Europeanisation Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and Hungary's “Return to Europe”

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Introduction

The second half of the 20th century was marked by two developments in institutional change in political regimes all over the world. The first is usually associated with Francis Fukuyama's thesis about the global hegemony of liberal democracy and market capitalism and Samuel Huntington's second and third wave of democratization. Political scientists have empirically documented in comparative and case studies processes of democratization after the military defeat or political implosion of authoritarian systems: after the Second World War, when Western Europe was freed from fascist regimes and finally democratized, and after the Cold War 1989/1990, when the fall of Communist regimes all over Eastern Europe spawned a new wave of democratization.

The second development has generally been less present in the political science literature, that is, the "Global Expansion of Judicial Power" (Tate & Vallinder, 1995). All over the world, Constitutional Courts or similar institutions have been given the power to declare acts of the executive or laws enacted by the democratically legitimated legislature unconstitutional. In Western Europe, Germany, Italy, Spain and Portugal are examples for powerful constitutional courts (Stone Sweet, 2000). In Eastern Europe, all but three countries have provided for a constitutional judiciary in their constitutions (Schwartz, 2000).

This development is far from self-evident. The practice of judicial review had no tradition in this region, indeed, one could say that judicial review was one of the few really "revolutionary" features of the great regime change of 1989/90. The Central European countries, for example, had a tradition of legality before the Second World War, but not of constitutionalism. They did not know...

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1 The revolutions of 1989/1990 were "counterrevolutionary" rather than "revolutionary". They did not, at large, introduce new ideas on the world-historical stage, as the French and the American Revolutions had done. The end of Communism basically meant the return to what some of the countries had tried – and failed – to realize in the pre-WWII period: political democracy and market economy.
effective judicial review.° Neither did this practice exist during the Communist period. Marxist-Leninist ideology proclaimed that law was not autonomous, but an instrument of the ruling classes, be it the bourgeoisie or the proletariat. Judicial review did not fit into that system, even though it existed, in some largely impotent form, in Poland, Hungary and Yugoslavia.° To be sure, the "international demostration effect" was an important reason for the adoption of constitutional courts. Many successful and prosperous Western Countries, which were admired as models by the reformers, have a Constitutional Court. But many do not have one, such as Britain, Australia, Israel. One could have expected that the new democratic legislatures would have liked to preserve their power to shape the political and social order through legislation. Instead, the framers of the constitutions gave sweeping powers to the constitutional judiciaries.

And the story does not stop here. According to democratic principles, the protagonists of the transformation of party rule and central planning into political pluralism and market economy were supposed to be the political parties in the new parliaments, and the governments formed by them, plus, where applicable, the directly elected president. Constitutional Courts, in the traditional theory of the separation of powers, were only intended to solve legal-constitutional problems, and maybe protect Human Rights of the citizens. They were not intended to become central players. But in some cases, such as in the case of Hungary, at which I will look in this paper, the Constitutional Court became at the same time, a motor and a brake of the transformation. And I want to investigate today what the concept of legitimacy can explain in this process.

After the demise of the Hungarian Socialist regime, a powerful Constitutional Court emerged from the round-table-talks between the Socialist party and the opposition. Equipped with broad jurisdiction and the possibility of easy access by

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2 Poland, for example, was influenced by Prussia in this respect, Hungary, the Czech Lands, and Slovenia by Austria (even though both countries developed their own legal traditions).

3 There was a Czechoslovak Constitutional Court modelled on the Austrian Constitutional Court which was designed by Hans Kelsen, but it never rendered any meaningful sentences.

4 In Hungary, a parliamentary Constitutional Council was set up in the mid-1980s, without having any significant effect. Yugoslavia had a Constitutional Court and Poland a Constitutional Tribunal. But both bodies had been introduced because of factors outside of the political structure of Leninism: in Yugoslavia, the task of the Constitutional Court was to solve problems arising from the federalist structure of Yugoslavia, and in Poland, the establishment of the Tribunal had been a concession to the strong opposition after the imposition of martial law in the 1980s.
citizens to the court, it began, under the leadership of chief justice László Sólyom, to aggressively challenge the legislature on new legislation. Since access to the court was very easy (everybody could challenge any law without any requirements of "standing"), basically all of the legal and political problems of the transformation ended up at the court and had to be decided. At the peak of its activity, one in three laws challenged were invalidated by the court. And in spite of severe criticism by parliamentarians and the government, virtually all decisions of the court were complied with and no attempt was made to curtail the court's powers, as it has occurred in other countries of the former Soviet bloc. Some commentators have even characterized the Hungarian political system of the first years after the regime change as "courtocracy" (Scheppele, 2001). It is out of the scope of this paper to provide a detailed account of the court's activities, which are, however, well documented (i.e. Schwartz, 2000, Chapt. 4; Sólyom & Brunner, 2000). The basic question of this paper is how this "remarkable, radical" constitutional court (Zifcak, 1996) managed to legitimate its activity in a political culture without any previous tradition of constitutional review.

