how to secure vertical accountability, there are also an agreement that accountability in the terms described above is the main procedural mechanism of democracy. Courts are a part of a vertical accountability relationship that is legally specified by serving as a mechanism for popular control or societal accountability by enabling individuals and groups to use litigation in order to protect and advance their rights and interests (Gloppen et al., 2010: 16). The literature further refers to *horizontal accountability*, which is a much more debated concept that deals with accountability relationships between different state institutions. The concept involves the relationship in which bodies within the state are given a legal mandate to control other state institutions. These state institutions are in turn obliged to account for how they have exercised the powers that they have been given and entrusted with. The different agencies in an horizontal accountability relationship are institutionally independent, and the state institutions can either be given an independent mandate from the voters (as is the case in presidential systems, where there is strict separation of powers between the legislature and the executive) or act as controller (ombudspersons, courts, supreme audit institutions and forth), appointed and funded by one or more of the institutions that they are set to hold accountable (the executive and/or the parliament)(Gloppen et al., 2010: 13-14).

Courts also have a horizontal accountability function, as they are crucial to the system of accountability between state agencies – and to hold other state actors to the law and the constitution (Gloppen et al., 2010: 16). A definition of the concept involves

“The existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful.”

(O'Donnell, 1999: 38)

O'Donnell (2003) further argues that accountability is as a relationship based on a law where a party is obligated to explain (answerability) and the other authorized to sanction (controllability). The definition has been criticized as being too narrow when defining horizontal accountability as relations that only deal with relationships within the legal fram. Critics suggest including all activities that involve holding public officials accountable for their unlawful actions, not only when the relationship is formal and legally regulated by the state, as accountability (Gloppen et al., 2010).

3.2 The Dependent Variable: The Judicial Independence and Authority of Courts

In order to discuss specifically how judicial independence can be assessed and compared over time, a general discussion of the dependent variable is required.

There is a set of assumptions about what the courts are supposed to do, combined with a shared understanding of what is required and expected in order to uphold and maintain a well-functioning democracy. The courts play an important, but not undisputed, role in protecting the genuine competition for positions of political power, equal opportunities for political participation, political space for deliberation and contestation of political decisions and the protection of basic rights. These concerns, as well as the courts' role in protecting these rights, are not undisputed: there is a century-long debate about the relationship between constitutionalism and democracy. The factors adopted here are all formulated to be compatible with different notions of democracy – and there is a shared understanding of these factors as central concerns in all democracies. Courts are central to the endeavor of holding political bodies and officeholders accountable for illegitimate use of political power and neglect of responsibilities, and are therefore the key to a stable and well-functioning democracy. Still, the specific actions that courts should, as well as have the opportunity to, take depend on the political and institutional context and their position within the structure of other accountability institutions (Gloppen et al., 2010: 18-19).

Courts are expected to enhance democracy by clearing the channels of political change and protect basic rights – especially the rights of disadvantaged minorities, as they are particularly vulnerable to being marginalized. Furthermore, courts are crucial in securing periodic elections. The electoral process is the only institutionalized channel for control of political power-holders for the people in a modern democracy, and it is especially important to secure that this channel functions properly and fairly. Courts play an important role in securing that the integrity and trustworthiness of the electoral process are high, and they are expected to do

so through appellate jurisdiction where the courts demand compliance with the rules of the game and sanction illegal electoral activities. A proxy for judicial independence is whether courts deliver judgments with political costs for the government, and refrain from passing judgments that are favorable to the government in situations where they should have said “no” (Gloppen et al., 2010: 18-22).

3.3 Explaining Judicial Independence, Authority and Accountability: A Conceptual Framework for Comparative Analysis

The aim of this section is to create a framework that can explain variations in the dependent variable: judicial independence, understood as the extent to which judges deliver judgments that carry political costs for the government. The next section discusses the most dominant theories provided by the literature, and integrates insights from various approaches – with a goal of enhanced understanding of the dynamics at play.

3.3.1 The Formal Framework: the Institutional Structure

The formal framework includes a range of structural and institutional factors that are believed to protect the independence and authority of the judiciary, and their ability to set limits for the government’s exercise of power and act independent. The legal framework defines the powers and jurisdiction of the courts’, regulations and organization of the judiciary – and the resources available to them (Gloppen, 2004: 123).

The formal framework often forms the dominant basis for the study of judicial reform policies. The literature that focuses on institutional design assumes that variations in judicial independence stem from differences in the judicial institution. That makes institutional structures relevant for the study of the Hungarian judiciary. Indicators to consider are judicial appointment procedures, protection of tenure and terms of service and sufficiency of resources (Gloppen, 2004: 113). Such structural factors define the boundaries within which legal actors and institutions operate. Explanations focusing on institutional design are built on literature that focuses on structural factors as a fundamental condition for the ability of courts to act independent (Rosenn, 1987: 13). The institutional design-centered approach to the study of judicial authority and independence is reflected in both a variety of frameworks for assessment of judicial independence, policies of judicial reform and legal-political documents (Gloppen et al., 2010: 25).

There are various assumptions about the effects and importance of particular institutional features in institutional design-centered approaches, but most of them share a focus on a

common list of institutional factors. Arrangements that can provide the judiciary with structural independence from the political branches is the predominant focus among the more theoretically centered, and informed, institutional design literature. The emphasis of this literature lies primarily on appointment procedures, procedures for promoting, disciplining and removing judges, protection of judge's tenure, the judiciary's autonomy over their budget and the security for and adequacy of remuneration (in terms of salaries and perks) (Gloppen et al., 2010: 25). This is further emphasized by Rosenn (1987:13-22), who focuses on the importance of measures that are designed to protect and insure the independence of the judiciary, and formal regulations of the courts' jurisdiction that can secure judicial authority. This includes the adequacy of a formal framework that forms the basis for how courts are to develop their authority functions, as well as the formal constitutional mandate given to the courts. The empowerment of courts through formal regulations can strengthen the jurisdiction, and thus the political authority of courts. Court's control over their caseload is included here. The availability of resources, in terms of infrastructure, staff, running costs, legal material and training, is also a factor that the literature emphasize as something that affects the judiciary's ability to act independent of other institutions. The provisions of resources that are available to the courts determine their ability to, in an effective manner, process cases and deliver judgments. However, not only the volume of resources, but also the sources of funding and security of resources are central in this matter. Last, recruitment patterns, training and education can affect the professional competence of the judiciary, including the personal and professional qualities of the judges on the bench. Professional forums can help to establish these professional standards, and make professional reputation matter (Gloppen et al., 2010: 25-26).

Rosenn (1987: 13-14) emphasizes the importance of legal measures that can guarantee judicial independence, both by protecting the integrity of judicial decision-making processes from pressure from outside and by protecting the personal independence of judges. The most common measure to ensure the integrity of judicial processes is a constitutional prohibition against interferences by other branches of government with proceedings by the judiciary. Furthermore, in order to protect the personal independence of judges, there are certain measures that are needed. Judges should be protected from financial retribution for rendering decisions that displease the legislature or the executive, and it is therefore necessary to secure the irreducibility of judicial salaries. Financial independence has been emphasized as an important measure to ensure judicial independence. In addition, to protect the judges'

independence by providing that their compensation is not diminished during their term of office, a second technique is a constitutional requirement that a fixed percentage of the government's total budget should be allocated to the judicial institution. A third way of securing personal judicial independence is a constitutional guarantee of tenure in office, for instance by assuring lifetime tenure for judges pending good behavior or protected tenure in office pending good behavior until a specified retirement age (Rosenn, 1987: 13-19).

Furthermore, the selection and reappointment processes of judges are critical in ensuring an independent judiciary. For instance, constitutions with selection processes that involve multiple bodies in the appointment and removal of judges are usually associated with higher levels of judicial independence (Guarnieri, 2014: 5). If the executive branch is entrusted with the task of selecting candidates, without constraints, then the risk of appointing unqualified candidates or persons, selected primarily on the basis of political or personal motives becomes exceedingly high. Consequently, it is therefore necessary to set forth a minimum of qualifications for members of courts. Popular election of judges are mostly eschewed, based on a perception that such a measure could compromise judicial independence by forcing judges to involve themselves in political activity. The tendency in the highest courts throughout the world is therefore that the executive select the judges, either with some form of legislative or judicial approval as a check, or from a prepared list by the judiciary or the legislature of prescreened candidates (Rosenn, 1987: 19-21). To further enhance judicial independence, theory emphasizes the importance of avoiding conflicts of interest. It is common practice to prohibit, by law, judges from engaging in political and economic activities, in order to avoid conflicts and ambiguous situations. In return, the constitution should protect judges against involuntary transfers, as such transfers can be regarded as an invitation to resign, and the lack of constraints on transferences can compromise personal judicial independence (Rosenn, 1987: 21-22).

However, there is a problem with much of the institutional design theory today. The literature presented above seems to take for granted that the institutional structure operates in a vacuum and there is not enough appreciation for how the design of such legal-political institutions is influenced by the sociopolitical context. The judicial institution is not determined by such context, but it is, whether emerging over centuries or developed as part of a reform process, shaped by the political and social context in which they operate within – and when promoting the judicial institution, it is necessary to come to grips with how this influences judicial independence (Carothers, 2006: 55-62). While the formal framework influences the courts'

ability to act independent, the corporate culture affects the judges' willingness to realize their potential for independence. The willingness can change if there are alterations in the judicial personnel. Furthermore, the political context can act as an underlying variable, and influence the formal framework and the willingness of judges.

3.3.2 Actor-Based Explanations: the Corporative Culture

A wide range of studies focusing on courts and legal institutions attempt to explain the behavior of judges and judicial institutions by focusing on the individual qualities of the judges. There is a prolific strand of such actor-centered approaches, and the different approaches describe various assumptions about what makes judges act the way they do. The internal standards, created by the judiciary itself, that judges are incorporated into, or the legal aspect of the system, are of high importance when trying to explain why some courts appear to be more independent than others.

The courts' willingness to act in an independent manner is affected by the professional, self-understanding and 'norms of appropriateness' that guide judges in their work. Particularly important is the judges' own understanding of what their role should be in a democratic system vis-à-vis the executive, and that the judges are motivated by the norms prevalent in the institution within which they operate. Judges' behavior is further influenced by the collective conceptions within the society of how a good judge should act (Gloppen, 2004: 122). The corporate culture affecting the courts' willingness to act independently can change with the appointment of new judicial personnel. This makes it relevant for the Hungarian case.

Attitudinal approaches assume that judges' ideology matters, and focus on how values and preferences of judges can help to explain the decisions of the court. Such an approach emphasizes judges' ideology, moral and political orientation, as well as other factors that are assumed to be relevant to their identity – and understand judicial decisions as something that directly reflects the policy preferences of judges. The assumption is that judges act non-strategically, and do not engage in exchange of support or favors or care about how other institutions react to their judgments. Class background, religion and ethnicity are the most relevant identity markers – but these may vary between contexts (Gloppen et al., 2010: 26-27). Dahl (1957) was the first to challenge the view of what has been called the counter-majoritarian difficulty. Based on empirical evidence, he demonstrated that “the Supreme Court of a nation is inevitably a part of the dominant national alliance and, as an element in the political leadership of the political dominance; the Court of course supports the major

policies of the alliance” (Dahl, 1957: 293). The work of Dahl (1957) implied that the court, instead of serving as a counter-majoritarian power, tended to be a pro-majoritarian institution, thus reflecting prevailing political preferences that influenced judicial decisions. Embedded in a claim about the attitudinal model is an assumption about the decision-making of the judiciary – namely that judicial decisions are a function of the political preferences of the judiciary. Therefore, if the Court legitimizes other branches of government’s policies, it is not, according to Dahl, because they have made an a priori decision to do so, but because they are motivated by their personal ideologies. The tendency is that the Court reinforces the prevailing policies of the political majorities by voting in alignment with their sincere preferences. They do so because the selection process is biased in favor of choosing judges who have political preferences that are consistent with those of the incumbent government - political preferences that are in accord with their sincere preferences, but which, again, happens to coincide with the preferences of the ruling regime. The alignment of preferences can also help to explain why politicians selected them in the first place (Epstein et al., 2001: 587).

Though, as Epstein et al. (2001: 587-588) emphasizes, Dahl was writing at the time of the behavioralism movement in the 1950s – a movement that influenced the study of Courts by using the *attitudinal model*, a model that claims that justices base their decisions solely on the actual cases vis-à-vis their ideological preferences. Based on this model, ideology is the only factor that actually comes into play - and the model is what undergirds Dahl’s thesis about the ruling regime. The ruling regime will select justices whose preferences are in alignment with, and reflect, their own preferences. Those justices will, in turn, vote in according to their sincere ideologies, which due to the appointment procedure is likely to the same ideologies as the politicians. That legitimizes the interests of the ruling regime (Gloppen et al., 2010: 26-29).

Rational choice approaches focus on the strategic self-interest of judges in order to understand the decisions of the court. Such an approach implies a necessary focus on the judges’ incentive structures – a structure that is usually defined by both the institutional and context variables that are discussed in this chapter. An example of this approach is the strategic defection thesis, which includes both the political balance of power and the predictability of the political context⁹ as crucial factors when determining whether judges find it to be in their

⁹ Understood as who will be in power after the next election

interest to hold the executive accountable. When judges face opportunities for recognition and careers, it may create incentives that motivate judges to act out their accountability function (Gloppen et al., 2010: 27). Concerns for prestige, career ambitions and other personal interests influence the decisions of judges, and the personal incentive structure that judges are faced with is therefore relevant. Issues of personal background, values and life experience may influence their decisions and actions (Gloppen, forthcoming 2014). Varieties of both attitudinal and rational choice approaches have in common that they assume that judges are motivated by preferences, values of “higher order” and ideologies. This momentum can motivate them to act in a strategic manner, and thereby sacrifice preferences that are more short-term (for instance, ensuring that the executive act accountable) in order to secure the “higher-order” interest (Gloppen et al., 2010: 27).

A critique of the *attitudinal model* is that it is too focused on judges as single-minded actors that, without exception, vote according to their personal preference (Gloppen et al., 2010: 28). Judges are dependent on other actors, for instance other judges, and institutions – and it is necessary to pay attention to how the relevant others behave in relation to the court and its decisions. This can cause judges to vote in ways that doesn’t necessary reflect their personal ideology, but rather in ways that ensure what they see as the second best solution, given the existing political constraints (Knight, 1992: 191-193). Other authors, on the other hand, claim that courts try to decide in alignment with the public in order to ensure compliance with the decisions they make and to keep a certain level of public legitimacy. Smulovitz and Peruzzotti (2000) write about societal accountability as a phenomenon where citizens act with an aim at overseeing political authorities, including politicians, judges and bureaucrats. There are different ways for the public to influence courts, but common to them all is how voice is the mechanism that is available for control. This form for control can be exercised in many ways, but a tendency is that the public exercise pressure directly through the other political branches, reach out to the courts directly with demands or organize demonstrations against the courts or some of their members (Smulovitz and Peruzzotti, 2000: 148-152). This is emphasized by empirical studies by Mishler and Sheehan (1993), who found a relationship between public opinion and the ideology of the Supreme Court’s decisions – a relationship that was a result of such pressures. According to their study, the decisions of the Court both reflect changes in the ideology of the public mood and serve to reinforce and legitimize opinion change in what can be said to be a iterative process (Mishler and Sheehan, 1993: 96).

However, the *strategic model* has, most typically, focused on how other branches of power influence the judges' decisions. Those in favor of this model argue that the opinions of justices are written with an eye on the other branches. Judges are highly aware of the fact that other political branches have the power to change the composition of the courts by appointing judges from other ideologies, change the size of the courts, and even, in extreme cases that is, impeach some or all of the judges. These are all threats that are more radical than having their decisions overturned (Helmke, 2002: 292). Attempts from other branches to combat them, deliberately fail to implement the orders given to them from the courts, reform the system of judicial review, change the salaries, perks and benefits of the judges, amend the constitution, or cut the court's budget can generate serious consequences for the courts (Gloppen et al., 2010: 28). Epstein et al. (2001: 592) argue that both the *attitudinal* and the *strategic* model are based on the idea that justices are "single-minded seekers of legal policy", but from thereon out, the two approaches diverge. The strategic approach assumes that justices cannot, if they want to maintain the ultimate state of law, as suggested by attitudinalists and Dahl, vote according to their own sincere ideological preferences as if they were operating alone. It is instead expected that the justices are "attentive to the preferences of other institutions and the actions that they expect them to take if they want to generate enduring policy" (Epstein et al., 2001: 592). This may help to explain why situations sometimes arise where the justices avoid adopting decisions that manifestly defy what other institutions, such as the executive power, regard as acceptable; even when this challenges their own sincerely held preferences. This model is called the separation of powers model (Gloppen et al., 2010: 28).

Helmke (2002: 293- 294) extends the force of the separation-of-powers argument to more judicially politicized and unstable environments, and argue that courts in more stable contexts tend to adjust their opinions and decisions to those of the current government, while unstable and shifting environments can cause interaction between the courts and the government's successors in order to avoid being punished by the coming authorities. The concept of strategic defection, first coined by Helmke (2002), emphasizes how an institutionally unstable setting can cause a reverse legal-political cycle in which there is an increased opposition from the justices once they sense that the current government is losing power, and decreased opposition when the incumbents grow stronger. The concept generates both a hypothesis that judges will increase their rulings against the incumbent government once there emerge a prospect that the current government will lose power, and a hypothesis that the judges use

strategic defection to concentrate about cases that are considered to be most important to the incoming government (Helmke, 2002: 294).

3.3.3 The Social, Legal, and Political Context

Underlying variables, such as the political context, the balance of power, the legal culture and the existence of protective constituencies can explain variations in the ability and willingness of courts to act in an independent manner. Such factors are believed to be of high relevance in the case of Hungary. Common for most of these variables is a focus on factors outside the judiciary – and the tendency is that these factors change slowly and are difficult to reform, at least intentionally.

The political balance of power in a society is presumed by the literature to be decisive for the degree of judicial independence. When an alternation in power is unlikely in the foreseeable future, due to a dominant political party or coalition of parties, actions by the courts to actually hold political power accountable are more likely to cause the government to take control of the judiciary and thus limit their independence by changing the formal framework. If the judges become aware of their vulnerability, that might lead them to exercise self-censorship. However, if the political arena is limited, or even closed, for oppositional parties, political actors may turn to the courts instead. This can cause an increased case load and thus enhance courts' opportunity to decide cases that makes the courts politically relevant. If there are no alternative means to influence political power or if there is a weak civil society, the judiciary may be instilled with a sense of urgency and duty (Gloppen et al., 2010: 24). The political context can influence the opportunity structure of judges, and thus their ability and willingness to act independent and exercise an accountability function. If the balance of power goes in the direction of a dominant ruling party, this can cause changes in the formal framework of courts, thus weakening judicial authority and independence (Gloppen, 2004: 169).

The legal culture in a society is considered to be important, and the questions included here concerns the extent to which a culture of legalism in general permeates a society – or how the political community leads citizens to bring cases to the courts and other state institutions, and authorities to respect their rulings. Several explanations focus on the nature of the legal and corporate culture in a society (Gloppen et al., 2010: 24). Rosenn (1987: 33) refers to the difference between two broad legal traditions: common law and civil law tradition. It is assumed that civil law heritage is less conducive to judicial independence than the system of

common law (Rosenn, 1987: 33)¹⁰, but in the case of Hungary, which has a civil law tradition, this is not so relevant. This is firstly because of the use of a civil law tradition does not, in itself, preclude an active role for the judiciary (Gloppen et al., 2010: 172), but also because this study focuses more on the extent to which the judiciary are willing to actualize the judicial independence.

Furthermore, Widner (1999: 184-185) emphasizes the importance of protective constituencies that can make it costly for the government to encroach on the courts' independence as an underlying variable that can influence the extent to which courts are able and willing to say no in the required situations in a "hostile" political environment. Such protective constituencies can be based on the support from more limited, but still politically significant groups, such as religious, business or international donors, or even an active civil society. By building constituencies, the judicial independence can be "locked in" by creating popular opinion that can function as a bulwark against interference from other state actors. The constituencies encourage and inspire, as well as support the judiciaries in the media and in the public. Some even quietly lobby on behalf of the judicial officers and the judiciary in general. The European Union functions as a protective constituency in the case of Hungary, and has the ability to close infringement procedures on the Hungarian government if EU law is violated.

3.3.4 A Combined Explanation of Judicial Behavior

Each of the approaches mentioned in this chapter provide us with important insights, but, when trying to explain variations in judicial independence, none of them can alone offer a satisfactory explanation. When considered individually, the existing explanations are both incomplete and overambitious. The approaches are all dominated by a monocausal nature,

¹⁰ Unlike common law systems, the judge has historically been a weak figure in the civil law tradition, and the tendency is that judges within this tradition traditionally don't have the same power, prestige and deference enjoyed by judges in common law traditions (Gloppen et al., 2010: 23-24). In systems of civil law, judges are framed as technocratic appliers of legal codes, rather than independent actors that develop the law to serve new contexts and function as the core of the system, as judges in common law tradition is known for (Gloppen et al., 2010: 172). It must be added that the separation between the two legal traditions, as well as their conduciveness to promote or weaken judicial independence, is debated and criticized: there are cases with a civil law tradition in which the judicial authority is strong and well-developed, despite the fact that this system traditionally has been assumed to work against the development of judicial independence and a strong accountability function. Furthermore, while there traditionally have been little, or even no, use of precedent in civil law countries, this has now changed. The degree of precedent has increased, and there is a lot of movement in the distinction between the two traditions – something that indicates that the differences between the two legal traditions no longer can defend why some courts appear to be more independent than others

something that causes them to fall short when it comes to explaining judicial behavior. Gloppen et al. (2010) suggest focusing on a combination of different types of factors in order to gain a more complete understanding of different outcomes within the legal institution. An analytical framework that includes all the factors mentioned above, from the formal framework that provide the protection of judicial independence through procedures for appointment and tenure, and the formal regulation of the courts' jurisdiction; the corporate culture that guides judges in their work; and the political context of a society can offer a more complete explanation of judicial behavior (Gloppen et al., 2010: 29), and can help to explain the development of the Hungarian judiciary.

3.3.5 The Pendulum Effect

If the manifest judicial independence is high, there is increased likelihood that political authorities will attempt to reign in the judiciary through reforms limiting their formal authority and/or independence. Garoupa and Ginsburg (2009) argue that a strong and powerful court can be perceived as threatening to other political institutions, thereby initiating reforms that aim to undermine the court. The result is a kind of pendulum effect, where the courts will be held back if their independence is of such a nature that they can exercise considerable power at the expense of the other institutions. The theory of the pendulum effect can be seen in relation to the theory of the social and political context mentioned before, which focuses on the political balance of power in the society. If the political arena is occupied by a dominant political party, with limited chances for alternation in power in the foreseeable future, then actions by the court to hold the politicians accountable are more exposed to the threat of reform and measures aimed at weakening the judiciary and limiting their independence.

There is a genuine fear among other political institutions that a strong court has too much latitude to exercise power and make decisions at the expense of other institutions – and they therefore implement measures that aim to limit the court's power to act independently of the other institutions and undermine the structural factors that were aimed to strengthen the court in the first place. The court's independence is thereby weakened, and the pendulum swings from a strong and independent judiciary to a weaker legal institution that is, to a much greater extent than before, vulnerable and exposed to abuse from other institutions. Garoupa and Ginsburg (2009) therefore claim that if courts become too strong and powerful, there is an increased risk of decline in, and loss of, courts' independence. The opposite is the case if the court is too weak. A key element in any democracy is that the court has enough power to

perform the expected tasks. Thus, measures with an aim to improve the court's authority and independence will be implemented by other institutions. Likewise, the political executive power, which initially launched reforms that were aimed at weakening a strong court, can attempt to strengthen the court, in order to use the court's power to their advantage – as well as to avoid incentives that can be found in the system (Garoupa and Ginsburg, 2009).

3.3.6 Institutional Change

Institutional change can happen both gradually and suddenly. In the case of Hungary, both are relevant to include. Changes in the judicial institution have partly developed throughout time, but the process is also characterized by several rounds of sudden shocks. While gradual changes usually are internal, abrupt changes are often the result of discontinuous external events. Abrupt transformations of institutions are usually caused by revolutionary events, and the outcome is often consequential for state organization. Exogenous and stochastic events can give power to certain groups in the society who take advantage of the situation and push for change (Roland, 2004: 115-116). Gradual changes are not as dramatic as abrupt transformation, but they can be equally consequential as causes for other outcomes, as well as for shaping substantive political outcomes. Mahoney and Thelen (2010) argue that gradual institutional change occurs when problems of rule interpretation and enforcement open up space for actors to implement existing rules in new ways. When identifying and explaining types of institutional change, it is necessary to focus on both the political context and characteristics of the institution in question – and how these two factors drive the type of institutional change one can expect. The characteristics of both the political context and the institutional form have these effects because they shape the type of dominant change agent that is likely to emerge in any specific institutional context – and the kinds of strategies this agent is likely to pursue in order to effect change (Mahoney and Thelen, 2010: 14-15). Furthermore, Streeck and Thelen (2005) argue that institutional change, rather than abrupt and discontinuous, result from an accumulation of more gradual and incremental change. Moreover, rather than being a result of exogenous shocks, or actions from outside of the system, change is often endogenous and generated from within the system, and, in some cases, produced by the very behavior an institution itself generates.¹¹

¹¹ Streeck and Thelen (2005: 15-31) and Mahoney and Thelen (2010: 16-18) suggest five broad modes of gradual change: displacement (existing rules are removed, and new ones introduced), layering (new rules are introduced on top of, or alongside, existing ones), drift (existing rules change due to shifts in external conditions) and conversion (existing rules remain formally the same, but their impact changes due to changed external conditions).

Table 1: A Summary of the Theoretical Framework

| Dependent Variables (Underlying) | Dependent Variables (Intermediate) | | Independent Variable |
|--|---|--|---|
| Political Context | Formal Framework for Protection of Judicial Independence and Authority (Ability) | | «Willingness» to use the Formal Framework |
| <u>Political balance of power</u> <u>Protective Constituencies</u> <u>Political and Legal Culture</u> | Judicial Authority | Judicial Independence | Manifest (observed) Judicial Independence <u>Judgments carrying political costs for political authorities</u> <u>Undue deference: Inaction when action could be expected</u> |
| | The Courts' Jurisdiction | Appointment Procedures Protection of Tenure Resources (salaries and perks) Procedures for Promoting, Disciplining and Removing Judges | |

CHAPTER 4 - Empirical Analysis

This chapter presents an empirical analysis that can contribute to a broader understanding of how the Hungarian judiciary has developed since the fall of communism in 1989. The chapter further seeks to examine the judicial independence of the judiciary in Hungary, and analyze how this function has developed and changed throughout the years. The aim of the chapter is to provide an accurate review of the historic development of the Hungarian judiciary, which then again can help to explain why and how judicial independence in Hungary has developed. The understanding of the organization and development of the judiciary, and their actions, are built on answers given through interviews, as well as other empirical sources, and the descriptions and analysis in the following chapter is built on the theoretical framework that was introduced in the previous chapter. The chapter addresses both the Constitutional Court and the ordinary judiciary, but it must be stressed that the two institutions are institutionally separated. The two institutions are led by separated administrative units, and their tasks are tactfully coordinated so that the different areas of focus aren't overstepped.

4.1 The Beginning: Dealing with the Past and Moving into the Present

The history of Hungary has played a major role in its present, and can contribute to a greater understanding of the Hungarian case. Even though Hungary enjoyed independence for centuries in the early beginning of the country, the experience of foreign domination over the last centuries is an important and defining feature of the consciousness of the Hungarian public. The Ottoman Empire took control over Hungary in the sixteenth and seventeenth centuries, the Habsburgs followed in the eighteenth, nineteenth and the beginning of the twentieth centuries – and the Soviet Union from 1945 and until the communist regime fell in 1989. Foreign domination over centuries required techniques of survival and informal operation, and the Hungarians learned to operate in such a way that they mastered the formal and rigid rules that represented the dominant foreign power (Bozóki and Simon, 2010: 204).

Even though Hungary's triumphs and defeats throughout history have turned out to be a complicated legacy for the rulers of both the communist and the post-communist system, the country's transition out of communism in 1989, when the fall of communism brought with it major changes for Eastern Europe, proved to be a particular smooth one. The Hungarian government at the time, already one of the most liberal of the communist governments, allowed free association and assembly and ordered the opening of the country's border with the West – something that provided an avenue that the ever-increasing number of East Germans could use as an escape route (Argentieri, 2008: 215-216). The Hungarian transition

to democracy was characterized by non-violence and round-table talks between the communist power holders and the emerging opposition organizations. This was possible as a result of a shared agreement among the elites that legal security had to be put before justice, and when upholding this procedural legal continuity, the negotiating parties managed to avoid continuity with the communist dictatorship regarding their content. In order to unify their strength, the opposition parties decided to form an Opposition Round Table in March 1989. Three parties participated in these talks: the Communist Party (MSZMP), the Opposition Round Table (EKA, with nine oppositional organizations), and the so-called Third Side (seven organizations), which were invited by the MSZMP, as satellite organizations of them. Though, the real discussion took place between the MSZMP and EKA, while the Third Side basically just accepted the compromise they presented (Bozóki and Simon, 2010: 208-209).

The trilateral discussions of the National Round Table Talks, occurring mostly in the summer of 1989, were a series of formalized, orderly and highly legalistic discussions held in Budapest that resulted in a change of the constitution and the declaration of the democratic Republic on 23 October 1989. Importantly, it meant the loss of communist control. This was followed by a national referendum on 26 November 1989 that settled unresolved issues, such as the status of the president and the accounting for communist wealth, and a parliamentary election in March-April 1990, in which the center-right MDF “Hungarian Democratic Forum”, whose leader, József Antall, became the first democratically elected prime minister, that ended the transition (Bozóki and Simon, 2010: 209). A great contribution to the success of the peaceful and coordinated transition was a split within the communist party between the reformers and the hardline representatives of the old guard, and when analyzing the Hungarian case, it needs to be stressed that no true hardliners were represented in the National Round Table Talks, since they had already been marginalized before the talks even began (Bozóki and Simon, 2010: 209).

4.1.1 Building a New Constitutional Structure: a Road to the Rule of Law

The democratic transition altered the basic structures of the Hungarian State, and the early 1990s were therefore characterized by a focus on establishing democratic institutions and formal guidelines for the new regime. There was no rule of law in Eastern Europe during the communist years, and the first reaction when communism fell was that it was necessary to reject all communist structures. There was a complete agreement that fundamental human rights needed to be protected, although there was both ignorance and uncertainty about the means of achieving this. Even though communism was dead, the ideology’s ideas, patterns of

behavior and institutions still penetrated the society, although with varying degrees in the Eastern European countries. Systems of checks and balances were often rudimentary, courts and judges lacked the self-esteem necessary to develop judicial independence and while the Western models of the rule of law were the models they strived to reach, the models were applied out of context (Sajó, 1995: 253-254). The new constitutional Court, as well as the reestablishment of the ordinary judiciary, must be seen in this context.

The year of 1989 marked a new era for Hungary, and introduced the concept of constitutional democracy. Like the other countries in the region, the outcome of the political transition was revolutionary: democratic institutions replaced an authoritarian regime, and the dominating communist ideology was replaced by a pluralist society. Though, compared to the rapid political transformation, the text of the Hungarian constitution was changed only gradually. When establishing a new and democratic regime in 1989-1990, it was decided to only amend the provisions of the old Stalinist-era constitution of 1949 in order to preserve the concept of constitutional continuation (Bánkuti et al., 2012b: 241), instead of adopting a new one. These amendments created a legal framework¹² that laid the foundation for the new democratic Hungary: representative government, a parliamentary system, an independent judiciary, ombudsmen that could guard important and fundamental rights, and a Constitutional Court that had the capacity to review the laws for their constitutionality (Kovács and Tóth, 2011: 183-184). The constitution was further amended after the elections of 1990, with a shared understanding that these amendments would be followed by a complete constitutional overhaul when the time was right. Though, by the early 1990s, the constitution had been revised so many times that it only in its formal framework remained the same as the communist 1949 constitution, meaning that basically every provision of the old communist constitution was changed in the Constitution of 1989. Substantively there was a clear break with the communist constitution of 1949 (Fröhlich and Csink, 2012: 425). This resulted in a somewhat humorous, yet true (according to some), statement claiming that “the only provision remaining from the old constitution was a statement reaffirming that Budapest was the capital of Hungary” (Dimitrijevic 2013 [interview]).

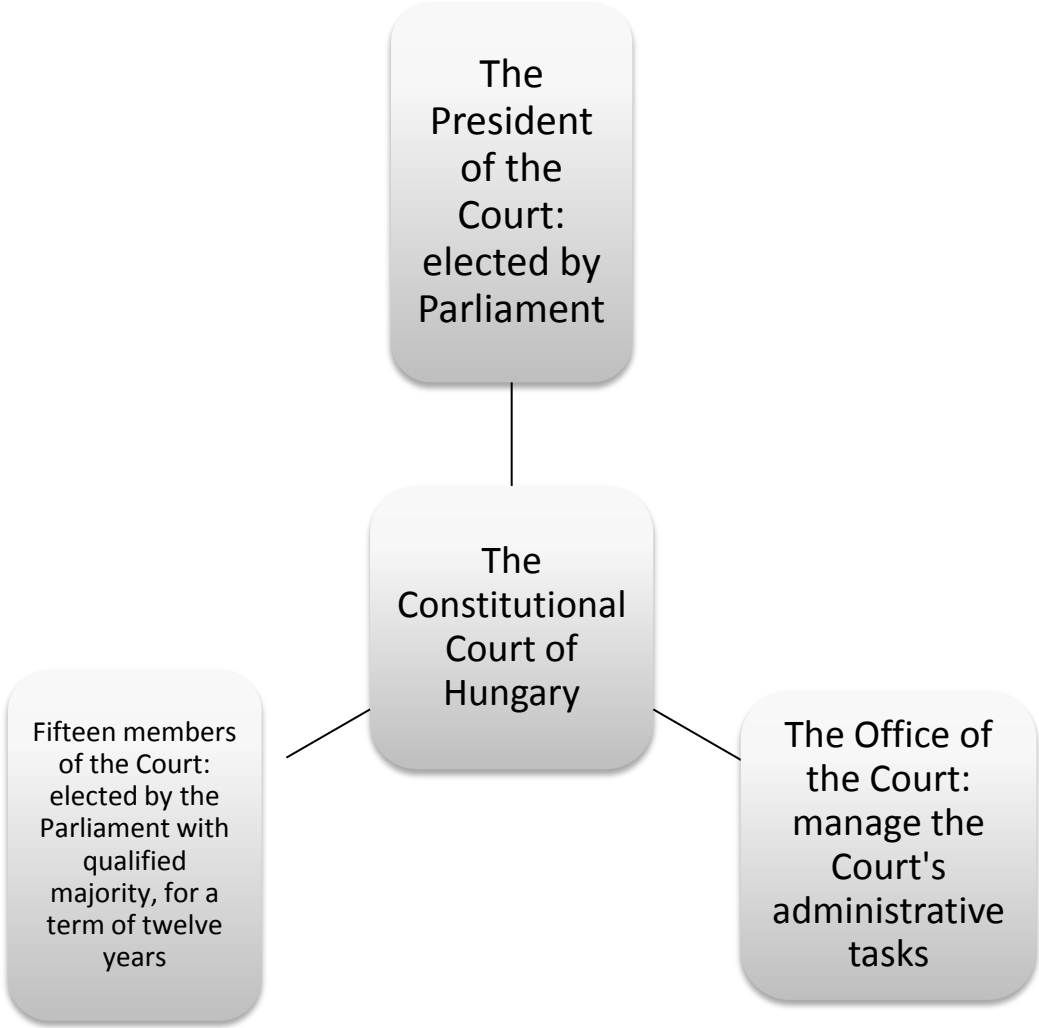
The judiciary was formally independent during the communist years, but judges were under strict supervision and direction by the communist rule (Csink 2013 [interview]), and that was a legacy of the past which proved difficult to get rid of after the political transition (Tóth, B

¹² Hereinafter referred to as the 1989 Constitution,

2013 [interview]). As in other post-dictatorial Eastern European countries in the early 1990s, Hungarians found it difficult to trust that an autocratic and politically compromised judiciary, trained under communism, could safeguard the constitutional liberties and human rights (Sajó, 1995: 253). The distrust of judges of the communist party-state and political mistrust between the negotiating parties during the transition period (Szente, 2013: 1594) caused consensus among the participants in the Round Table Talks that there was a need for an active institution with wide-ranging responsibilities that could contribute to the establishment of legal and democratic traditions. “At the time of the transition in 1989 was undisputed that there was a need to have an institution that could secure judicial review. This institution should be kept separated from the ordinary judiciary” (Kovács 2013 [interview]). The Constitutional Court, based on the German model, was therefore established in October 1989, and despite discussions concerning the necessity of such an institution, as several democracies all over the world functioned perfectly well without one, a majority of the participants involved in the Round Table Talks of 1989 agreed that such an institution, separated from the ordinary judiciary, was needed as a safeguard of fundamental rights and to administer and usher constitutional transformation (Kovács and Tóth, 2011: 184). Furthermore, as the early 1990s were the beginning of a new era in Hungary, there were no established institutions that could promote the new democratic state governed by the rule of law or protect fundamental human rights. It therefore became apparent that the Constitutional Court could play a potentially important role in the Hungarian society (Uitz, 2013: 1-4). While the institution’s organization and authority had been determined by the trilateral political negotiations, together with the subject of political transformation of the political system, the basic provisions of the Constitutional Court was first established in October 1989, in the Act on the Constitutional Court. The first five judges of the Court were elected by the Parliament on 23 November 1989, and commenced their operation on 1 January 1990. Furthermore, five additional members were elected by the new and freely elected Parliament in mid-1990s (The Constitutional Court of Hungary, 2014). The Basic Law of Hungary¹³, from 2012, further increased the number of judges from eleven to fifteen (The Constitutional Court of Hungary, 2014).

¹³ See paragraph 4.2.2

Figure 1: The Composition of the Constitutional Court of Hungary



(The Constitutional Court of Hungary, 2014)

4.1.2 Powers and Actions of the Hungarian Court

The Constitutional Court played an active and important role in the early 1990s, when they acted as an interpreter of the Hungarian legal framework and the constitution. “In the first period of the 1990s, the Court played an important role in establishing the rule of law as a system in Hungary” (Fleck 2013 [interview]). After its establishment in 1989, the Court commenced its operation with interpreting the temporary or transitional constitution, waiting for the final constitution that was promised in the preamble of the document from 1989. As the necessary parliamentary majority was absent during 1990 and 1994, and the political parties fought against each other, there was never a question of adopting a new constitution. It therefore became the duty of the newly established Court to interpret the provisions of the constitution that had been modified at its core in 1989, but which should rather be classified as an extension of the 1949 constitution, based on its structure. The court, led by its president

at the time, László Sólyom,¹⁴ became an institution that defined the constitutional rules, and with its decisions of definitive significance the Court became the gatekeeper of the transition. The focus of the Court was to work out real constitutional legal doctrines by interpreting the Constitution from an expanded viewpoint stemming from their judicial activism. That led to decisions in questions of determinative significance, such as the right to life, abolition of the death penalty, and compensation regarding retrospective actions (Csink et al., 2012: 37). The Constitution was regarded as a holistic unity of principles and rules, and this approach paved the way for the well-known, though much-criticized concept of “the invisible constitution” (Uitz, 2013: 6) that emerged in a dissenting opinion of Sólyom, the first president of the Court. According to this theory, the invisible constitution embraces and gathers all the background or underlying principles that are necessary in order to understand the actual written constitution, and it furthermore makes a coherent body of the constitutional law (Szente, 2013: 1596). Sólyom intended to base the decisions of the Court on both the invisible and the written constitution, as he saw that the general principles of constitutionalism wasn’t necessarily present in the written one, but they would still be observed. Between 1990 and 1994, the Court played a strong role in working out the essential content of basic rights, and acted as a constitution-making power through the abstract interpretations of the Constitution through the decisions they made (Csink et al., 2012: 37). The Court’s broad jurisprudence on transitional justice, welfare reform and capital punishment gave the Court an excellent international reputation (Uitz, 2013: 8), and the Constitutional Court of Hungary was, “at one point, the most powerful court in the world” (Dimitrijevic 2013 [interview]), “with an important and undisputed place in the state organization” (Csink 2013 [interview]).