The structure of the paper is the following: first, I will talk shortly on recent theorizing about constitutional courts in the political process, and offer a few remarks on how this theorizing is relevant to our thinking about legitimacy and the other way around. In the second part, I will discuss the Hungarian case in more detail. In the conclusion, I come back to the concept of legitimacy and try to show how, in the case of judicial review, normative and empirical notions of legitimacy can inform each other, and how this can enrich our understanding of the role of law in the transformation processes in post-Communist countries. I will argue that legitimacy of judicial review is embedded in a particular historic-geographic cultural context.

I. Legitimacy, Judicial Review, and "Transitology"

There are two ways the concept of legitimacy can be investigated. As it is well known, legitimacy has a normative, and an empirical dimension (Barker, 2001:7-29). Normative legitimacy is the subject of political philosophy. The debate centers on questions of morality and ethical adequacy of the political order, and the appropriate behaviour of an institution within this order. It is obvious that the normative discourse depends on time and place, and is highly contingent on "who speaks". The social scientific debate on empirical legitimacy tries to distance itself from this debate. As Lipset argued, following Weber, in this understanding "legitimacy involves the capacity of a political system to engender and maintain the belief that existing political institutions are the most appropriate or proper ones for the society" (Lipset, 1959:68). It does not matter if we as observers...
share this belief. All that matters is that people subjected to the authority of the institution believe it (Barker, 2001:19). As Max Weber put it, legitimacy is the "prestige of being exemplary or binding" (das Prestige der Vorbildlichkeit oder Verbindlichkeit) (Weber, 1980:16). In this perspective, the stability of a dictatorship might be based on a belief in its legitimacy the same way as a democracy. Of course, these dimensions are not strictly separated. Sometimes, the observation of missing empirical legitimacy of an institution can lead commentators to produce a discourse of missing normative legitimacy. And this discourse can in turn produce the loss of empirical legitimacy among those who have so far been loyal to the institution.\(^5\)

I do not have to recur to the extensive literature on the legitimacy of judicial review (see for example Elster & Slagstad, 1988; Cappelletti, 1989). From a both a normative and an empirical standpoint, a lot has been written for and against the activism of constitutional courts in post-communist politics.

I begin with the more normative literature and restrict myself to present the criticism. Bela Pokol, for example, the leading critic of the Hungarian Constitutional Court, has disputed the Court's authority to decide political question on the basis of "super-abstract" principles like "legal security" (Pokol, 1994). Pokol's argument is a principled one and does not depend on what the court actually decides. He disputes that a democratically unaccountable body has no right to decide substantive political questions in the name of abstract principles found in the constitution. In his view, whenever the constitution does not provide a clear rule for a legal question put before the court, the court should defer to the legislature to decide it. By accepting activist constitutional jurisprudence, "we would relinquish the moral ground to criticize any further judicial invention that may follow, since, being detached from both parliamentary jurisdiction and conventionalized traditions, the criteria of legality and constitutionality are left at the mercy of the constitutional justices - that is, to their random selection" (Pokol, 1996:454).

In a similar note, Stephen Holmes has acidly criticized the activity of "overly prestigious" constitutional courts of Eastern Europe. He warned against the weakening of the democratically legitimate parliament in the name of constitutional stability. He criticises East European Constitutional Courts who look for guidance to the "Kantian" basic rights activism of the German Constitutional Court in the post-war period. But, Holmes points out, there is a difference: Whereas the German court had the "luxury" of operating in an economically and politically stable environment, the post-Communist countries have to establish a strong government first which has to push through painful

\(^5\) In a more detailed discussion, the difference between regime legitimacy, and institutional legitimacy will have to be discussed.
economic reforms. To weaken this government in the name of an aggressive basic rights jurisprudence is to "court political desaster" (Holmes, 1993:23). But why were these courts so powerful, he asks, and polemically wonders whether "the overlegitimation by legalistic observers of constitutional courts in Eastern Europe [might not] result from the resemblance between these bodies of unelected men- who deliberate in secret and refuse to bargain publicly about differing interest-and the old Politburos" (22).