The rapidly achieved reputation as one of the most activist constitutional courts in Europe, a label that came under the presidency of László Sólyom, came mainly as a result of a broad competence that the Constitutional Court of Hungary was given from its very beginning. These powers were broader than in any other country with a similar institution, but it was argued that such broad competences were necessary in order to have the ability to block all attempts to restore a non-democratic system (Károlyi 2013 [interview]). Under the 1989 constitution, the Constitutional Court had a competence of abstract review of legal rules – a competence that could be applied even when there was no case or controversy. The original design entitled anyone to bring an action or to request the review of legislation without limitation (Uitz, 2013: 8). There were no deadlines to be observed, and there were no

¹⁴ The President of the HCC from 1990 to 1998. Later the President of the Republic (2005-2010)

requirements for the applicant to prove any personal impact or other legally protected interest. This competence was called *Actio Popularis*, and in the two first decades, the great majority of the court's proceedings fell in this category (Kovács and Tóth, 2011: 185). "What made the Court so strong in the beginning were its competences, and especially the *Actio Popularis*" (Fröhlich 2013 [interview]), which was "a contributing factor in making the Constitutional Court of Hungary the most powerful court in the world" (Polgari 2013 [interview]). The fact that everyone could start proceedings against a norm or a rule, with no controversy, personal involvement with or legal interest in the law required, made the court stronger. This very peculiar instrument resulted in a practically unlimited access to constitutional justice in Hungary until few years ago. Though, it also caused a heavy burden of cases for the Court, and as the number of cases increased, it became difficult for the Court to conduct a thorough enough work (Fröhlich 2013 [interview]).

4.1.3 Building a Legal State: the Act of 1990

"The crucial point for the judicial institution is the political transition of 1989, when measures aiming to ensure both personal and functional independence was implemented."

(Csink 2013 [interview])

The political transition in 1989 had great consequences for the Hungarian state, and brought with it major changes for most of the already existing institutions. The ordinary judiciary system was recreated in the aftermath of the breakdown of communism, and the transition period in 1989-90 created the basis of the rule of law in Hungary, and gave rise to both a gradually evolving reform in jurisdiction and the outlines of the existing system (The Curia of Hungary, 2014). Though, first and foremost, it was the years for the foundation of the legal state (Juhász 2013 [interview]). During the communist period, the judiciary and the executive were closely interwoven, as in true conformity with the socialist state model. It is important to be familiar with this former structure of judicial administration in order to understand the significance of the judicial reforms (The Curia of Hungary, 2014).

The judiciary was formally independent during state-socialism, and it was rather rare that judge's decisions were ordered, and influenced, by the communist party. There were of course cases of political importance where the party pressure appeared, but that was rather unusual (Fleck 2013 [interview]). The apparent independence of the judiciary was explained as a

result of the political regime under Communist Party Secretary General Janos Kadar, which was milder than in most other communist countries. In the last two decades of the socialist state, the Hungarian judiciary and the courts was seldom employed as a means of open political repression (Sajó, 1993: 293). Judges' independence was therefore rarely threatened, and they maintained a relatively high level of independence and autonomy. Though, like other institutions under communism, the judges were still strictly controlled by the communist power holders (Csink 2013 [interview]), and some political pressure was exerted as far as support of the ruling elite privileges, judge selection, protection of the ruling elite's private interests and state interest protection. The transition in 1989 was therefore characterized by deep mistrust of the masses in the judiciary, as judges were considered to have been the means of the previous oppression (Sajó, 1993: 293-299). However, one should not exaggerate the role of, and the relevance of, the judiciary in the communist system. The political power was unified and in the hands of the communist party, and the judiciary and the judges played a less central role in the first place (Fleck 2013 [interview]). The judiciary had little impact on a great number of social relations under the rules of procedure, and judicial review of administrative decisions was very unusual. The courts were considered to be responsible for "socialist legality" alone, and the judiciary was concerned neither with the rule of law or the constitutionality of legal acts and rules. Consequently the judiciary was never regarded as important for the power holders and the society in general. This was reflected in the professional prestige of the judges, and the remuneration. Due to insufficiently wages and too much bureaucracy in the work itself, there existed a constant shortage of judges (Sajó, 1993: 294).

As a result of the democratic transformation of the political system, the functioning of the ordinary judiciary in Hungary underwent a reform with historical consequences in the course of the subsequent decade. The judiciary was established as an independent branch next to the executive, and a formal, and very necessary, requirement of judicial independence was formulated through regulations and provisions in order to make the judiciary compatible with democracy. The goal was to activate the judiciary, which was perceived as rather passive before the democratization process began in 1989, for a mental change (Fleck 2013 [interview]). A formal framework that could provide judges with the ability to act independent was established as a consequence of reforms aiming at strengthening what had during communism been a weak judiciary.

The transition was peaceful, and none of the judicial organizations dating from the communist period was terminated. However, no new organizations were created either, and judges who had served during the old system weren't removed (The Curia of Hungary, 2014). Only a minor portion of the judiciary was replaced after the transition in 1989. This was related to three facts. First, only a few of the judges who were responsible for the political justice in the aftermath of the 1956-58 revolutionary periods were still active. They had become older, and many of them asked to retire (Sajó, 1993: 294). "There had been a generation shift in the judiciary, and the judges who served in the 1950s, and decided in the so-called political cases in the aftermath of the Hungarian uprisings in 1956, had retired, so that was never a problem. This can be considered a fortunate coincidence" (Juhász 2013 [interview]). Second, the judiciary leaders who were responsible for court personnel matters adapted to the emerging new regime in a very short time. Formal political independence for judges was granted by the Parliament after the regime change in 1989 in a legal framework that included a conflict of interest rule that prohibited judges from being members in political parties. The existing hierarchy was therefore saved, and the court presidents maintained their role and place in the system, despite former affiliation with the communist party. Third, as there was both a considerable lack of manpower and new functions related to work load, there existed a constant need for judges. A sudden increase in crime in the transition period resulted in an increased need for judges due to the work load (Sajó, 1993: 294-295).

By the early 1990s, the entire legal system was renewed, and as the right to turn to the court became general, it became necessary to increase the number of staff. New and younger judges were therefore appointed, and legislative actions renewed the content of old political decisions of the court (Juhász 2013 [interview]). Step by step, the Hungarian judicial system started to assimilate to the classical Western European judiciary. It became part of the courts' functions to support the political power, be in control of crime, safeguard business and economic relations in the Weberian sense and of course, promoting the rule of law, especially in the form of judicial review (Sajó, 1993: 293). A formal framework for judicial independence was established, and the corporate culture was characterized by judges who had a better understanding of what their role should be in a democratic system, and thus were more willing than before to act in an independent manner.¹⁵

¹⁵ See Table 3.1, page 38, for a summary of the theoretical framework that explain judicial independence

4.1.4 Organizational Transformation of the Legal Status: the Act of 1997

In the mid-1990s, it became evident that there was a need for a general renewal of the judicial system. While the focus of the early 90s was to establish and formulate a requirement of judicial independence, the judicial and executive branch were, in close conformity with the socialist model, still closely interwoven. The control and administration of both county and local courts fell under the competence of the Minister of Justice, who further ensured, apart from the Supreme Court, whose president was elected by Parliament, the connection between the judicial and executive branch in the case of all other courts. Furthermore, the Minister of Justice continuously examined and guided the professional judicial activity of all courts as well, within the framework of its right to supervise the functioning of courts (The Curia of Hungary, 2014). The Minister of Justice was both responsible for, and in charge of, the organizational conditions and rules of the judiciary (Juhász, 2013, interview), and the administration of courts. That meant that the executive branch, represented by the Minister of Justice, led the nomination process of judges and was in charge of budgetary issues, as well as the development of the budget itself (Csink 2013 [interview]).

The judicial reform package of 1997 was introduced with an aim to remodel and reorganize the judicial system, and to establish a modern and more effective system which was more compatible with Western European standards. In order to separate the judicial and the executive branch, the administration of the courts was transmitted from the Minister of Justice to the newly established National Council of Justice¹⁶ (The Curia of Hungary, 2014), a self-governing body which were entrusted with the administration of courts (Tóth, A 2013 [interview]). “All rights regarding the administration of courts were transferred to this council, which was independent of all the other branches” (Vitvindicis 2013 [interview]). With the establishment of the National Council of Justice, the judicial independence was further strengthened, and the control of the government was brought to an end. The external administration and control that had previously been exercised by the Ministry of Justice was transformed into an internal administration (The Curia of Hungary, 2014). The majority of the NCJ’s fifteen members were judges, but also other branches were represented in the council, such as parliamentary deputies, the general prosecutor, the head of the Hungarian bar association and the Minister of Justice. The president of the Supreme Court acted as the head of the NCJ. The Minister could only act as a member of the NCJ and had, like the rest of the council, one vote. The NCJ was given the right to decide on three issues: personal issues, such

¹⁶ Hereinafter referred to as NCJ

as nominations and appointments, economical issues, like the budget of the courts, and administrative issues. The rights and the decisions belonged to the NCJ as a whole, not the head of the NCJ (Csink 2013 [interview]).

While the tendency during communism was that judges were recruited from poor quality law school students, and appointed at a very early age without proper preparation (Sajó, 1993: 294), the Act of 1997 prescribed stricter requirements that had to be met in order to become a judge. The Act defined exhaustively the rights and duties of judges, and established new principles on which to base the remuneration of judges. The aim of the law was to improve the composition of the judiciary, as to increase the prestige of judicial career. It further regulated the remuneration of judicial employees, as they were seen as an important factor that could increase the efficiency of the courts and their ability to act independent of other branches (The Curia of Hungary, 2014). Furthermore, while the judicial system until 1997 had consisted of three levels, with local courts, county courts and the Supreme Court, which functioned as a court of appeal (Senyei 2013 [interview]), the reform resulted in a complementary fourth level. In order to reduce the workload of local courts, extend the possibility of legal remedy, and simultaneously reduce the number of cases and hearings for the Supreme Court, five regional appellate courts were established. This made it possible for the Court to concentrate on providing theoretical guidance to lower courts, which was their primary task (The Curia of Hungary, 2014). Though, it must be added that while both the Constitution and the Act of 1997 provided the establishment of regional courts of appeal, the setting up of the courts of appeal was postponed by the Parliament until 1998. That led to the repeal of the relevant act of 1997, and stressed the importance of strengthening the position of the lower forums of jurisdiction instead (The Curia of Hungary, 2014). The parliament failed to regulate the establishment of several courts of appeal, notwithstanding the explicit approval. However, when the parliament was called upon to perform its obligation to regulate according to the constitution, the amendment was passed by the end of 2002. The appellate regional courts have been working actively since 2005, which was when the two last courts were instituted. With the formulation of the regional appellate courts, the establishment of a system with rulings about a unified application of the law and a review of court's decisions was a fact (Senyei 2013 [interview]).

4.1.5 Consequences of Judicial Dysfunctions

“There were some serious problems with the Council’s efficiency”

(Fleck 2013 [interview])

The judicial council model made an end to the problems that arose in the aftermath of the transition in 1989. The Act of 1997, which introduced the model, declared the independence of judges by prohibiting them, by law, from being members of political parties. It further established application procedures for the nomination of judges, legislation concerning the appointment and remuneration of judges, and regulated the jurisdiction of the judiciary. When formalized by law, these legislations functioned as a guarantee of the independence of judges (Vitvindic 2013 [interview]), and it laid the foundation for increased interference where it was expected of them. The model was unique in Europe, with its structure and new responsibilities. Though, with new responsibilities came higher expectations. The council was responsible for all administrative issues, and met once every month. While the system of administration of justice that was introduced in 1997 was unmodified until the early 2010s, it had often met criticism from both scholars and politicians. As experience was gathered, there were concerns and questions about the efficiency of the Council (The Curia of Hungary, 2014). “There were problems with the NCJ’s efficiency, transparency and degree of judicial independence. The administrative process wasn’t transparent enough” (Fleck 2013 [interview]). As the NCJ, which took all decisions regarding the administration of courts, only met once a month, concerns were formulated that the NCJ couldn’t react effectively enough (Vitvindic 2013 [interview]). Furthermore, it had been established that the members of the NCJ were usually judicial leaders, such as the head of county courts, over whom the employer’s rights were exercised by the NCJ itself (The Curia of Hungary, 2014). As the NCJ’s responsibility was to overview the administrative work of the courts, and their presidents, that meant that the judges in the NCJ acted as a supervisory body for themselves, and also had to make decisions regarding their own judicial activity. As the regional courts saw a chance to promote their region, as well as their court, in for instance budgetary issues, they aimed at getting their judges into the council. This caused critical voices to claim that the system worked to serve and promote the courts, as well as the courts’ interests, and further made it easier for the members of the NCJ to favor their own regional court in vote callings and negotiations in order to be reelected again (Tóth, A 2013 [interview]).

A second issue with the system was the fact that the President of the Council was the President of the Supreme Court at the same time. Difficulties arose as both positions required full-time commitment, which made it difficult to balance the administrative tasks that came with the presidency of the Council and the professional judicial responsibilities of the President of the Supreme Court. The President of the NCJ led the office of the NCJ, but was obligated to fulfil the duties of internal administration at the Supreme Court, as well as the responsibilities that arose from the constitutional duty to establish and maintain a unity of jurisdiction (The Curia of Hungary, 2014). Furthermore, as the number of cases increased in the aftermath of the system change in 1997, so did the expectations that the NCJ would handle the amount of cases. Though, the NCJ, as the institution responsible for the central administration of courts, had difficulties coping with both the huge number of delayed cases and the uneven distribution of cases among the courts (The Curia of Hungary, 2014). When appeal became available in the 1990s, the amount of cases increased further. That caused an even more uneven distribution of cases, and resulted in a heavy workload for courts situated in Budapest and surrounding areas (Tóth, A 2013 [interview]).

4.2 Developments since 2010: A New Constitution and a Storm of Constitutional Amendments

The Constitutional Court and the ordinary judiciary have both played an important role in the Hungarian society since the transition to democracy in 1989. At the time of the transition it was undisputed that there was a need to have an institution, separated from the ordinary judiciary, which could secure judicial review. There was very little trust in the ordinary judiciary's capacity to function as an institution with the responsibility of judicial review, and as the participants in the Round Table Talks of 1989 agreed that the German constitutional system was a well-functioning system, it was decided to establish a Constitutional Court based on this model (Kovács 2013 [interview]). The Constitutional Court was given the task to safeguard the fundamental rights, and function as an institutional guarantee of the separation of powers. These responsibilities were closely focused on all throughout the 1990s, and the Court played an important role in the Hungarian society in building democratic traditions and institution. Though, the role of the Court has recently changed, and their role today is allocated to a minimum, with reduced competences. It is insinuated that the changed role of the Court can be seen in the context of a flexible Constitution and a hostile political climate. Furthermore, the ordinary judicial system, which was reformed in 1997 in order to establish institutional guarantees of judicial independence, was completely and radically reorganized in 2012. The changes that this reform brought with it have met both criticism and

optimism. What is common for both institutions is that most changes were introduced after the year of 2010, which is when Fidesz and the Christian Democratic People's Party won the majority of the seats in the Hungarian Parliament for the first time.

4.2.1 The Amendment Rule: A Slippery Slope?

“The opinion of the majority is that with a two-thirds majority, the government is free to do almost whatever they want, and change everything they want. It is the magic two-thirds majority. With a two-thirds majority, everything is possible. Today the government has a two-thirds majority. Unfortunately.”

(Tóth, B 2013 [interview])

During the transition away from the communist regime in 1989 and 1990, the constitutional drafters at the Round Table Talks were worried about two things: a fractured parliament in which it would be impossible for small parties to form stable majoritarian coalitions, and a deeply rooted constitution that would be difficult to change if the new democrats figured out that they wanted to change and redesign the political institutions in the country. The solution was to opt for an election law that favored large parties by effectively using extra seat bonuses as means to ensure stable governments. To allay the second concern, the amendment rule in the constitution opted to allow a single two-thirds majority of parliament to alter, amend or adopt any provision of the constitutional text (Bánkuti et al., 2012a: 138). Hungarian parliamentary system is therefore based on the two-thirds supermajority. Important regulations, such as the act on the Constitutional Court and the Constitution, can be adopted and amended with only a two-thirds majority (Szántho 2013 [interview]). Compared to the constitutions of other European states, the Hungarian constitution is therefore rather easy to amend. It only requires the votes of two-thirds of members of parliament in order to amend the constitution, and the Constitution does not render any principle or provisions that are unamendable. The Constitution is regarded as relatively flexible rather than rigid, despite the fact that it cannot be modified or amended by the ordinary law-making procedure according to a simple majority rule. One legislative body has the sole power to change the constitutional text, and there are no requirements for referendums or any other form of ratification, such as the approval of the subsequent parliament, in order to adopt a new constitution or amend the existing one. The two-thirds majority of the votes of the members of the parliament can further, in addition to the modification of the Constitution, elect the president of the Republic,

the Supreme Court chief justice, the members of the Constitutional Court and the Ombudsman (Kovács and Tóth, 2011: 184-185).

The two-thirds amendment rule can be explained as both a theoretical consideration and a practical agreement between the government and the opposition during the transition period. It was argued that in order to have consensus regarding legal questions, the most important regulations should require a two-thirds majority (Szántho 2013 [interview]). The idea was that, in order to govern the state properly, a simple parliamentary majority wouldn't suffice to reshape the constitutional architecture, which was all gone during communism, or limit fundamental rights. The requirement of a qualified majority can be seen as a control over the governing majority in power, and as a mean to protect constitutionalism in Hungary. Though, it can also make the constitutional balance fragile. When modernizing the constitution, wide cooperation between the parties in parliament and a shared commitment toward constitutional values are required. If these factors are absent, the Constitution can become the victim of a powerful governing majority (Kovács and Tóth, 2011: 187). "It is a slippery slope to have such an easy amendment rule: it can easily be used as a tool for the governing majority to gain the advantage" (Kovács 2013 [interview]).

Though, after the system change in 1989, there were no consensus among the parties, and none of the political actors had the possibility to amend or adopt laws and regulations (Szántho 2013 [interview]). Prior to 2010, there was only one period, between 1994 and 1998, where the government had the support of a two-thirds parliamentary majority. There were a number of issues in which the then-ruling Socialist-Liberal coalition government failed to seek the consent of the opposition regarding certain acts that required a two-thirds majority. Though, the governing majority expressed some willingness to cooperate with the opposition in constitution-making (Kovács and Tóth, 2011: 187). When the possibility of writing a new constitution emerged in the 1990s to complete the transition, the procedural guarantees of the Constitution were modified with the establishment of a requirement in the Constitution that called for a four-fifths majority of the members in Parliament to introduce and approve the detailed rules on making a new constitution (Article 24(5), old Constitution)(Uitz, 2013: 11). The supermajority rule was designed in order to ensure that a new constitution would have broad political acceptance (Bánkuti et al., 2012b: 249). Though, a hostile political environment and contradictory constitutional notions made sure that the constitution-making process further collapsed in 1997. The coalition had serious political differences, and as the ideas of rival political parties regarding the legal frameworks of the political community were

so diffuse, there was no consensus on a new constitution. Thus, although the Constitution of 1989 was amended several times, the basic structure of the state under the 1989 Constitution remained untouched until 2010 (Kovács and Tóth, 2011: 187). Furthermore, as none of the political parties were able to gather a two-thirds majority in parliament, regulations regarding the Constitutional Court remained unmodified for more than twenty years (Szántho 2013 [interview]).

Throughout the years the amendment rule has caused debate in Hungary. Though, there is a surprisingly broad consensus among most respondents participating in this study that the rule in itself is not the problem, despite the fact that it certainly color the political context. In a polarized country, such as Hungary, a two-thirds majority rule can make it easier to push through important political issues, and the Hungarian political context is in many ways created around such a majority. Most important regulations can only be adopted or amended if the parliament has a two-thirds majority. This is an agreement from the transitional period, which was meant to create consensus regarding all important legal regulations. The idea was that if there was a will to change or amend a regulation, then the political groupings would have to agree on how to reach the necessary majority and thereby create consensus (Szántho 2013 [interview]). However, the amendment rule must be used carefully. It makes demands on those who use it, and the way they use it (Grabow 2013 [interview]). “The two-thirds majority is not a problem; it has always been like that. Though, in my opinion, in order to prevent a too powerful governing majority, there should be more political compromises” (Csink 2013 [interview]). Furthermore, such a rule imposes greater demands on other institution’s ability to function as checks and balances, to prevent misuse. The judiciary has a significant role in checking the state (Polgár 2013 [interview]). “The two-thirds majority is a part of the constitutional legacy in Hungary, but it must not cause the neglect of rights protection and institutional design. That is the challenge today” (Tóth, B 2013 [interview]).

4.2.2 After the 2010 Elections

“The problem today is not the requirement of a qualified majority. The problem is the party in position of the two-thirds majority.”

(Grabow 2013 [interview])

In the parliamentary election of 2010, the then opposition parties Fidesz, from the center-right, and the Christian Democratic People's Party won 263 of the 386 mandates in the Parliament, giving them an overwhelming majority of 68 percent of the seats with 53 percent of the votes,¹⁷ and the necessary two-thirds of the seats in parliament. According to the theoretical framework, there is a theoretical expectation that if an alternation in power is unlikely in the foreseeable future, due a dominant political party, actions by the court to impose judgments with political costs for the government are more likely to cause the government to take control of the judiciary, and thus limit their independence by changing the formal framework.

The constitution-making majority Fidesz won was sufficiently large to amend the Constitution or rewrite it totally (Lendvai, 2012: 207), thus making constitutional revision exceptionally easy. It turned out that both were to happen as, just after the election results were ready, an immediate flow of constitutional changes and amendments took place. These changes were all a part of Fidesz' plan to completely remake the Hungarian political order (Bánkuti et al., 2012b: 238), and affected the manner of election, composition, jurisdiction and the procedure of the Constitutional Court. A wide range of constitutional amendments were adopted within the first year of Fidesz' term, and the 1989 Constitution was adjusted ten times within six month (Kovács and Tóth, 2011: 187-188). One year after the 2010 election a new constitution was promulgated, named the Basic Law – a constitution which in recent times has been accompanied by subsequent amendments (Uitz, 2013: 9).

Fidesz presents their overwhelming victory in the 2010 elections¹⁸ as a revolution that was called for by the citizens, who wanted a change in the organization of the government. Though, the supermajority can be explained as a result of both the existing election law that gave Fidesz 68 percent of the seats in Parliament after having received 53 percent of the popular vote, and the total collapse of the primary opponents in the election, the Socialists, who actually had the parliamentary majority from 2002 to 2010. The last years of the Socialist era was characterized by economic recession and scandals within the party, and it hardly came as a surprise to anyone that the Socialists gained only 19 percent of the popular vote in the 2010 election. Thus, it is difficult to interpret the landslide victory of Fidesz in 2010 as a

¹⁷ The Christian Democratic People's Party (KDNP), in reality a satellite party of Fidesz, ran on a joint list with Fidesz. After the election on 11 and 25 April 2010 a parliamentary fraction of KDNP was formed, and the party became an official coalition partner of ruling party Fidesz.

¹⁸ New Parliamentary elections were held on 6 April 2014, and as in 2010, the ruling conservative coalition i.e. the alliance of Fidesz and the Christian Democratic People's Party (KDNP) gained once again a two-thirds majority.

positive mandate for a constitutional transformation of the Hungarian society (Bánkuti et al., 2012b: 253). In fact, Fidesz never promised constitutional changes during the election campaign – rather, it promised the reverse. It was denied that such changes were planned, and Orbán, the party’s candidate for prime minister, only promised “big changes” if he and his party were to win the most votes. It was a tendency in the 2010 election that many citizens decisively rejected the Socialist party because of the reasons mentioned above, but that is not necessarily the same as voting for major constitutional changes. Yet, from May 2010, when Fidesz took office in the Hungarian parliament, and to January 1, 2012, when the new Constitution went into effect, Fidesz initiated the most significant constitutional reforms since 1990 (Bánkuti et al., 2012b: 253).

Between May 2010 and April 2011, before the enactment of a new constitution, Parliament passed a flow of constitutional amendments which removed and challenged key constitutional checks on legislation. Furthermore, a constitution-drafting process that could proceed without involvement from the opposition was facilitated by Fidesz. One of the constitutional amendments removed the provision from 1995 that required the four-fifths vote of Parliament to approve the rules of drafting a new constitution. The amendment removed the most important formal obstacle to make a new constitution, and made it easier for Fidesz to change the constitution without having to consult any of the opposition parties (Uitz, 2013: 11). The provision requiring the four-fifths majority was meant to protect the interest of minority parties. Though, Fidesz didn’t have the required four-fifths, so one of their first amendments was to use the two-thirds majority to remove the requirement to have four-fifths of the votes - the last restraint on a government.¹⁹ The amendment rule to the constitution was never altered to exempt the new four-fifths rule from its responsibility, so Fidesz was able to use its two-thirds majority vote and eliminate the four-fifths requirement from the constitution. With that rule gone, Fidesz was free to write a new constitution without interference from any other parties (Bánkuti et al., 2012a: 139). The removal of the requirement enabled Fidesz to revise the constitution without having to rely on the votes of parties outside its own parliamentary bloc. This change was followed by other major and crucial changes that caused difficulties for the opposition when trying to interfere in the constitutional revolution while it was happening (Bánkuti et al., 2012b: 254). Consequently, those who are critical of the new constitution have

¹⁹ Some scholars believe that this act ceased to be in force in 1998 at the end of the parliamentary term of the coalition government who adopted it.

claimed that the new 2012 Hungarian constitution should have been adopted by four-fifths of the votes of the members of parliament (Fröhlich and Csink, 2012: 427).

The Basic Law of Hungary entered into force on 1 January 2012, and made Hungary topical both inside and outside the country, more than two decades after the post-communist constitutional transition (Fröhlich and Csink, 2012: 424). The adoption of the Basic Law symbolized formal discontinuity, but in general, with respect to the basic content, there is continuity with the constitutional culture of the past twenty years since 1989 (Fröhlich and Csink, 2012: 425). With a great deal of public fanfare and symbolic reasoning,²⁰ the new Constitution was the final step in the Hungarian transition begun in 1989, completely replacing the constitution established at that time (Bánkuti et al., 2012b: 238). The Constitution introduced new institutions to the legal system, and gave already established institutions new roles and tasks. While some scholars evaluating these institutions are critical about the new regulations, others are rather optimistic. Furthermore, several of the novelties in the new Hungarian constitution have been debated by international organizations, and while such interest is quite unusual for a national constitution, it must be emphasized that the Basic Law of Hungary does bring unusual solutions.

4.3 Consequences for the Constitutional Court

The Constitutional Court was established as an institution that could act as a safeguard of fundamental rights, and an institutional guarantee of the separation and balance of powers in the Hungarian society. Since Hungary was established as a one-chamber legislature, there is no limiting upper house in the Hungarian constitutional system. Furthermore, because Hungary is a unitary state, it cannot follow the vertical separation of powers doctrine which is characteristic of the federalist states. Hungary is a parliamentary system, in which the executive and legislative branches are interwoven, and the president has strongly limited competences, with few veto powers. Hence, the fundamental rights that are recognized by the Constitution and the Constitutional Court, that are responsible for the interpretation and upholding of those rights, are the only real constitutional checks on the powers of the parliament (Kovács and Tóth, 2011: 185).

The Constitutional Court managed to stay in the limelight for two decades as an important institution that led the creation of a new constitutional architecture and ushered the transition

²⁰ The constitution was officially signed by the president of the Republic on Easter Monday, which caused it to be known as the “Easter Constitution.” That highlights the aspirations that are expressed in the Basic Law of 2012 itself to make Hungary a Christian nation.

to democracy. Though, the Court, which was known to stand up against the other political branches, and had its tense moments with them over the years, has supposedly lost its strong position in the Hungarian society. While some explain this as a natural development in which the Court has fulfilled its role in building a constitutional democracy (Mázi 2013 [interview]), others blame Fidesz, who came sweeping into power in 2010, for making the Constitutional Court a subject of political power demonstration.

However, what is undoubtedly a fact is that constitutional amendments in the Act on the Constitutional Court of 2011, as well as the Basic Law of 2012, brought with it great consequences for the Constitutional Court, and affected the formal framework in the manner of election, composition, jurisdiction and procedure of the Constitutional Court (Uitz, 2013: 9). Further amendments in the aftermath of the new Constitution, such as the Fourth Amendment to the Basic Law, brought with it even larger consequences for the Court.

4.3.1 Changes in the Nomination Process

After the inauguration of the new coalition government, consisting of Fidesz and KDNP, the two-thirds majority was used to amend the constitution so that the constitutional regulation of the nomination process of the constitutional justices was changed. Hitherto, the members of the Constitutional Court had been nominated by a special committee consisting of one member of each parliamentary fraction, with one vote each, before the nomination was confirmed and elected by a two-thirds vote of the Parliament's members (Kovács and Tóth, 2011: 193). This rule was meant to enhance consensus-building in the parliament, and to ensure that the opposition of the day had participation rights when deciding on the most important constraint of majority politics (Uitz, 2013: 10). In June 2010, the procedure for electing the justices of the Court was changed, and under the new rule a single two-thirds parliamentary vote is all that is necessary. A parliamentary committee, consisting of members appointed from and by the parties according to their share of seats in parliament, nominates the justices (Bánkuti et al., 2012b: 254), which basically means that it is the governing party that nominates the candidate (Bánkuti et al., 2012a: 139). A consequence of this change is that there is no longer a need for consensus. The parliamentary majority has the opportunity to overpower its opposition, or even its own coalition partner, in the nomination committee (Uitz, 2013: 11). Given the composition of the parliament at the time of the change, that meant that Fidesz was given the opportunity to put their own candidates onto the court.²¹ Though, the changes are justified by the government as a necessary development: the

²¹ As a direct result of this constitutional change, the majority has nominated and elected seven new justices.

Hungarian system is built on an idea that all important decisions have to be taken with a two-thirds majority in order to be implemented. However, as it is rather rare that a government wins two-thirds of the seats in parliament, the old solution was meant to gain consensus between the parties in parliament in order to appoint judges. Today the government has the necessary two-thirds majority, and that makes it no more than natural that the competence of nominating judges is decided with the two-thirds majority, like all other important decisions (Mázi 2013 [interview]).

According to theory, this is an alarming development. The formal framework that provides judges with the ability to act independent is changed by the government, and that can cause changes in the practice of the judiciary. The most common measure to ensure that the personal independence of judges is protected and insulated from political inference is through the selection and reappointment processes. As executive dominance, with its two-thirds majority, is the central challenge in Hungary, it is especially worrying that the institutional rules, which should limit the executive influence over judicial appointments and strengthen the court's ability to hold political power to account, are changed in a favorable direction for the government. A typical assumption is that judge's decisions are influenced by who appoints them, and by granting significant roles to other political, though neutral, actors in the process of electing justices, the judiciary is protected sufficiently from undue executive influence. The procedure for electing judges in Hungary is now based on a two-thirds majority. That is not necessarily a bad solution, but it relies heavily on those in position of such a majority – and their ability to appoint neutral judges with no clear political preferences. If the executive branch is entrusted with the task of selecting judges, without constraints, then the risk of selecting candidates that are unqualified increases. The theory emphasizes the importance of some form of legislative or judicial approval as check when selecting judges (Rosenn, 1987: 19-22). Though, as the composition of the committee that proposes the judges, and the majority required to elect them, has given the government the power to appoint and nominate judges without having to rely on the support of the opposition (Fröhlich 2013 [interview]), or the approval of the legislative or judicial branch, the government can select judges without constraints. That undermines the independence of the Court's members in relation to the current government.

Though, a provision in the Act on the Constitutional Court,²² article 3(4), prevents the government from appointing judges that come directly from the parliament:

“Having been a member of Government or a leading official in any political party or having held a leading state officials in the four year prior to election shall disqualify persons from becoming Members of the Constitutional Court”

(ACT CLI of 2011 on the Constitutional Court, 2011)

Still, seven new justices have been appointed so far, and just to state an example: most of them shared the government’s view that the challenged rules of the most controversial case²³ were in line with the constitution (The Norwegian Helsinki Committee, 2013: 16). Furthermore, there are no restrictions on previous members of Parliament prior to an election. Thus, the tendency is that most of the newly appointed justices have strong links to, or are directly connected to, the ruling party, and that is a possible reason for the changes in the role of the Constitutional Court (Polgár 2013 [interview]). Two of the judges in the Court are former ministers. One of them, Dr. István Balsaim, was Minister of Justice in both the government of József Antall, between 1990 and 1993, and the government of Péter Boross, between 1993 and 1994. He was later a member of the Parliament, representing Fidesz. When he was elected a member of the Constitutional Court in 2011, he resigned from his parliamentary seat and other political positions. Though, as a former Member of Parliament for Fidesz, it is easy to assume that his preferences and political views are located near the ones of Fidesz (Polgár 2013 [interview]). Furthermore, Dr. István Stumpf, a judge of the Constitutional Court since 2010, was a former minister in the Prime Ministerial Office from 1998 to 2002. As both judges held their positions more than four years before they were elected as judges, the appointment was in line with the Act on the Constitutional Court (Fröhlich 2013 [interview]). Theory emphasizes the importance of avoiding conflict of interest in order to enhance judicial independence (Rosenn, 1987: 19-21), and to establish a legal framework that aims at protecting the ability of court to act independent of other branches of government. Hungarian judges are prohibited by law from being members of political parties, but as there are no rules that prohibit former MPs to enter the Court, several of the judges have clear connections to the governing majority. Ambiguous situations and conflicts can therefore easily arise. That is problematic.

²² Act CLI of 2011 on the Constitutional Court, article 3(4)

²³ Mandatory retirement age of ordinary judges, see chapter 4.4.4

However, there are examples of newly appointed judges, expected to act in accordance with the governing majority's preferences, who have gone against the government. Judge Stumpf has led a professional and independent work since he was elected, and has voted against the government on several issues (Mázi 2013 [interview]). "Unfortunately, judge Stumpf is the only judge taking the liberty to go against the government in many cases. All other judges elected after 2010 are echoes of the government's legal reasoning in important cases" (Sepsi 2013 [interview]). Nevertheless, it is still problematic for the independence of the Constitutional Court: the justices are determining the constitutionality of laws that they might have voted on in parliament, or even submitted (Tóth, B 2013 [interview]), and it creates an attitude among most people that the Court is packed with judges loyal to the government (Fröhlich 2013 [interview]). "There are members in the Court who shouldn't be there" (Grabow 2013 [interview]).

The new composition of the Court has altered the corporate culture within the Hungarian judiciary, and thus influenced the willingness of judges to realize their potential for independence. The internal standards, created by the judiciary itself, that judges are incorporated into, are important when explaining the apparent decline in the Court's independence. Furthermore, attitudinal approaches emphasized in the theoretical part of the thesis focuses on judge's ideology, values and preferences – and understand judicial decisions as something that directly reflects the policy preferences of judges. The appointment of judges who have clear ties to the governing majority can be seen in relation to the work of Dahl (1957), which implies that the Constitutional Court serves as a pro-majoritarian institution in which their judicial decisions are a function of the political preference of the judiciary. This is the result of the selection process in which judges who share the political preferences of the incumbent government are appointed.

"The Constitutional Court lost autonomy when it was packed with selected lawyers, legal experts and law profiles with clear connections to Fidesz. It curtailed all the authority of the Constitutional Court, and turned the Court into a political body"

(Fleck 2013 [interview])

"The composition of the court has large impact on the Court's independence – much more than changes in its competences" (Miklosi 2013 [interview]). Several former Fidesz ministers and members of parliament have been appointed since the changes in the nomination process (Lendvai, 2012: 222), and that has shown to be an effective way of weakening the court

(Kovács 2013 [interview]). “The composition has weakened the Court’s function as an external control mechanism” (Polgari 2013 [interview]). The Liberal Party (LMP) proposed to amend the Act on the Constitutional Court with a provision that would disqualify former members of parliament from being appointed to the Constitutional Court, but the proposal was rejected (Fröhlich 2013 [interview]). “Personally I would have supported this proposal very much” (Fröhlich 2013 [interview]).

However, the composition of today’s court is a fair balance of judges elected both before and after 2010. It is important to mention that new and old is not the only dividing line. That is too simple (Fröhlich 2013 [interview]).

4.3.2 Fiscal and Budgetary Laws

In November 2010, a new amendment curbed and limited the jurisdiction of the Court to review the constitutionality of certain budgetary, tax and fiscal laws and measures (Kovács and Tóth, 2011: 193), unless such rules were violating certain listed rights that were hard to infringe with budget measures, such as human dignity, the right to life, the right to Hungarian citizenship, the protection of personal data or freedom of religion or belief (Uitz, 2013: 12). This means that, unless the petition refers to the listed rights, the Court may not examine and review the constitutionality of acts that are related to the state budget, central taxes, custom duties and laws regulating local government taxation (Kovács and Tóth, 2011: 194). Conspicuously, the Court are in no position to review tax or budget laws if they violate other rights that are easier to limit with fiscal measures, such as the right to property and the guarantee of fair judicial procedure (Bánkuti et al., 2012a: 139). The amendment was passed after the Constitutional Court found that a 98 percent retroactive tax, imposed on, in order to plug gaping budget holes, the compensation and severance payments of state servants who had left public employment in the preceding five years, was unconstitutional. Parliament responded by both amending the old constitution in such a manner that the jurisdiction of the Court was curbed on fiscal matters, and by rephrasing the constitutional provision on special taxes and reenacting the law with the 98 percent special retroactive income tax in it. The Court found the special tax unconstitutional again in its second decision on the matter, and claimed that it was violating the right to human dignity. Though, the rule that curbed the jurisdiction of the Court on economic legislation was still included in the Basic Law of 2012 (Uitz, 2013: 13).

The restrictions of the Court's jurisdiction to review fiscal laws changed the formal framework, and thus weakened the Court's authority.²⁴ The Court was deprived of the opportunity to check budgetary and tax policies – and that gave Fidesz room to present a wide range of unconventional economic policies, and to act in the financial arena without having to pay attention to the Court, who, in the original constitutional design, was supposed to function as a constitutional constraint (Bánkuti et al., 2012b: 255). The limitations on the jurisdiction of the Court were designed to avoid and eliminate judicial scrutiny of the government's policies. Hence, when a government policy effectively nationalized private pensions by establishing a penalty that those who refused to move their private pensions into public accounts had to pay, a prior decision of the Court was directly violated. The prior decision of the Court held that it was unconstitutional for the government to threaten to cut pensions if people chose not to move their private pension funds into state coffers, as people had property interests in the money they had paid into public pension funds. The policy resulted in eight-thousand cases on the issue going to the European Court of Human Rights relating these controversial changes in the pension system²⁵ (Bánkuti et al., 2012a: 140). The new limitations were meant to avoid such judicial scrutiny, by effectively making the prior decisions of the Court unenforceable (Bánkuti et al., 2012b: 255).

However, Prime Minister Viktor Orbán has emphasized that the Government will remove the Constitutional Court's restrictions with regard to financial issues, once the public debt of Hungary sinks below 50 percent of gross domestic product (Dempsey, 2011). This is also stated in the Basic Law of 2012, in a constitutional amendment that was enacted on December 30, 2011. That implies that as long as the public debt is more than 50 percent of the GDP, the Court can never review fiscal laws enacted during this period. Only new fiscal laws that are enacted after the debt drops below 50 percent of the GDP can be reviewed by the Court (Bánkuti et al., 2012b: 261). However, regarding the state of the Hungarian finances, this is something that is not expected to happen in the foreseeable future (Csink 2013 [interview]).