A last example is Bojan Bugaric, who bases his critique of the performance of Constitutional Courts not so much on their activism per se, but on the the insuitability of "a theory-driven adjudication based on various abstract concepts and principles" for the complex issues of the transformation period. According to Bugaric, they turned out to be "poor policy- makers" because they stubbornly clinged to the old-fashioned Kelsenian theories of a logical, hierarchical normative framework, instead of using a "pragmatic and provisional legal reasoning" which emphasizes "provisional jurisprudence on pragmatic and contextual dealing with particular details of complex social problems". Their decision- making style, Bugaric demands, should allow for a "dialogic relationship between judges, other policymakers and citizens" (Bugaric, 2001:288).

For the moment, I am not engaging with these author's arguments. What is interesting to me is the questions of legitimacy they raise. Pokol disputes the legitimacy of judicial review in cases where there is no clear constitutional rule in principle. For him, the principle of majoritarian democracy is more legitimate, i.e. can be better justified, than judicial discretion (see also Pokol, 1998). Holmes argument is more contextual: what might be legitimate for the German Court, he argues, might not be for the courts in post-Communist Countries, mainly because of the adverse – empirical – effects: The "negative constitutionalism", as he calls it, weakens the only agents which can effectively push through reforms: the government and parliament. Bugaric, finally, centers on the method: courts can be important and successful political players, he argues, but only if they give up abstract reasoning, and instead become a forum of flexible conflict arbitration.

I now turn to a discussion of social scientific theories about judicial review 7 in the transformation process. Constitutional Courts have largely been left out of focus of "transitology" so far (Schatz, 1998). Political Scientists have traditionally either did not dare to touch "complicated legal stuff" or – in the tradition of the legal realists – disregarded the law as meaningless in social explanation (see e.g. Segal & Spaeth, 1993). But for a couple of years now, a new field of research is emerging, spilling over from the research on the "Global Expansion of Judicial Power" (Tate & Vallinder, 1995). In this context, different theoretical paradigms are used in the analysis of courts. In this paper, I want to
present two of them - the rational choice model and the triadic dispute resolution model -, and discuss the status of the concept of legitimacy within these theories.

Many political scientists are quick to repeat Robert Dahl's thesis that a constitutional court can be analyzed just as any other political institution, "an institution, that is to say, for arriving at decisions on controversial questions of national policy" (Dahl, 1957; Dahl, 1957:279). One major school of thought used in political science to analyze political actors and institutions is the rational choice model (Elster, 1986), which posit that social behavior can be explained in terms of individual actor's utility maximization. The concept of legitimacy is difficult to express in the language of interests. In terms of rational choice theory, legitimacy is a function of interest congruence. A rational actor only accepts authority as long as the person or institution claiming the authority "delivers" or the costs of removal are higher than the potential benefits. But this renders the concept superfluous, since an analysis in terms of interest congruence and cost-and-benefits are sufficient for this explanatory model.

There is an increasing number of studies using rational choice theory to construct mathematical models of judicial review (see, for example, Vanberg, 1998; Vanberg, 2001), which abstract from all context and postulate causal mechanisms which apply to all instances of judicial review. I am sceptical if this decontextualized approach will lead us very far (for a critique, see Stone Sweet, 1998). In a more empirical – and comprehensible – way, Epstein, Knight and Shvetsova have proposed a approach to study a post-Communist constitutional courts using rational choice theory (Epstein, et al., 2001). The authors explain the fate of the first Russian Constitutional Court under Chief Justice Zorkin. The court, acting overtly "political", violated what Epstein et. al have called the "tolerance sets" of President Yeltsin and the legislators. It was left without allies and was subsequently 8 disbanded. In their model, Epstein, Knight, and Shvetsova assume that there are certain strategic imperatives Constitutional Courts have to respect if they want to command obedience from the other branches of government. If they disregard the interests of the major political players, they have no chance of survival.