By restricting the Court from reviewing budget and tax policy, the Fidesz government can act in the financial arena without having to pay attention to the constitutional constraints they would have met otherwise – and excludes the possibility of there being consequences of violating the constitution in those areas. “The restrictions on the Court's competence to deal with financial laws are definitely a limitation. Such provisions cannot be found anywhere else

²⁴ See Table 1, page 38, for a summary of the theoretical framework

²⁵ <http://www.euractiv.com/future-eu/human-rights-court-inundated-hun-news-510155>

in the world” (Kovács 2013 [interview]). When restricting the Court’s competence in such a way that it can only review certain state acts with regard to only a limited part of the constitution, it runs counter to the aim of the most important task of the Court: enhancing the protection of fundamental rights in Hungary (The Venice Commission, 2013). Fundamental provisions of the constitution are all of a sudden not valid in cases of financial issues (Kovács 2013 [interview]). For instance, laws that violate the right to property, which is a fundamental human right, cannot be reviewed by the Court, and that is questionable given Hungary’s communist past (Jakab 2013 [interview]). “Restricting the Court’s competence in financial issues is a negative change, and, for the integrity of the constitution, especially regarding human rights, it is negative that there are regulations that the Court cannot review (Csink 2013 [interview]). The selection of protected rights can further cause a conflict between the Hungarian legal system and the rights protected by the European Convention on Human Rights (Kovács and Tóth, 2011: 195). The fact that the restriction will terminate when the state debts drops below 50 percent of the GDP is a poor consolation, both because there are insecurities regarding what the government actually includes in the GDP, and because the current level of state debt is almost 90 percent, which means that it is extremely unlikely that the state debt will drop below 50 percent in the foreseeable future (Tóth, B 2013 [interview]). The Venice Commission (2013) further points out that such a limitation on the Court’s power to review financial laws when state debt exceeds 50 percent give an impression that capping the national budget at 50 percent of the GDP is such an important aim that it might be reached by using unconstitutional laws.

The restriction of the Court’s ability to review the constitutionality of financial measures caused fierce criticism, both because it gave room for the government to regulate financial issues without interference from the court, and because there is a genuine fear that the restriction can cause neglect of fundamental human rights. Though, there is support for the restrictions as well. The government defended the restriction by arguing that budgetary and tax issues rightly remain the preserve of an elected government (Navracsics, 2011). Some argues that the executive and legislative branch should deal with financial matters, such as the budget, together, without the interference of other institutions. As both branches are elected by the people, this can guarantee a certain degree of democratic control over the process (Polgár 2013 [interview]). Others claim that the powers of the Court related to fiscal regulations and provisions used to be too wide, and that the Court’s frequent annulments of the budget made it difficult for the governing majority to implement changes in the national

economy (Szántho 2013 [interview]). It was therefore agreed that the Court's competences regarding financial and budgetary laws had to be regulated (Mázi 2013 [interview]). "Though, there are differences between regulating a competence in order to make it more compatible with the institutional design, and deliberately restricting it" (Tóth, B 2013 [interview]).

4.3.3 An Increase in the Number of Seats

Finally, a constitutional amendment passed by Parliament in June 2011 affecting the Constitutional Court increased the number of seats on the Court from 11 to 15, effective since September 2011 (The Constitutional Court of Hungary, 2014), giving the government the power to name four additional judges, thus ensuring that the majority of judges on the Court were friendly faces (Bánkuti et al., 2012b: 255). The government was further able to fill vacancies on the Court that had opened up after it took office, and Fidesz therefore named a total of seven of the fifteen judges on the Court in its first year and a half in office. The amendment strengthened Fidesz' control over the Constitutional Court (Bánkuti et al., 2012a: 140), and with the new judges on board, Fidesz was given new and reliable votes, in addition to the votes that Fidesz already knew that they could count on from appointments that were made when prior rules guaranteed that all the major parties had representatives within the Court. The majority makes it highly unlikely that important provisions and elements of the new constitutional program will meet resistance (Bánkuti et al., 2012b: 255). Changes in the personnel of the Court altered the corporate culture within the judiciary, and thus the willingness of judges to act independent. Changes in the internal standards of the Court can further face problems of interpretations when the corporate culture changes, and this can open up space for actors within the institution to implement existing rules in new ways, thus causing a gradual change of the Court.

The government defended the increase in judges from 11 to 15 by claiming that it was necessary because of the workload of the Court, and how the workload would increase when introducing a new system of constitutional design (Jakab 2013 [interview]). Though, the argument falls short when comparing Hungary with Germany, who has a similar constitutional system. Germany is both larger in size and population, but the number of judges within the constitutional court is only 16. Furthermore, the caseload of the Hungarian Constitutional Court is much lower today than it was just a few years back, and that makes the increase in the number of judges a paradox (Kovács 2013 [interview]). "The number of judges

was increased, so that the government would have the majority within the Court. End of story” (Polgari 2013 [interview]).

Ironically, with an increase in the number of judges from eleven to fifteen, the makers of the Basic Law of 2012 returned to the much criticized design of the 1989 Constitution. The original idea was to have fifteen justices on the Court. A transitional provision of the 1989 Constitution required five constitutional justices to be elected by the outgoing Communist parliament from 1985, another five justices to be elected by the parliament that was elected in 1990 and the remaining five seats to be filled within a time frame of five years. Though, the number of seats on the Constitutional Court was reduced to eleven in 1994 (Uitz, 2013: 14).

Another change that occurred in an amendment from 2010 concerned the structure of the Constitutional Court, and stated that the president of the Court from now on would be elected by the Parliament. Previously the president was elected by the justices from among themselves. It is a widely accepted phenomenon, promoted by, among others, the Venice Commission, that a political actor elects the president. Nonetheless, it could be said to be a regression in the independence of the Constitutional Court. However, the amendment lengthened the term of office from nine to twelve years, while terminating the possibility of re-election of the justices, which may contribute to a strengthening of their independence (Fröhlich and Csink, 2012: 436), as they don't have to fear not being re-elected if they don't act in accordance with government policies. Protection of tenure, in the form of non-renewable terms of service, is seen as crucial to insulate judges so that they can make rulings with political costs for the government, without fearing political reactions to their decisions (Gloppen, 2004: 125). When terminating the possibility of re-election through the formal framework, judges' ability to act independent increased, just as the theoretical framework suggests.

4.3.4 The Removal of *Actio Popularis*

Under the 1989 Constitution, the Constitutional Court responsibility was to maintain the integrity of the Constitution, and to annul and remove all norms that fell outside the frames of the Constitution. Anyone could challenge the constitutionality of a law or provision, and request the review of legislation if it was considered unconstitutional (Fröhlich and Csink, 2012: 435). The competence of *Actio Popularis* was imbedded in the Constitution, and despite the fact that this jurisdiction was rather unusual in Europe, it became an effective way to keep

the government in constitutional line in Hungary. Furthermore, it made the Constitutional Court of Hungary one of the most powerful courts in the world (Fröhlich 2013 [interview]).

Though, the Basic Law of 2012 eliminated the *Actio Popularis* jurisdiction and substituted it with a constitutional complaint based on the German model. The new system allows individuals to challenge laws only if the laws affect them personally (Bánkuti et al., 2012a: 142).²⁶ The change from the abstract posterior review of legislation to the examination of individual complaints was the most apparent change in the field of state organization. The Basic Law of 2012 further allowed for both laws and judicial decisions to be challenged in the constitutional complaint proceedings. The ability of the Constitutional Court to review laws in the abstract is further limited by the fact that the range of initiators who have the competence to take the case to the court for abstract review are restricted to apply only to the Government, one-fourth of the MP's, the President of the Curia, the Prosecutor General, or the Commissioner for Fundamental Rights. Even the President of the Republic no longer has this power. As the Basic Law of 2012 abolished *Actio Popularis* and restricted the range of initiators, the importance of abstract review is reduced (Fröhlich and Csink, 2012: 435). By building restrictions on the Court's competence into the formal framework of the court, so that the formal regulation of the court's jurisdiction changes, judicial authority was weakened.

Nonetheless, the elimination of *Actio Popularis* was a rational measure that can be defended. The workload was too burdensome, and caused delays in legal proceedings (Polgár 2013 [interview]). Two-thirds of the petitions that the Court received came through the competence of *Actio Popularis*, and in the two first decades of the court, this was the main feature of judicial review. The caseload before the removal could reach 1500 cases per year. Now, the caseload has decreased to a minimum (Kovács 2013 [interview]). The removal of the competence can therefore be justified as a measure that decreased the heavy workload that the competence caused the Court, and caused a more efficient Court (Polgari 2013 [interview]).

The Hungarian people can still approach the court, but as the abstract review is restricted to the institutions mentioned above, they will have to use these institutions as intermediaries in order to do so (Fröhlich 2013 [interview]). That can improve the legal character of the complaint, and give it the expected judicial expression (Csink 2013 [interview]). However, that implies that the few institutions that now have the right to turn directly to the Court are willing to do so. It is worth noting that currently it's not that easy to challenge the government

²⁶ See paragraph 4.3.5 for a more detailed description

before the Court. So far, the right of abstract review has been applied to the minimum. The problem is the political context. The opposition is basically nonexistent, and far from unanimous enough to write a common petition to the Constitutional Court under present conditions (Csink 2013 [interview]). The chances of consensus building are unlikely (Uitz, 2013: 32). The previous commissioner was very active and constantly challenging government policy and legislation. It was assumed that this was a result of the unlikeliness that he would ever be re-elected, and that he therefore knew that he had nothing to lose by being active (Kovács 2013 [interview]). Though, the incumbent commissioner, who was elected in 2013, has yet to introduce any petitions to the court. The Hungarian people are paying close attention to the new commissioner, and the fear is, considering that he is believed to be close to governing majority, that he won't use the right at all (Polgari 2013 [interview]).

While the heavy workload caused by Actio Popularis was a negative feature, some people argue that an elimination of the competence was not the only solution. The Constitutional Court had the possibility to introduce a filtering system, similar to the system used in Strasbourg. "It was the Court's responsibility to increase the efficiency of the court – not the government's responsibility" (Kovács 2013 [interview]). The government chose to remove the competence, based on reasons claiming that the measure would make the Court more effective in the every-day work (Kovács 2013 [interview]). It has further been claimed that members of the Court supposedly proposed the removal of the competence, in order to reduce the workload and increase the efficiency (Mázi 2013 [interview]). This is true to some extent. The present chief justice of the Court wrote articles suggesting that there should be some form for eligibility criteria for the petitioner, in order to ease the workload, "but as far as I know, there were never any explicit request from the Court to remove Actio Popularis" (Fröhlich 2013 [interview]).

"Actio Popularis was a positive competence that motivated the Hungarian people to participate in the constitutional process. My personal opinion is that the government wanted to avoid that people turned the court, asking for judicial reviews of laws and regulations"

(Kovács 2013 [interview])

The competence of Actio Popularis caused an active and powerful Court, and several of the judgments carried out by the Court in the 1990s came with political costs for the government

(Uitz, 2013: 8-10). “The Court overacted their role” (Mázi 2013 [interview]). It was argued that the Court interfered too much in political issues, and the government therefore saw the need to regulate and limit the activity of the court (Mázi 2013 [interview]). Constitutional amendments changed the formal framework of the Court, and restricted its jurisdiction. The consequence was a limitation in the formal authority of the Court. This can be seen in relation to the pendulum effect, in which I refer to in the theoretical chapter: when the manifest judicial independence is high, there is an increased likelihood that authorities will attempt to reign in the judiciary through reforms and measures limiting their formal authority and/or independence (Garoupa and Ginsburg, 2009).

4.3.5 Constitutional Complaint

The Basic Law of 2012 caused significant changes in the formal framework of the Court, and grants the Court new jurisdiction to review the constitutionality of judicial procedures and decisions through a new competence called constitutional complaint. The formal regulation of this competence in the constitution empowers the Court, and secures judicial authority.

The mechanism of constitutional complaint includes that a person whose rights have been violated or affected by the concrete application of a law may approach the Constitutional Court in order to obtain redress. The Constitutional Court can thereafter decide on one of the following three outcomes: (a) that there has been no violation of rights, (b) or that a violation of rights was a result of an unconstitutional interpretation of a constitutional law, (c) or that a violation of rights was directly caused by the application of an unconstitutional law. Despite the fact that the Court still retains the power to find laws unconstitutional, it is one mechanism short in relation to the repair of unconstitutional interpretations of law. The elimination of the *Actio Popularis* restricts citizens to only bring cases that involve infringements of their own rights to the Court, or cases in which the law does not provide the possibility for a legal remedy. Judges from the ordinary courts are still given the possibility to petition the Constitutional Court to review a law that is thought to be unconstitutional before it is applied in a concrete case, just as they have been able to do since the transition in 1990 (Bánkuti et al., 2012b: 261).

The new system of constitutional complaint has been well received by both the Court and other state organizations, and as the system is still very new, it is difficult to criticize it just yet. Through this system, individuals have to prove that a statute or a law affects them directly, in order to bring the case to the Constitutional Court. The easiest route to the Court is to take

the case to the ordinary court, and then let that court decide if the case is worth taking further in the system. The idea behind the introduction of the system was that it could create more efficiency within the court (Jakab 2013 [interview]), and increase the Court's power as they were given the opportunity to supervise ordinary courts' decisions (Sepsi 2013 [interview]). However, as there was a fear that the system would cause people to come directly to the Court in order to complain, a filtering system was introduced. Consequential, only a small amount of cases come through the system, and few cases are declared admissible by the Court. The workload of the Court is too low (Kovács 2013 [interview]), and there are few successful complaints – and too few cases in progress (Fröhlich 2013 [interview]). “So far, in light of statistics, the constitutional complaint procedure has not met with the prior expectations” (Tóth, B 2013 [interview]).

4.3.6 Abolishing the Age Limit

In 2013, the Government of Hungary wanted to abolish a provision stating that the mandate of justices in the Constitutional Court shall end when they turn 70 years old (The Norwegian Helsinki Committee, 2014: 6). The original rule had neither been revised nor applied since the beginning of the Court, but as a result of the amendment, the mandate of Constitutional Court judges, including the mandate of current ones, now allows judges that were elected after 2010 to remain in their seats until the end of their 12-year term. The consequence of the abolishing of the upper age limit of 70 years in the case of elected Constitutional Court judges, including current serving judges, is that several of them will be able to decide on cases even when they will be close to 80 years old (The Hungarian Helsinki Committee, 2013). The provision was convenient, considering that the governing majority had just nominated and elected five new judges as a result of the increasing number of judges of the Court. According to the new rule, the mandate of these five newly elected judges will not terminate when they turn 70 years old, as it would have done under the old provision. For instance, the mandate of István Balsai will be extended with 6 years and 5 months, and the mandate of Egon Dienes-Oehm with 8 years and 8 months (The Hungarian Helsinki Committee, 2013). When changing the formal framework in terms of retirement conditions, the government made sure that the composition of the Court was mostly in favor of their own policy preferences. That contributed to a change of corporate culture, despite the presence of a formal framework, within the judiciary, which influences the willingness of the judges to realize their potential for independence, and thus act in an independent manner. The formal framework was changed in order to enhance the

presence of judges who are less likely to deliver judgments with political costs for the government.

The abolishing of the age limit is a paradox though, as the governing majority terminated the mandate of 274 ordinary judges before they reached the age of 70 in a similar way; only that in the case of the ordinary judges, the retirement age was lowered by an amendment to the law.²⁷ Whilst the lowered retirement age in the ordinary judiciary caused a forced retirement of hundreds of judges, the Constitutional Court judges, who are elected exclusively by the governing majority for 12 years terms, will be able to decide on cases and review laws even when some of them will be close to 80 years old (Tóth, B 2013 [interview]). “The diminishment of the retirement age secured the representation of judges loyal to the government” (Polgari 2013 [interview]).

Most of the judges appointed by the governing majority after 2010 were quite old. When diminishing the upper age limit, the government secured that these judges could remain in office for a longer period. A remark was added to the provision stating that the age limit is still 70, but judges elected after 2010 can remain in their positions after having turned 70 years old (Jakáb 2013 [interview]).

“That makes all the sense in the world: the judges appointed by the government were all appointed after 2010. Judges appointed before 2010, by a balanced council of judges, will have to retire by the age of 70. This is something that, in my opinion, shouldn’t take place in a civilized constitutional culture. Though, that is the problem here: there is no constitutional culture, and the government lacks respect for the constitutional rule.”

(Jakab 2013 [interview])

4.3.7 The Fourth Amendment

The Fourth Amendment, affective from February 2013, affected the role of the Constitutional Court in several ways. A number of provisions were taken to a constitutional level, in response to earlier decisions of the Court. Other provisions affected its functioning, by directly changing the jurisdiction of the Court. The legal framework of the Court was

²⁷ See paragraph 4.4.4

changed, and formal regulations that worked to protect the jurisdiction of the Court were removed. The restrictions in the Court's jurisdiction weakened the judicial authority.²⁸

A consequence of the amendment is that the Constitutional Court can no longer reject constitutional amendments on matters that concern its substance – only on procedural grounds (The Economist, 2013). That means that the Court can only review the acquiescence of the Basic Law, and the amendments to the Basic Law thereof, for conformity with the procedural requirements that are contained in the Basic Law pertaining to the adoption and promulgation of the Basic Law or its amendments.²⁹

The Fourth Amendment further states that Constitutional Court decisions that were given prior to the entry into force of the Basic Law, 1 January 2012, are hereby repealed.³⁰ All previous rulings are void, and should hereafter have no bearing on the future decisions by the Court (The Norwegian Helsinki Committee, 2014: 6). Though, when constitutionalizing issues that were previously deemed unconstitutional by the Court, the Basic Law of 2012 challenges the role of the Court as a guardian of constitutionality and the main control organ in the democratic system of checks and balances (Grabow 2013 [interview]). The Court must now ignore more than two decades of legal precedent, and base future rulings on the Basic Law of 2012. The legal maneuver has a significant outcome: the government has used the measure to pass laws that might otherwise be rejected by the Court. The amendments in the fourth round since the enactment of the constitution included several laws that the Court had previously rejected, such as limits on political advertising in election campaigns and homeless penalizing. As these laws were amendments to the constitution, they can be further amended only with a two-thirds majority, something that limits the scope of future governments to change them (The Economist, 2013). “It is such an aggressive way of doing politics” (Grabow 2013 [interview]).

It is emphasized that the provision is without prejudice to the legal effect that was produced by those decisions. That means that the Court's rulings do not lose their binding force, and laws that have been annulled by the Court do not enter into force again. However, the Court will no longer have the ability or obligation to refer to these decisions. That basically means that, in substance, the Court could come to the same conclusions as before, but without referring to its earlier jurisprudence (The Venice Commission, 2013). Thus, the Court is

²⁸ I refer to Table 1, page 38

²⁹ Article 12.3 of the Fourth Amendment, amends Article 24.5 of the Basic Law

³⁰ Article 19 of the Fourth Amendment

obliged to ignore years of legal precedent, and base future decisions on the constitution that was enacted in January 2012 (The Economist, 2013). Moreover, laws that had earlier been deemed unconstitutional by the Constitutional Court were later included in the Basic Law of 2012, which means that the Court can no longer strike out these laws and regulations (The Norwegian Helsinki Committee, 2014: 6).

Furthermore, a provision of the Fourth Amendment provides that the Court shall review cases for conformity with the Basic Law, originating from the proposal of any ordinary judge, immediately – but no later than within thirty days.³¹ That means that in concrete review cases, the Court is obliged to fit its whole procedure, including the distribution of the decision, within a timeframe of thirty days (The Venice Commission, 2013).

4.4 A New Beginning for the Judiciary: the Act of 2011

The continuous difficulties of the ordinary judicial system, all included as important factors in a thorough analysis of the situation, caused the legislators to draw the consequences that a new system of administrative and professional direction of justice was needed. The conclusion was that the system should contain certain elements of various models of administrations, while at the same time enable immediate measures. It was suggested that a new system should be based on already existing institutional grounds, though radically renewing the foundations of these grounds (The Curia of Hungary, 2014)(Tóth, A 2013 [interview]).

While the act of 1990 and 1997 were unmodified when the new government was elected in 2010, it soon became apparent that changes were inevitable. A modification process was therefore initiated in 2010 by the new government, and the consequences of this process were changes in the administration of the NCJ. Rights which previously fell within the NCJ's jurisdiction were now transferred to the head of the NCJ, who also functioned as the President of the Supreme Court. It was argued that this measure would increase the efficiency of the NCJ, as the head of the NCJ would be more available than the NCJ of 1997, which only met once a month (Juhász 2013 [interview]). Though, the change proved to be ineffective. With both the presidency of the NCJ and the Supreme Court comes great authority, but also great responsibility. The Supreme Court has the right to make unified decisions that are binding for all courts, and the main responsibility is to monitor the work of lower level courts. The presidency of the Supreme Court requires both time and effort, and when the President was

³¹ Article 12.1 of the Fourth Amendment, changes Article 24.2.b of the Basic Law

put in charge of new areas of administration within the judiciary, the workload increased. It was difficult to allocate time, and the tendency was that too much time was spent working on administrative issues, and too little time was spent on professional jurisdiction (Tóth, A 2013 [interview]).

4.4.1 The Three-Level System

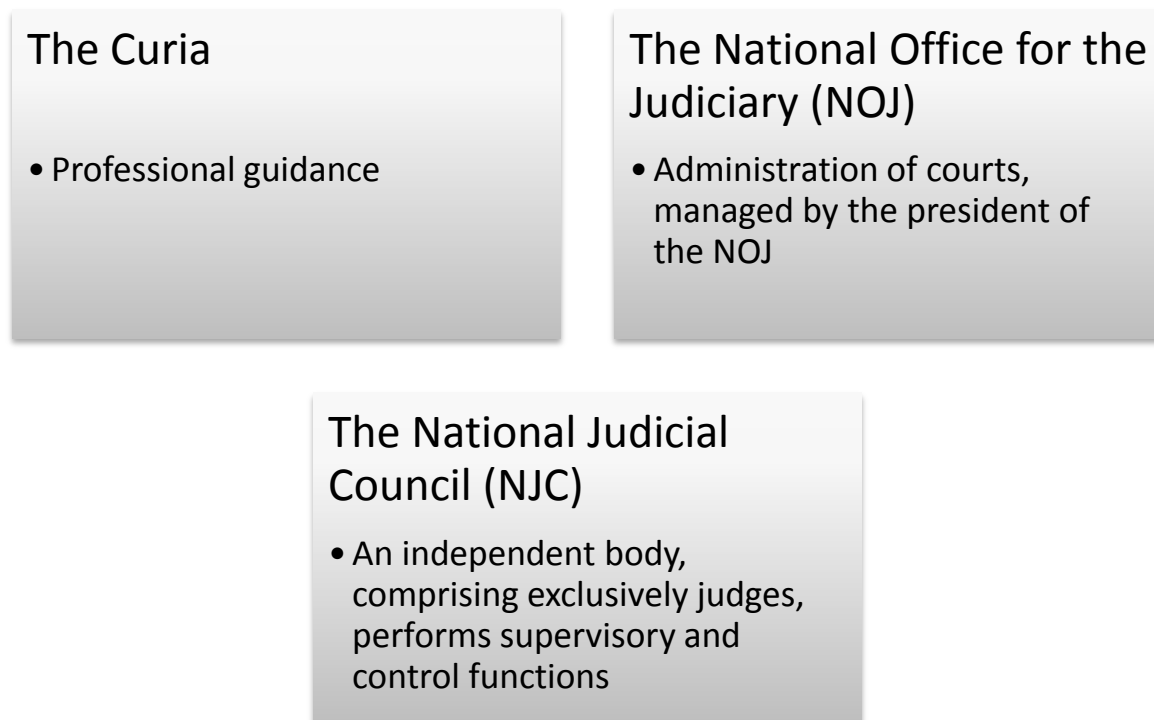
Consequently, the Act of 2011, on Administration and Organization of the Judiciary, declared that the judiciary worked best if the two functions were kept separated, with the head of the Supreme Court³² being responsible for the professional supervision of the judiciary and the unified application of the law, and a president of the newly established organ the National Office of the Judiciary³³ being responsible for the administration of the judiciary (Juhász 2013 [interview]). The act, together with the Act of 2011, on the Status and Remuneration of Judges, was aimed at the elimination of the problems mentioned above, and worked to provide a new path that could lead to a more up-to-date and efficient system. With the implementation of the new constitution, the Fundamental Law of Hungary, effective as of 1 January 2012, it was decided that the administrative and professional competences should be separated within the framework of the new system. As of 1 January 2012, a three-level system was introduced.³⁴

³² Changed its name to the Curia (Kúria) of Hungary from 1 January 2012

³³ Hereinafter referred to as NOJ

³⁴ Model 1 provides a summarized overview of the three-level system as of 1 January 2012

Figure 2: A Three-Level System of Judicial Administration



(The Curia of Hungary, 2014)

The central administration of courts is now assigned to the President of the NOJ, who is supported by deputies and the office. Administrative competences, such as budgetary and personnel administration, appointment of higher judicial leaders, contact between branches and assessment of the applications for judiciary posts, were transferred from NCJ and its president – who was president of the Supreme Court at the same time - to the president of NOJ. Thus, the Curia, whose president provides professional guidance, and the president of the NOJ, who manage the administration of courts, have been separated (The Curia of Hungary, 2014). The president is given an office and a staff that works to assist the president in his or hers work. “The NOJ acts as an administrative body, and a consultative adviser, that assists and prepares the work of its chairman” (Juhász 2013 [interview]). The independence of the president of the NOJ is ensured by the fact that only a judge can occupy the position. It is further stipulated that the president of the NOJ is nominated by the President of The Hungarian Republic, and elected by the parliament. An independent body, the National Judicial Council,³⁵ a supreme judicial self-government body, comprising exclusively judges, performs supervisory and control functions to ensure that the president stays within the framework of the NOJ (Juhász 2013 [interview]). The NJC is composed of fifteen judges,

³⁵ Hereinafter referred to as NJC

where fourteen of them are ordinary, elected members, and the last place belongs to the president of the Curia. The NJC meets on a regularly basis, and based on an agenda they make the necessary decisions. The responsibility of the NJC is limited to the control of the NOJ and the decisions of the president of the office. The NJC deals with few administrative issues, but there are areas of judicial administration in which the NJC's consent is needed. These areas are described by the law (Tóth, A 2013 [interview]). However, the NJC's decisions are not binding, and its opinions can be ignored. Thus, The Venice Commission (2013: 16) has on several occasions emphasized the need to enhance and strengthen the role of the NJC as a control instance. The Fourth Amendment of 2013 went in the opposite direction, and raised the position of the president of the NOJ to the constitutional level by giving the presidency the power to exercise the central responsibilities related to the administration of courts. Increased legitimacy to the president has come at the expense of accountability, and the necessary limitations and the checks and balances are nonexistent. The NJC wasn't even mentioned in the Basic Law.

4.4.2 The President of the National Office for the Judiciary

“The President of NOJ shall bear a serious personal responsibility for the central administration and for its effective operation, i.e. to perform the president's duties – as enshrined in the Act of Parliament – with due regard to the constitutional principle of judicial independence.”

(National Office for the Judiciary, 2014)

The presidency of the NOJ comes with great advantages and extraordinary power, and can both appoint judges, and promote and demote judges presently sitting anywhere in the judiciary. The president is elected for a nine-year term by a two-thirds majority in Parliament, and when the term expires, the president can be replaced only by a candidate who can gather a two-thirds vote of parliament. If it were to happen that parliament are unable to agree on a successor, the president may be stay in office until a new candidate musters the required legislative supermajority (Bánkuti et al., 2012a: 143). While it can be criticized that the president is elected by a two-thirds majority, due to the circumstances in which Fidesz has a supermajority, it is a widely accepted phenomenon that a political actor, such as the parliament, elects representatives to such offices. “It is a constitutional guarantee that the

leader of such an important institution is elected by the parliament. I don't find that problematic at all" (Tóth, A 2013 [interview]).

The current president of the NOJ is Tüende Handó, a former judge and president of the Budapest Labour Court. She happens to be the wife of József Szájer, a founding member of Fidesz, who is credited as the writer of the preamble of the new Hungarian constitution - on his iPad on the train between Brussels and Strasbourg (Rozenberg, 2012). Szájer resigned his posts in the domestic Fidesz party as soon as his wife was appointed the president, but he remains a chair of the Fidesz group in the European Parliament. Moreover, Mrs. Handó is also a former college roommate and lifelong friend of the wife of the Prime Minister, Viktor Orbán (Lendvai, 2012: 223). It is difficult to see how a person, who is a close friend with the prime minister and his wife, and married to one of the chief authors of the new constitution, can appear to be a neutral person. And not least, it is difficult to assume that the appointment of Mrs. Handó is one big coincidence. Consequently, the appointment has caused a lot of dismay. The president possesses great powers, and with great power comes great responsibility. It is an undisputed expectation that the president has to be a judge, with some legal experience within leadership. Moreover, as it soon became apparent that the president of NOJ had little leadership experience within the judicial system, the theory, promoted by some observers, that personal friends and acquaintances of the Prime Minister are put in key positions, was strengthened. "The president's relation to the political elite is a problem, and questions the legitimacy of the office as a whole, and the independence of the president" (Polgari 2013 [interview]). Though, the allegations have been met with objections that state that the president had enough professional executive experiences from court organization through her many years as president of the Budapest Labour Court (Juhász 2013 [interview]). However, it does not change the fact that she is a close friend with the prime minister.

Considering that the president is the one responsible for the promotion and demotion of judges, the appointment of judges and disciplinary proceedings, her close ties to the governing party threaten the independence of her position. "It is certainly worrying that newly appointed president is not seen as political impartial. Her political background has a bad appearance" (Miklosi 2013 [interview]). While the president, and judges in general, is prohibited by law from being a member of a political party, it is obvious that there is some connection between her and the governing party, and the Prime Minister, nonetheless. That makes it easy to draw a conclusion that the president reflects the prevailing political preferences of the ruling majority - and that her judicial decisions are a function of this. Given the president's

competences, such as the unlimited power to appoint and replace judges, it is a serious threat to her independence that she is considered to be a Fidesz loyalist – and thus act in accord with the preferences of the governing party. Occupants of offices with such important powers should not be directly connected to the governing majority, and consequently, should not make decisions and appointments based on the policy preferences of Fidesz. Adding that the Chief Prosecutor of Hungary, an official that is in charge of the prosecution of cases at the national level, is himself a highly controversial Fidesz loyalist, the sharp criticism of the new legal landscape by the purged president is more than understandable. “Important offices like these should not be held by people with political backgrounds” (Miklosi 2013 [interview]).

However, up until now, the president has been less biased in decisions and appointments than the expectations implied, and her independence has, consequently, been less questioned than expected (Polgari 2013 [interview]). “The chairwoman is highly respected, and voices from the opposition who questioned her independence in the beginning have mostly subsided now” (Juhász 2013 [interview]). Handó has not been in the position for that long, so it’s too early to judge her way of handling the new responsibilities (Miklosi 2013 [interview]), but even if she exercises the powers with the necessary professionalism, the powers of this position is unprecedented in the European practice. The powers are vast, and leave the affected actors with an inability to appeal or contest her decisions (Scheppele, 2012). Both when appointing and firing judges, reassigning them to new jobs and evaluating them, as well as in the administration of courts, the president’s word is both first and last in this process. Though, it must be added that currently, at the request of the international community, with EU at the forefront, there is an ongoing process in which the president’s vast powers are being challenged.

The judiciary’s ability to act in an independent manner is seen to depend on institutional structures that can insulate the judiciary from political interference and secure judicial authority. That includes formal rules that can limit the executive’s influence over judicial appointments. The formal framework of the ordinary judiciary grants significant power to the president of the NOJ in terms of appointment, vetting and nomination procedures, and that should be sufficient to protect the judiciary from undue executive influence. Though, the formal rules are a promise of judicial independence that only holds under certain political conditions. When the president of the NOJ is seen as an extension of the government, it is likely to believe that the governing majority is able to exert strong governmental influence over the composition of the judicial nominating body, through the supposedly independent

presidency of the NOJ. The judicial selection process in Hungary shows some illustrative signs of this. “The main problem today is that politics interfere with the judiciary and its work, and not the other way around” (Polgari 2013 [interview]). This illustrates how the corporate culture can affect judges to act in a less independent manner, despite the presence of a formal framework that can provide judges with more ability to act independent.

4.4.3 The Nomination of Judges

The constitutional reforms since 2010 has brought with it changes for the ordinary judiciary with regard to the appointment and reassignment process for judges. While judges in the old system were selected by panels consisting of their fellow judges, the judges in the new system are selected by the President of the NOJ. The President of the office has the power to select new judges, promote and denote any judge, to select leaders of each of the courts, and to begin disciplinary proceedings (Bánkuti et al., 2012a: 143). Furthermore, the president is the one who is in charge of the timing and terms of the judicial tenders through which candidates that are interested can apply for the positions available. When choosing a new judge, according to the cardinal acts on the structure of the judiciary, the president of the National Judicial Office must select a candidate from among the top three candidates recommended by local councils of judges from the court in which the appointment will be made. There are requirements that the applicant has to be a judge, and having reached the age of thirty years (The Basic Law of Hungary, 2012).³⁶ The president sets up the process through which candidates may apply, and can select either any judge from the list or reject the judge’s list and start the process over again if necessary. If the president decides to reject the top candidates, then the decision can, as a result of amendments to the law in 2012, be vetoed by the National Judicial Council. Thus, by the time these limits were placed on her powers, almost ten percent of the judiciary was replaced without this check. However, the president still has substantial power, and can call for a new tender. Most of the relevant aspects of the process are controlled for by the president, and Mrs. Handó can, among other things, attend all meetings that the judicial councils held in order to make their recommendations to her. The president of the Hungarian Republic must sign off on all new judicial appointments, but has yet not refused any appointments made by the current government. The fact that the appointments are subject to the approval of the president is in theory a strong check on president of the NOJ’s appointing theory. However, given the president of the NOJ’s strong power, and the government’s control over the president of the republic, the approval becomes

³⁶ Article 26(2)

a formality. Whether this is due to the rumors that he is a Fidesz loyalist, is not known (Grabow 2013 [interview]). Though, he was elected by the Fidesz parliamentary supermajority. Nevertheless, the president of the NOJ possesses all power in relation to the promotion and demotion of judges sitting anywhere in the judiciary (Bánkuti et al., 2012b: 262), and the general administration of the judiciary and the control of judges. There are no procedures for judges to contest the decisions of the president, unless a judge has been asked to resign from the position (Scheppelle, 2012).

Under the old constitutional order, judges ran the process of judicial appointment themselves. That made it difficult for the government of the day to control and influence judicial appointments. The new constitutional order brought with it a solution in which one person selects all new judges. When Mrs. Handó, in 2012, announced that she was to fill more than 100 judgeships, it soon became clear that only a few of these were already judges. That means that most of these positions were given to judicial newcomers. While new judges are allowed within the Hungarian legal system for a three-year probationary term, the government carefully pays attentions to their actions in order to decide on their reappointments (Scheppelle, 2012). Knowing that the occupation of the offices depends on how the government, or the president of the NOJ, evaluates the work they do, judges may act more cautious – as they fear that they will be punished for independent-minded judgments (Gloppen et al., 2010: 122). While formal frameworks that includes structural regulations that includes life tenure or long renewable terms are assumed to prevent judges from considering the political reactions to their decisions, and thus increase the likelihood of delivering judgments with political cost for the government, a probationary term of three years can cause judges to act according to the political preferences of the government.

4.4.4 The Age Issue

“Except for the President of the Curia and President of the National Office for the Judiciary, the service relationship of judges shall terminate upon their reaching the general retirement age”

(The Basic Law of Hungary, 2012)³⁷

³⁷ Article 26(2)

The Hungarian Government adopted, in 2011, a legislation that lowered the mandatory retirement for judges, prosecutors and public notaries from 70 to 62 years, starting on the day the new Constitution went into effect (Bánkuti et al., 2012b: 262). The law terminated the mandate of 274³⁸ ordinary judges within a very short transition period of one year, and forced them into early retirement. The 274 judges included eight of the 20 court presidents at the county level, two of five appeals court presidents and 20 of the 80 Supreme Court judges (Bánkuti et al., 2012b: 262). The judges were replaced with nominees that were both nominated and appointed by one single politically appointed individual: the President of the NOJ. Hungarian officials claimed that the change was necessary in order to standardize the retirement age for all public employees. In June 2012, a group of judges submitted complaints to the European Court of Human rights, assisted by the Hungarian Helsinki Committee, claiming that early dismissal was a violation of the European Convention of Human Rights. The Hungarian Helsinki Committee argued that the judges' expectations that they continue until they reached the age of 70 was protected by the right to property, and the law was therefore against both the property right and EU law. Furthermore, as the early retirement didn't apply in a mandatory manner to other professionals, it was a discriminative measure, the organization added. The Constitutional Court declared the law unconstitutional in July 2012, because both its content and formal framework breached constitutional requirements stemming from the independence of judges. The declaration further emphasized the short transition period, and stated that such a change could only gradually, over an appropriate transitional period, be introduced (The Norwegian Helsinki Committee, 2013: 17-18).

The Court of Justice of the European Union, on the request of the European Union, started infringement procedures on the basis of age discrimination. The conclusion was that such an abrupt and radical lowering of the retirement age for judges was incompatible with EU law because it violated the EU equal treatment rules by constituting unjustified age discrimination at the workplace. As EU rules in equal treatment in employment prohibit discrimination at the workplace on grounds of age it was stated by the Commission that Hungary should take all necessary measures to comply with the judgment as soon as possible, as there was not found any objective justification for the lowering of the retirement age. Furthermore, the contradiction caused by a drastic lowering in age limit, and then a sudden raise as of 2014, the measure was seen as both disproportionate and incoherent – and not in compliance with EU law (The European Commission, 2012).

³⁸ Almost 10 percent of all judges

Hungary later satisfied the Commission by bringing its legislation in line with EU law. The Hungarian Parliament adopted a new law on 11 March 2013 that lowered the retirement age for judges to 65 over period of 10 years (2022), rather than lowering it to 62 over one year, as before (The Norwegian Helsinki Committee, 2013: 17). This adjusts it to the general retirement age in Hungary of 65 years. The new law further provided all judges and prosecutors who had been forced to retire before the right to be reinstated in their posts, without having to bring a case to court. They were moreover promised compensation for remuneration that was lost during the period they were out of work. The Commission has closely monitored that the new legislation is implemented correctly in practice (The European Commission, 2013). Though, most of the judges affected by the law never returned to the judiciary. Those who did were not necessarily reinstated in previous positions, as most of these positions had already been filled. Not to mention, several of the dismissed judges didn't want to go back (Csink 2013 [interview]). The infringement procedure by EU illustrates how much influence underlying variables, such as the presence of protective constituencies, has on the formal framework for judicial independence and authority. EU made it costly for the Hungarian government to lower the retirement age by threatening to sanction them financially. That could complicate Hungary's efforts to secure the aid that were needed to remain solvent (Polgár 2013 [interview]).

The positions that were left open were replaced by the current government. As the usual procedures for appointing judges was suspended until the new constitution came into effect six months later, the government had even more new judgeships to fill. An act, adopted in June 2011, halted all appointment procedures for judges between that date and January 1, 2012 – and the combined effects of the two laws, one lowering the retirement age for judges and the other blocking the appointment procedure, gave Fidesz the power to appoint judges to about 10 percent of all judicial posts in the country (Bánkuti et al., 2012a: 143-144). When the infringement procedure was pending, the government quickly filled the then newly opened judgeships (The European Commission, 2012). This was met with fierce criticism from the opposition, who claimed that this was just another attempt from the government to make sure that the judiciary was filled with people close to the majority. Critics have seen the provision as undermining the independence of courts because it gives the governing majority a chance to directly influence the appointment of new judges. “It is not really about age – it is a question about what is more beneficial to the government” (Polgari 2013 [interview]). Not to mention, it may infringe on the human rights of the dismissed judges. The law made the

independence of the judiciary a fiction, as it gave the president of the NOJ a chance to replace about 10 percent of all the judicial posts in the country (Grabow 2013 [interview]). The tendency was that these positions were filled with judges who were loyal to the governing majority – and, most importantly, judicial newcomers (Scheppelle, 2012). The fact that the president of the NOJ, who is believed to have ties to Fidesz, were able to make significant efforts to create a judiciary that is beneficial to the government can provide some explanatory power for judicial development. The radical changes in the composition of the courts are clearly correlated with the jurisprudence developed the last couple of years.

Worth adding is that the President of the Curia, András Baka, spoke out strongly about the law that suspended all new judicial appointments until the Basic Law came into effect on January 1, 2012. The law on mandatory retirement age therefore provided that the president of the Curia had to have at least five years of judicial experience in Hungary. This formulation contributed to the removal of Baka, on 1 January 2012, although his mandate didn't expire until June 2015. As Baka had 17 years of experience as a judge on the European Court of Human Rights, he was “disqualified” as the president of the Curia. It has been suggested that this pretext was invented in order to remove what most people characterized as a conservative, but independent and internationally respected judge, as he had publicly opposed government policies, such as the establishment of a new National Judicial Office. The removal was stated as both unlawful and unprecedented (Lendvai, 2012: 222), and illustrates that there are no guarantees for tenure security if caught opposing the governing majority. He was replaced by Péter Darák, a previous Supreme Court justice and academic – elected by the Fidesz parliament, with their two-thirds majority (Tóth, A 2013 [interview]).

In general, protection of tenure, meaning that the judges' can't be removed unless exceptional circumstances, is an important structural factor that works to protect the judiciary from political inference. Judges in Hungary are given long nonrenewable terms that terminate upon them reaching the general retirement age. Though, the sudden change in the retirement age, from 70 to 62 (in the beginning), removed senior judges that still had years left within the judiciary and had well-founded expectations that they would be able to remain in office until they turned 70, had it not been for the unexpected law – a law that left them with no possibility to plan their retirements (Miklosi 2013 [interview]). The law changed the formal framework, and weakened structural regulations regarding tenure protection. The result was a violation of the principle that judges cannot be removed, which is a crucial guarantee of judges' ability to act in an independent manner. While judges in Hungary have remained in

office during changing administrations throughout the years, and even through the transition in 1989, the more or less forced resignations, disguised as an adjustment of the retirement age to the standardized retirement age for all public employees, in 2012, allowed the government, and the president of the NOJ, to appoint new judges shortly after taking office (Grabow 2013 [interview]).

4.4.5 The Transfer of Cases

The Act on the Transitional Provisions of the Fundamental Law, an amendment passed at the very end of 2011, introduced the possibility to transfer cases to other courts (The Norwegian Helsinki Committee, 2014: 7). The idea was that the provision could remedy the issue of an extremely unbalanced workload of the Hungarian Courts, as it had done in other EU Member States (Martonyi, 2013). The amendment allowed the president of the NOJ and the chief prosecutor to reassign specific cases from the courts in which they are assigned by law to specific courts any other place in the country – according to their assessment of the courts’ relative workloads, and without being accompanied by reasons for the reassignment. A consequence of this amendment was that the president of the NOJ and the chief prosecutor were given the ability to decide which judge should hear each case. It was believed that this measure could improve the efficiency of courts (Bánkuti et al., 2012b: 263), as the courts in Budapest, and other large cities, were critically overloaded, and overbooked, with cases (Polgari 2013 [interview]). “The NOJ was eager to speed up procedures, which is an understandable goal, but it only put the independence of the judiciary in question” (Polgari 2013 [interview]).

As there was nothing in the law that could preclude or even evaluate that the president of the NOJ and the chief prosecutor were using the new power as a tool to choose judges that were favorable to the government side, the law caused fierce criticism claiming that this was a serious assault on judicial independence. It further served as an excuse to attack the Hungarian judiciary as a whole. In the first set of reassignments, made in the first months of 2012, three³⁹ of the nine cases that were assigned to other courts had distinct political overtones and came off as very sensitive. As there were no criteria for the selection of which cases and to which courts they should be transferred, the introduction of the possibility to

³⁹ High-profile corruption case brought against MSzP officials by the public prosecutor was moved to Kecskemét, which was led by a president who was one of few court leaders in the country who did not sign the petition to the government protesting its judicial reforms, an appeal by a Fidesz party member from a criminal conviction for corruption, and a case against a firm involved in alleged real estate speculation that has generated substantial interest among members of the far-right Jobbik party.

transfer cases was highly controversial, and caused criticism from both the EU and the Venice Commission (The Norwegian Helsinki Committee, 2014: 7). Not to mention, the transfer of cases occurred in a context in which 10 percent of all judgeships were to be filled with new judges – by a judicial leader with close ties to the government, and with few legal constraints on her actions (Scheppele, 2012). Furthermore, as courts’ control over their caseload is included as an important regulation that protects the courts’ jurisdiction, and thus secure judicial authority, as illustrated in the theoretical framework, the regulation was said to lower the judges’ ability to act independently.

However, the Fifth Amendment⁴⁰ eliminated the possibility to transfer cases from one jurisdiction to another, in line with international criticism (Miklosi 2013 [interview]). “That contributed to the restoration of the individual judges’ independence” (Miklosi 2013 [interview]). Yet, that did not settle the situation for the cases that had already been transferred (The Norwegian Helsinki Committee, 2014: 7), and the issue of disproportionate burdens on some courts will now have to be handled through structural and organizational changes (Mázi 2013 [interview]).

⁴⁰ Added to the Basic Law of 2012 on September 16, 2013

CHAPTER 5: Conclusion – What is the State of the Judiciary?

Both the ordinary judiciary and the Constitutional Court have gone through major changes within the last decades. I would argue that these changes have caused a weaker judiciary, with less ability and willingness to act independent. Furthermore, these developments should be seen on the basis of the political context in Hungary, and the political process that began in April 2010, when Fidesz won the general election in Hungary. I will in this chapter summarize and conclude the findings in this study, and relate them to the theoretical expectations.

5.1 Efficiency at the Expense of Independence in the Ordinary Judiciary?

“The current model of judicial administration is the third of its kind since the democratic transition in 1989. None of them has proven effective enough in making the judiciary compatible with democracy. It’s a failure.”

(Fleck 2013 [interview])

The process of judicial administration since 1989 has been a complicated process, and the two previous models were both met with criticism after a few years of use. “We can never achieve a perfect system. Though, what we can do it to constantly strive to improve it. That is what we try to do” (Tóth, A 2013 [interview]). The current three-level model was introduced as an attempt to eliminate the problems of the previous two models, while introducing a modern and efficient judicial system, compatible with democracy. The Act of 2011 introduced a unique administration of justice that Europe had never seen before, with a strong President that has the administrative authority to decide in important questions and the responsibility to appoint judges. However, two years after it was introduced, the three-level model now meets both criticism and appreciation.

“The new system is complicated, but there are guarantees of judicial independence on each level” (Tóth, A 2013 [interview]). While the new model is still quite new, it is, according to the NOJ a very good one. It is argued that the system is more transparent than ever before, both because of the requirement to publish decisions and voting – and because of the constant demands for continuous reporting about the work of the office to both parliament and the President of the Hungarian Republic (Juhász 2013 [interview]). “There has been a lot of critique, but the third model has never been criticized for a lack of transparency” (Tóth, A 2013 [interview]). “The third model is a young model. It is not a perfect model, but it is a

process of constant development – and we are constantly working to improve it and to increase the efficiency” (Juhász 2013 [interview])

Nonetheless, the system has met criticism since it was introduced, both from international and national level. The model is unique in Europe, and involves a strong one-person central administration (Fleck 2013 [interview]). It is a system in which one person possesses the power to both appoint the judges and effectively transfer them to other courts for one year within a three-year period - or even sack them. The president further has the mandate to administer the courts, as well as both draw up court rules and initiate legislation on the courts. Not to mention, the person holds some 60 other specified legal powers. This individual is also given a nine-year term of office, and, what is even more debated: this powerful person might remain in office when the mandate expires – unless a successor can gather a two-thirds majority in the Hungarian parliament (Fleck 2013 [interview]). “The one-person administration questions the judicial independence” (Fleck 2013 [interview]).

While the council model of 1997 was criticized for being both unbalanced and poorly designed, the present system, which was among the first political decisions of the new government, faces some major challenges that can't be ignored. The main focus of the system is a more efficient judiciary, and while efficiency was a deficiency in the former system, it can also question the independence, integrity and autonomy of both the judges and the judiciary in general. An efficient system often equals a very centralized system, and in this case that means placing the power in the hands of one person (Fleck 2013 [interview]). While most people working within the judiciary acknowledged the need for reform of the judiciary in order to increase the efficiency, the conclusion today, by for instance the Venice Commission (2012), is that the reform as a whole threatens the independence of the judiciary. The main issue, among other, is the concentration of unheard-of powers in the hands of the president of the NJO alone, and the extraordinarily long term of the president's office. “In no other member state of the Council of Europe are such important powers, including the power to select judges and senior office holders, vested in one single person” (The Venice Commission, 2012). The president has inordinate and uncontrollable power over the administration of the judiciary which is rather unprecedented in Europe. Moreover, as the extensive powers of the president, and the lack of the appropriate accountability, are strongly criticized, it is insisted in background documents to the Basic Law that the president operates under the effective control of the NJC and of Parliament. Though, the council's decisions are not binding, and its opinions can be ignored. According to the Venice Commissions, the NJC

“has scarcely any significant powers and its role in the administration of the judiciary can be regarded as negligible” (2012).

The judicial reform has caused waves of criticism. To Europe, these changes and practices come off as measure to extend the political control of the judiciary. The rapid acceleration of European critique regarding the judiciary is a signal that the transformation of the judicial system has hit a European nerve (Scheppelle, 2012). The Venice Commission (2012) has concluded that the changes within the judiciary, especially the concentrations of powers in the hands of one official, “contradict the European standard.” Judicial independence requires that judges can act free of political influence. Though, the new constitutional order has brought with it changes that places the power to both appoint, promote and removed judges in the hands of one person – a person with intimate ties to the inner circle of Fidesz, the governing party. Changes in the nomination process of judges, as well as the forced retirement of hundreds of judges, are serious measures implemented by the government that makes it difficult for Hungary to guarantee that judges will remain independent. Moreover, it will take strong judges not to be swayed when the person who appoints them also has the power to control their judicial career. “No wonder Europe is worried about judicial independence in Hungary” (Scheppelle, 2012).

5.2 Has the Constitutional Court Surrendered?

“The Constitutional Court has put down their gun – and surrendered”

(Tóth, B 2013 [interview])

For more than two decades, the Hungarian Constitutional Court has been a constitutional guardian and the primary check on the government – and the Court played an important role in the democratic transition in 1989, as an interpreter of the new constitutional order. Tpday, the role of the Court is limited, and the jurisdiction of the Court is by no means as broad as it used to be. There is an opinion stating that this development was partly natural, and thus predictable. As democratic standards were established throughout the 1990s, and the legal system was purged of unconstitutional elements, there was not much room left for an active Court (Fröhlich 2013 [interview]). “Democracy is stable, and we have well-functioning legal institutions” [Szántho 2013 [interview]]. However, the explanation falls short when faced with the serious condition of the Constitutional Court today.

It must be mentioned that the Court played a very active role in the early 1990s, and there were concerns that the Court was too powerful. Several of the Court's judgments in fiscal matters came with great economic consequences, and its wide jurisdiction caused difficulties for the executive (Mázi 2013 [interview]). Though, this does not justify deprivation of the Court's original function as a check on the political branches.

It is not an exaggeration to view the Hungarian Constitutional Court as a victim of constitution-making. The victory of Fidesz in the general elections in April 2010 came with a flurry of constitutional amendments, affecting the manner of the election, composition, jurisdiction and procedure of the Court, which escalated in the implementation of the Basic Law of 2012 and its subsequent amendments. The recent times of the new constitution are defined by the evaporation constraints on the government through repeated constitutional amendments. These constitutional amendments are regularly manufactured to override the decisions of the Court, and has brought with it serious consequences for its composition and jurisdiction that has reduced the role of the Court to a minimum (Uitz, 2013: 2-10).

Changes in the constitutional regulation of the constitutional justices' nomination process, as well as the increase in the number of judges from eleven to fifteen, changed the composition of the Court in favor of the governing majority, and gave Fidesz the opportunity to pack the Court with a majority of friendly faces (Polgari 2013 [interview]). In its first fifteen months in office, Fidesz named a total of seven new judges to the Court. This majority makes it unlikely that any important regulation or provision will be derailed by the Court's actions. What is equally problematic is that there are judges within the Court who were previous members of either parliament or government, with clear ties to the governing majority, who then determines the constitutionality of laws that they might have voted on in parliament – or even submitted (Miklosi 2010 [interview]). As of 2013, judges who were appointed after 2010 no longer have to retire by the age of 70, but can instead remain in their seats until the end of their 12-year term. “The amendment ensures the presence of Fidesz loyalists in the Court for nearly a decade to come. That is convenient for Fidesz in the (unlikely) event of a change in power” (Polgár 2013 [interview]).

The next step for Fidesz was to curb the Court's jurisdiction with regard to budget and tax policy, unless these laws violated certain listed rights. By making it impossible for the Court to review budgets and tax laws, the government was able to act in the financial arena without having to pay attention to the usual constitutional constraints. The Basic Law further

abolished *Actio Popularis*, a competence that allowed anyone to bring an action to the Court, without limitations. A great majority of the Court's proceedings during the two first decades fell in this category, and it caused a heavy workload for the Court. The removal of the competence can therefore, to a certain degree, be defended. A new jurisdiction was introduced as a replacement of *Actio Popularis*: the competence of constitutional complaint, which restricts citizens to only bring cases that involve infringements of their own rights to the Court (Kovács and Tóth, 2011: 185-190).

The result of the changes is a Court that has lost its ability to guard the government. The Court has put down their gun, and surrendered. While the Constitutional Court used to be in a continuing dialogue with the other political branches, the Court has become a victim of constitution-making literally overnight. The political context of today's Hungary has left the Constitutional Court defenseless and the government in a comfortable position, making incremental adjustment to the new "constitutional" order.

5.3 What is the State of the Judiciary?

The aim of this study was to trace the trajectory of judicial development, and contribute to a better understanding of the dynamics at play. In order to do so, the political context must be emphasized. The two-thirds majority of the governing majority, Fidesz, gives them the power to change everything. After the election in 2010, it was decided to use all the power to completely remake the constitutional order – and to further end the Hungarian transition begun in 1989 by completely replacing the constitution established at that time. The result was the Basic Law of 2012, which introduces a new governmental form in which Victor Orbán and Fidesz basically operates with a free hand.

The development of the Hungarian judiciary meets the expectations that we draw on the basis of the theoretical expectations. The political balance of power in is presumed to be decisive for the degree of judicial independence. That is confirmed in the case of Hungary. When an alternation in power is unlikely, due to a dominant part, actions by the judiciary to act deliver judgments with political costs for the government are more likely to cause the government to take control of the judiciary, and thus limit their independence through changes in the formal framework. The changes can be limited by protective constituencies holding the government back, or if the courts themselves hold back. Though, if the composition of the judiciary alters, the likeliness of them holding the Court back consequently changes.

The finding of the study is that judicial development should be seen on the basis of the political context, which I have argued has caused a weakened judiciary, both in terms of judicial independence and authority. The Constitutional Court has suffered the most from the changes introduced by the ruling majority, and has rather rapidly been transformed from a guardian into a martyr when placed in the hands of the mighty parliamentary majority. The Court's role in Hungary is now diminished to a minimum. The ordinary judiciary still has an undisputed place in the Hungarian society, but recent reforms, and subsequent amendments, have introduced a system in which judicial independence is questioned, and the concentrations of powers in the hand of one single official, independent of political background, contradicts the standards that are expected in a democratic regime. The aim to increase efficiency is a legitimate consideration, but the value of this objective falls dramatically when it happens at the expense of judicial independence. With internal constitutional constraints melting away, the need for external checks and constraints on constitution-making is becoming critical. Among the protective constituencies who now function as the constrain that make it costly for the government to encroach on the courts' independence, are the Venice Commission, which features prominently, the European Court of Human Rights and various actors within EU, such as the Commission.

The changes brought by the political context have changed the legal framework that provides judges with the ability to act independent. Limitations of the Court's jurisdictions have weakened the political authority of the Court, and changes in the formal framework regarding appointment procedures and protection of tenure have consequently led to a Court less insulated from political interference from the executive. These procedural changes have caused a complete altering of the composition of the Court, which then works to alter the corporate culture. As judges with political ties to the governing majority acquires the balance of power within the Court, the 'norms of appropriateness' guiding judges in their work changes. Thus decreases their willingness to use the formal framework, and to act in an independent manner. That affects the amount of judgments that carry political costs for the government, and their inaction when action could be expected. The ordinary judiciary has gone through a similar development, in which the formal framework has been changed, and thus affected the ability and willingness to act in an independent manner. It is a common focus on the corporate culture, which has changed as both institutions have been packed with judges who are expected to act in accordance with the government. Though, the ordinary judiciary is currently administered by a judicial, non-political organization, outwardly at least,

and is through appointment procedures, among other things, less politicized than the Constitutional Court. For now, at least. “The Constitutional Court has become too politicized, and that is the problem” (Polgari 2013 [interview]).

“I am not so optimistic about the future of the Constitutional Court. In the long run, it might recover, but that depends on the next election”⁴¹ (Kovács 2013 [interview]). The problem is that Fidesz can continue to control policy far beyond the electoral mandate that is given to them, and thus constrain future governments with the decision they make now. These decisions can put constraints on power of future governments that disagree with the current one. The constitutional system of today makes the future of the Hungarian judiciary look pessimistic. “It is a slippery slope to have such an easy amendment rule” (Kovács 2013 [interview]).

“No wonder Europe is worried about judicial independence in Hungary”

(Scheppelle, 2012)

5.4 Concluding Remarks: limitations of the data material and suggestions for further research

In this thesis I have used data from several sources to construct a study of the Hungarian judiciary. Through interviewing political, bureaucratic, academic and organizational persons, I have been able to gather information about the case under scrutiny. I have corroborated the data collected from interviews with documentary data to secure an in-depth analysis of the judicial development in Hungary. However, the argument can always be made that one should have collected more data through additional interviews with other people, or consulted other data sources. The problem for me was to get interviews with representatives from political parties, and in particular, representatives from the governing majority, Fidesz. I had to search for their arguments through proxies such as political commentators and political blogs. This is not an ideal solution, as it makes it harder for me to assess the reliability of the data. Though, when triangulating different sources of data, the conclusion is still based on a wider set of evidences, and when interviews gave the same story as the secondary source, I felt that the reliability was strengthened. Another limitation of this study is the highly specific character of the data. When conducting data through interviews, I ensure that the findings are valuable for my particular case. Though, their relevance beyond the context of Hungary is more uncertain.

⁴¹ The next election has already been held: on April 6, Fidesz and KDNP gained once again a two-thirds majority.

As mentioned above, the findings of this thesis shows that judicial independence in Hungary should be seen on the basis of the political context, which function as an underlying variable, affecting courts' ability and willingness to act in an independent manner. If I was to continue the research of this thesis, the consequences of the newly held parliamentary election, as of April 2014, in which Fidesz once again won the two-thirds majority, would constitute a very interesting focus for further research. Especially in the context of increasing international attention directed towards Hungary by the EU and other external checks. Furthermore, Hungary's ongoing alternative constitutional reality is an intriguing case that should be an interesting case to observe and study more closely.

BIBLIOGRAPHY

- ABERBACH, J. D. & ROCKMAN, B. A. 2002. Conducting and Coding Elite Interviews. *Ps: Political Science and Politics*, 35, PP. 673-676.
- ACT CLI OF 2011 ON THE CONSTITUTIONAL COURT 2011. In: HUNGARY, T. P. O. (ed.).
- ARGENTIERI, F. 2008. Hungary: Dealing with the past and moving into the present. In: WOLCHIK, S. L. & CURRY, J. L. (eds.) *Central and East European politics: from communism to democracy*. Lanham: Rowman & Littfield.
- BÁNKUTI, M., HALMAI, G. & SCHEPPELE, K. L. 2012a. Disabling the Constitution. *Journal of Democracy*, 23, pp. 138-146.
- BÁNKUTI, M., HALMAI, G. & SCHEPPELE, K. L. 2012b. From Separation of Powers to a Government without Checks: Hungary's Old and New Constitution. In: TÓTH, G. A. (ed.) *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*. Budapest-New York: Central European University Press.
- BECKER, T. L. 1970. *Comparative Judicial Studies*, Chicago, Rand McNally and Co.
- BENNET, A. 2010. Process Tracing and Causal Inference. In: BRADY, H. E. & COLLIER, D. (eds.) *Rethinking Social Inquiry* United Kingdom: Rowman & Littlefield Publishers.
- BOGNER, A. & MANZ, W. 2009. The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction. In: BOGNER, A., LITTIG, A. & MANZ, W. (eds.) *Interviewing Experts*. Hampshire and New York: Palgrave Macmillian
- BOZÓKI, A. & SIMON, E. 2010. Hungary since 1989. In: RAMET, S. P. (ed.) *Central and Southeast European politics since 1989*. Cambridge: Cambridge University Press.
- CAROTHERS, T. 2006. The Backlash Against Democracy Promotion *Foreign Affairs* 85, pp. 55-68.
- CRESWELL, J. W. 2013. *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*, United States of America, SAGE Publications.
- CSINK, L., SCHANDA, B. & VARGA, A. Z. 2012. *The Basic Law of Hungary: A First Commentary*, Dublin, Ireland, Clarus Press Ltd. .
- DAHL, R. 1957. Decision-Making in a Democracy: the Supreme Court as a National Policy Maker. *Journal of Public Law*, 6, pp. 279-295.
- DEMPSEY, J. 2011. Hungarian Parliament Approves New Constitution. *The New York Times*, April 18, 2011.
- DICICCO-BLOOM, B. & CRABTREE, B. F. 2006. The Qualitative Research Interview. *Medical Education*, 40, pp. 314-321.
- DUPRÉ, C. 2003. *Importing the Law in Postcommunist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity.*, Oxford, Hart.
- EPSTEIN, L., KNIGHT, J. & MARTIN, A. D. 2001. The Supreme Court as a Strategic National Policymaker. *Emory Law Journal* 50, pp. 583-611.
- FEREJOHN, J. 1998. Independent Judges, Dependent Judiciary: Explaining Judicial Independence. *Southern California Law Review*, 72, 353-384.
- FRÖHLICH, J. & CSINK, L. 2012. Topics of Hungarian Constitutionalism. *Tijdschrift Voor Constitutioneel Recht*, 3, pp. 424-439.
- GAROUPA, N. & GINSBURG, T. 2009. Guarding the Guardians: Judicial Councils and Judicial Independence. *American Journal of Comparative Law*, 57, 201-232.
- GEORGE, A. L. & BENNET, A. 2005. *Case Studies and Theory Development in the Social Sciences*, Cambridge, Mass.: MIT Press.
- GERRING, J. 2007. *Case Study Research: Principles and Practices* New York: USA Cambridge University Press.
- GLOPPEN, S. 2004. The Accountability Function of the Courts in Tanzania and Zambia. In: GLOPPEN, S., GARGARELLA, R. & SKAAR, E. (eds.) *Democratization and the Judiciary*. Great Britain: Frank Cass Publishers
- GLOPPEN, S. forthcoming 2014. Studyin Courts in Context: the role of non-judicial institutional and socio-political realities. In: HAGLUND, L. & STRYKER, R. (eds.) *Economic, Social, and Cultural Rights: Emerging Possibilities for Social Transformation*. University of California Press.

- GLOPPEN, S., WILSON, B. M., GARGARELLA, R., SKAAR, E. & KINANDER, M. 2010. *Courts and Power in Latin America and Africa* New York, the United States of America, Palgrave Macmillan.
- GRØNMO, S. 2007. *Samfunnsvitenskapelige Metoder*, Bergen, Fagbokforlaget.
- GUARNIERI, C. 2014. Strengthening Judicial Independence in Central and Eastern Europe: a first assessment *GIGA International Workshop*. Hamburg.
- HELMKE, G. 2002. The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy. *The American Political Science Review*, 96, pp. 291-303.
- HERRON, E. S. & RANDAZZO, K. A. 2003. The Relationship Between Independence and Judicial Review in Post-Communist Courts. *The Journal of Politics*, 65, 422-438.
- KINANDER, M. 2011. *Comparing Courts: The Accountability Function of Courts in Poland and Hungary* [Online]. Available: http://works.bepress.com/morten_kinander/1/.
- KING, R., KEOHANE, R. O. & VERBA, S. 1994. *Designing Social Inquiry* New Jersey: USA Princeton University Press.
- KNIGHT, J. 1992. Positive Models and Normative Theory: A Comment on Eskridge and Ferejohn. *Journal of Law, Economics, and Organization*, 8, pp. 190-196.
- KOVÁCS, K. & TÓTH, G. A. 2011. Hungary's Constitutional Transformation. *European Constitutional Law Review*, 7, pp. 183-184.
- LENDVAI, P. 2012. *Hungary: between democracy and authoritarianism*, London, Hurst.
- MAHONEY, J. & THELEN, K. 2010. *Explaining Institutional Change: Ambiguity, Agency, and Power*, New York, United States of America, Cambridge University Press.
- MARTONYI, J. 2013. *The Hungarian Government Responds to the Objections of the European Commission Concerning the Amendments of the Fundamental Law* [Online]. The Ministry of Foreign Affairs. Available: <http://www.kormany.hu/en/ministry-of-foreign-affairs/news/the-hungarian-government-responds-to-the-objections-of-the-european-commission-concerning-the-amendment-of-the-fundamental-law> [Accessed February 23 2014].
- MISHLER, W. & SHEEHAN, R. S. 1993. The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions. *The American Political Science Review* 87, pp. 87-101.
- NATIONAL OFFICE FOR THE JUDICIARY. 2014. *Scope of Authority of the President of NOJ and the Central Administrative Supervision of the National Judicial Council* [Online]. Birosag, National Office for the Judiciary. Available: <http://www.birosag.hu/en/national-office-judiciary> [Accessed May 2 2014].
- NAVRACSICS, T. 2011. A New Constitution for Hungary: Locking in the Values of the 1989-1990 Transition, At Last. *The Wall Street Journal*, April 19.
- O'DONNELL, G. 1999. Horizontal Accountability in New Democracies. In: SCHEDLER, A., DIAMOND, L. & PLATTNER, M. F. (eds.) *The Self-Restraining State*. United States of America.
- O'DONNELL, G. 2003. Horizontal Accountability: The Legal Institutionalization of Mistrust. In: MAINWARING, S. & WELNA, C. (eds.) *Democratic Accountability in Latin America*. Oxford: Oxford University Press.
- ROLAND, G. 2004. Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions. *Comparative International Development*, 38.
- ROSENN, K. S. 1987. The Protection of Judicial Independence in Latin America. *The University of Miami Inter-American Law Review* 19, 1-35.
- ROZENBERG, J. 2012. *Meet Tünde Handó* [Online]. The Guardian. Available: <http://www.theguardian.com/law/2012/mar/20/tunde-hando-hungarian-judges> [Accessed November 13 2013].
- SAJÓ, A. 1993. The Judiciary in Contemporary Society: Hungary. *International Association of Legal Sciences Symposium: National Reports*, 25, pp. 293-301.
- SAJÓ, A. 1995. Reading the Invisible Constitution: Judicial Review in Hungary. *Oxford Journal of Legal Studies*, 15, pp. 253-267.
- SCHEDLER, A. 1999. Conceptualizing Accountability. In: SCHEDLER, A., DIAMOND, L. & PLATTNER, M. F. (eds.) *The Self-Restraining State: Power and Accountability in New Democracies*. United State of America: Lynne Rienner Publishers

- SCHEPPELE, K. L. 2012. First, Let's Pick All the Judges. *The Conscience of a Liberal* [Online]. Available from: <http://krugman.blogs.nytimes.com/2012/03/10/first-lets-pick-all-the-judges/> [Accessed November 11 2013].
- SMULOVITZ, C. & PERUZZOTTI, E. 2000. Societal Accountability in Latin America. *Journal of Democracy*, 11, pp. 147-158.
- STREECK, W. & THELEN, K. 2005. Introduction: Institutional Change in Advanced Political Economies. In: STREECK, W. & THELEN, K. (eds.) *Beyond Continuity: Institutional Change in Advanced Political Economies* Oxford: Oxford University Press.
- SZENTE, Z. 2013. The Interpretive Practice of the Hungarian Constitutional Court: A Critical View. *The German Law Journal*, 14, pp. 1591-1614.
- TANSEY, O. 2007. Process Tracing and Elite Interviewing: A Case for Non-probability Sampling. *Ps: Political Science and Politics*, 40, pp. 1-24.
- THE BASIC LAW OF HUNGARY 2012. Budapest, Hungary.
- THE CONSTITUTIONAL COURT OF HUNGARY. 2014. *Brief History of the Constitutional Court of Hungary* [Online]. The Constitutional Court of Hungary. Available: <http://mkab.hu/constitutional-court/about-the-constitutional-court/history> [Accessed February 13 2014].
- THE CURIA OF HUNGARY. 2014. *Judicial Reform* [Online]. The Curia of Hungary. Available: <http://kuria-birosag.hu/en/english/judicial-reform> [Accessed May 2 2014].
- THE ECONOMIST. 2013. Hungary and the European Union: Viktor's Justice. *The Economist*, March 16.
- THE EUROPEAN COMMISSION 2012. Court of Justice Rules Hungarian Forced Early Retirement of Judges Incompatible with EU Law. Brussels: The European Commission
- THE EUROPEAN COMMISSION 2013. European Commission Closes Infringement Procedure on Forced Retirement of Hungarian Judges. Brussels: The European Commission.
- THE HUNGARIAN HELSINKI COMMITTEE. 2013. *Abolishing the Age Limit Regarding Constitutional Court Judges* [Online]. Budapest, Hungary: The Hungarian Helsinki Committee. Available: <http://helsinki.hu/en/abolishing-the-age-limit-regarding-constitutional-court-judges> [Accessed November 23, 2013].
- THE NORWEGIAN HELSINKI COMMITTEE 2013. Democracy and Human Rights at Stake in Hungary: The Viktor Orbán Government's Drive for Centralization of Power. The Norwegian Helsinki Committee
- THE NORWEGIAN HELSINKI COMMITTEE 2014. Democracy in Hungary: Neither Saved, Nor Safe. Oslo, Norway: Norwegian Helsinki Committee.
- THE VENICE COMMISSION 2012. Opinion on act CLXII OF 2011 on the Legal Status and Remuneration of Judges and act CLXI of 2011 on the Organisation and Administration of Courts of Hungary 90nd Plenary Session ed.: The Venice Commission
- THE VENICE COMMISSION 2013. Opinion on the Fourth Amendment to the Fundamental Law of Hungary. *European Commission for Democracy Through Law (Venice Commission)*. 95th Plenary Session ed. Strasbourg: Venice Commission.
- TILLY, C. 2001. Mechanisms in Political Processes. *Annual Review of Political Science*, 4, pp. 21-41.
- UITZ, R. 2013. From Guardian to Martyr: The Hungarian Constitutional Court after the Fourth Amendment of the Fundamental Law. *Draft Conference Paper, on file with author*, 1-53.
- WIDNER, J. 1999. Building Judicial Independence in Common Law Africa. In: SCHEDLER, A., DIAMOND, L. & PLATTNER, M. F. (eds.) *The Self-Restraining State: Power and Accountability in New Democracies* Lynne Rienner Publishers: United States of America.
- YIN, R. K. 2009. *Case Study Research: Design and Methods*, United States of America, SAGE Publications.

Appendix 1: List of Respondents

| Respondent number: | Name: | Position: | Organization: | Date: |
|---------------------------|---|---|--|--------------|
| 1 | Dr. Lóránt Csink | Senior Advisor | Office for the Commissioner for Fundamental Rights (the Ombudsman's Office) | 13.11.13 |
| 2 | Nenad Dimitrijevic | Professor | CEU, Political Science Department | 13.11.13 |
| 3 | Dr. Eszter Polgari | Special Project Officer | CEU, Legal Studies Department | 13.11.13 |
| 4 | Tamás Polgár | Assistant Professor | Corvinus University of Budapest, Institute of Political Science | 14.11.13 |
| 5 | Gergely Deli | Assistant/ Sekretær | The Constitutional Court | 14.11.13 |
| 6 | Johanna Fröhlich AND Balázs D. Toth | Clerks/ Legal Assistants | The Constitutional Court | 14.11.13 |
| 7 | Zoltan Miklosi | Professor | CEU, Department of Legal Studies | 14.11.13 |
| 8 | Zoltán Fleck | Professor | ELTE, Sociology of Law | 15.11.13 |
| 9 | András Mázi | Senior Research Fellow | Századvég Foundation | 15.11.13 |
| 10 | Dr. György Senyei | Member of the Court of Appeal (judge) | The Court of Appeal | 18.11.13 |
| 11 | András Jakab | Professor/ Academic | Hungarian Academy of Sciences, Centre for Social Sciences, Institute for Legal Studies | 18.11.13 |
| 12 | Dr. Edit Juhász AND Dr. Mária Vitvindics | Juhász: Head of the Private Law and Justice Codification Division/ Department Vitivindics: assigned judge | The Ministry of Justice | 19.11.13 |
| 13 | Dr. Kriszta Kovács | Post-doctor Fellow, Senior Advisor at the CC | ELTE, Faculty of Social Sciences AND The Constitutional Court (on a leave) | 19.11.13 |
| 14 | Elisabeth Katalin Grabow | Journalist: Co-editor and News Editor | Co-editor in chief at the BUDAPEST ZEITUNG News editor of the BUDAPEST TIMES | 20.11.13 |
| 15 | Krisztián Gáva | Deputy State Secretary for the Legislation of Public Law | The Ministry of Justice | 20.11.13 |
| 16 | Dr. Aron | Head of the | National Office for the Judiciary | 22.11.13 |

| | | | | |
|----|----------------|---|---|----------|
| | László Tóth | Cabinet of the President | | |
| 17 | Miklós Szántho | Head Analyst | Centre for Fundamental Rights (legal research institute) – sympathize with the government | 22.11.13 |
| 18 | George Károlyi | Founder of the Joseph Károlyi Foundation | The Joseph Károlyi Foundation (a non-profit organization aiming at promoting Hungary’s integration to Europe) | 23.11.13 |
| 19 | Tibor Sepsi | Attorney-at-law, Constitutional lawyer (law expert) | Working for LMP – ”Politics can be different” | 23.11.13 |

Appendix 2: Interview guide

| <u>INTRODUCTION</u> | <u>PERSONAL NOTES:</u> |
|--|---|
| <p><u>KEY</u></p> <p><u>COMPONENTS:</u></p> <ul style="list-style-type: none"> ▪ Thank you ▪ My name ▪ Purpose of the interview/the study ▪ Confidentiality ▪ Does the respondent allow personal information to be published? ▪ Anonymous, if desired ▪ How interviews will be conducted ▪ Opportunity for questions ▪ Signature of consent | <p>I want to thank you for taking the time to meet with me today.</p> <p>My name is Sunniva Christophersen Haugen, and I am a master student in Comparative Politics, from the University of Bergen, in Norway. I would like to talk to you about the courts in Hungary, and the state of the judiciary in terms of independence and authority – with a special focus on the institutions’ development since the breakdown of communism in 1989.</p> <p>(My master thesis is an exploratory case study of Hungary, in which I focus on two different processes that have taken place over a 30-year period: the judicial institution, and the Constitutional Court in particular, was characterized as both strong and active early in the democratization process, but has in recent years, according to some literature, apparently lost power and the mandate to act independently. Hungary has, at the same time, experienced reforms that have affected constitutional, as well as political, matters – and this has caused some critics to question the validity of the nation’s democracy.)</p> <p>The aim of my master thesis is to identify how and why the Hungarian judiciary – and their political role - has changed over 30-year period, and how judicial development can be seen in the context of democratic development, regime changes, reforms and constitutional changes.</p> <p>The purpose of this interview is to hear about your thoughts about these developments, and how this it related to other developments within the regime. The interview should take about 30-60 minutes, and, as I am hoping that this could be more of a conversation than a questioning, I only have a few main questions. I will be recording the interview because I don’t want to miss any of your comments, and I hope that is ok? I will also be taking some notes.</p> |

| | |
|---|--|
| <p><u>QUESTIONS:</u></p> <ul style="list-style-type: none"> ▪ No more than 10 questions ▪ Add: please elaborate, please explain, can you elaborate on that? | <p>I hope that it is ok if I use personal information – your name and occupation - in the final thesis? You will not be quoted by name unless you have been given the opportunity to approve the quotes. All other personal information will be kept confidential, and is only available for my supervisor and me. Are there any questions about what I have just explained?</p> <p>Would you be willing to sign this consent form?</p> <ol style="list-style-type: none"> 1. Personal information → will not be recorded. <ul style="list-style-type: none"> ▪ Name ▪ Occupation 2. How would you describe the Hungarian judiciary and the role of the courts in Hungary? <ul style="list-style-type: none"> ▪ What are their specific tasks, and how are the legal system organized? (Question for academics and people within the legal institution) ▪ How would you describe the role of Constitutional Court? ▪ How's the relationship between the Constitutional Court and the rest of the judiciary? Is the degree of independence and authority lower or higher in the Constitutional Court than in other parts of the judiciary? 3. In your view, how has the role of the courts changed since the breakdown of communism? <ul style="list-style-type: none"> ▪ How has the judiciary developed? ▪ If things have changed, why has this happened? ▪ Is this change for the better or for the worse? ▪ How about the Constitutional Court, has its role changed over time? 4. Do you think the court is independent in Hungary today? <ul style="list-style-type: none"> ▪ Has this changed throughout the years? ▪ Why and how has this changed? |
|---|--|

| | |
|--|---|
| | <ul style="list-style-type: none"> ▪ What about the independence of the Constitutional Court – has this changed? ▪ What do you think has caused these changes – are there any specific events that have been important? <p>5. (How is the relationship with other branches of government organized, and how does the interaction with these branches work?)</p> <ul style="list-style-type: none"> ▪ Is it a power-sharing relationship between the branches, with clearly defined areas of focus?) <p>6. Did the introduction of constitutional amendments and the new Fundamental Law of 2012 affect the role of the courts? How?</p> <ul style="list-style-type: none"> ▪ What exactly are the consequences of the new Fundamental Law, if any, for the legal institution in Hungary? ▪ Has this lead to changes in the functioning and authority of the legal institution? ▪ Did these changes advance or hinder legal independence and authority in any way? (Question for academics and journalists) ▪ In your view, have constitutional changes, in some ways, limited the Constitutional Court? <p>7. What do you think of your own relationship to political authorities? Has this role changed? (Interviewing judges).</p> <p>8. Some literature suggests that the Constitutional Court is weaker than it used to be, as a consequence of constitutional amendments and the new constitution of 2012. Do you find this to be the case?</p> <ul style="list-style-type: none"> ▪ If that is the case, how does that affect the accountability mechanisms of the legal institution as a whole? <p>9. There are different views on what the proper role should be between the judiciary and political bodies. Some think that judges should stay out of political issues, while others think that it is important that courts are active to protect democratic principles and secure citizens' rights, not least the rights of minorities and social and economic rights. What is your view on</p> |
|--|---|

| | |
|--|---|
| <p><u>CLOSING KEY</u> <u>COMPONENTS:</u></p> <ul style="list-style-type: none"> ▪ Additional comments ▪ Next step ▪ Thank you | <p>what belongs to the political domain and what should be the matter of judges?</p> <ul style="list-style-type: none"> ▪ In your view, is it important to keep the political and the judicial domain separated? ▪ Should judges interfere in politics, or should they act as political neutral actors? Is that even possible? <p>My check list:</p> <ul style="list-style-type: none"> ▪ What is the role of courts? ▪ How has this changed? <p>Is there anything more you would like to add?</p> <p>I'll be analyzing the information you and the other respondents gave me, and I'll submit the final thesis on June 1, 2014. I'll be happy to send you a copy to review at that time, if you are interested. Also, would you like to approve your quotes before I use them in the final thesis?</p> <p>Thank you for your time.</p> |
|--|---|