One different theoretical approach has been proposed by Alec Stone Sweet, in his comparative analysis of West European constitutional courts (Stone Sweet, 2000). He applies a paradigm which was originally developed in structuralfunctionalist anthropology of law and then taken up by Martin Shapiro (Shapiro, 1981) Constitutional Courts are seen as the arbiter of conflict in a situations of "triadic dispute resolution": Two parties in the political arena cannot solve their conflict over interpretation of the constitution (understood by Stone Sweet not simply as the written text, but as the sum of all legal norms and political practices of a political community). Without constitutional courts, the "real meaning" of the constitution can only be determined by the majority principle: the political majority in parliament decides what the constitution
"means" by adopting laws that shape the constitutional order and practice itself. This is the British example. A different model would be what Carl Schmitt had proposed during the Weimar republic: To give a directly elected President the discretionary power to "guard the constitution" (Schmitt, 1985). But in post-World War 2 Europe, constitutional courts have been entrusted with this task, and, as Stone Sweet argues, the institutional arrangement has produced the end of parliamentary supremacy. By force of the mechanism inherent in the institution of judicial review, especially of abstract review, over time, more and more decision-making power shifts from the democratically elected parliament to the constitutional court, or, more precisely, to its jurisdiction. An increasingly dense web of constitutionally mandated norms restricts the scope of the legislative will. Judges start acting like legislators, and politicians internalise the constraints of constitutionality.

Stone-Sweet's model explains many of the "social mechanisms" (Elster, 1998) in the game of constitutional politics. We can expect much of what he describes for Western Europe also in the new democracies of the East. In Stone Sweet's Model the legitimacy of judicial review is mainly a function of the constitutional courts' arbitration role. As long as the court is able portray itself as a neutral "third" - for which there are a couple of techniques such as giving partial victories to all sides – the legitimacy of judicial review is preserved. Once this belief breaks down, however, nothing can save the court.

There is two aspects both rational choice and triadic dispute resolution models neglect: the political-cultural socialization of the political elite with which Constitutional Courts have to deal, one hand, and the influence of external normative influences, on the other. I argue that legitimacy of judicial review emerges from the interplay of the court's actions, including its ability to communicate in the public sphere and the nature of the political elite, structured both by its material and cultural interests, including the definition of their national identity. The behaviour of this elite towards the court, or, more specifically, the kind of claims to legitimacy that this elite is going to accept, depends in the Central European context strongly also strongly on what they think is appropriate behaviour, both on a national and an international level. In the case of Hungary, the political elite tolerated much more than a simple model of interest congruence would predict. In the next section, I am going to back these hypotheses with some empirical material.

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6 After the introduction of the Human Rights Act in 1998, however, the age of Judicial Review has officially begun even in Britain.
II. The "Success Story" of the first Hungarian Constitutional Court

1. Some "facts"

The idea to set up a constitutional court originated in the negotiations between the last Socialist government and the democratic opposition at the so-called national round table. The roundtable, which came together in June 1989, had the task of creating some transitional "rules of the game" that would lead the country from a planned economy and Leninism to the market economy and democracy. Most of the participants felt they lacked legitimacy to decide fundamental constitutional questions: this was to be left to the parliament scheduled to be elected in early 1990.

However, in the process of dismantling the Leninist political structures of Hungary, the constitution was less "amended" than almost entirely rewritten. A constitutional court was inserted very late in the process. Originally, the idea came from the last socialist justice ministry. At first, the opposition was suspicious of this government initiative. They feared that the court would be staffed with old cadres and would serve only to slow down the reform process. Very soon, however, it took over the project, and it was agreed that a constitutional court would be created. Neither the representatives of the socialist party nor those of the opposition knew very much about what a constitutional court was supposed to do exactly. There is evidence that both sides – the socialist government and the opposition - viewed the court as one of the institutional guarantees that would protect them in case the other side would win a decisive victory in the first elections, and the court was therefore equipped with a vast number of competencies (Scheppele, 1997). Both the constitution and the constitutional court act were soon afterwards passed without discussion. Space forbids to describe in detail the legal framework provided by the constitution, the act on the constitutional court, and the rules of procedure developed by the court itself in absence of legislative activity (see Sólyom & Brunner, 2000; Spuller, 1998; Halmai, 1995; Schwartz, 2000:75-108). The court's design is particular in several regards, but for the purpose of this paper, I only mention the so called "action popularis": the abstract, de-individualized constitutional complaint. This feature means that everybody (even foreigners) can appeal to the court to declare a certain law invalid on grounds that it violates the Hungarian constitution. This eliminates all barriers created by the conditions of "standing" required by other constitutional courts and, of course, it puts the court right in the center of legislative politics. Almost every major legislative project in connection with the regime change ended up at the Constitutional Court.

The Court began its work on January 1st, 1990, even before the first democratic parliament was elected. It was the first new institution of post-Leninist Hungary,
and it began its work immediately. The victorious coalition of the conservative Hungarian Democratic Forum (MDF) with the small Christian Democrats and the Smallholders' party were quite surprised to find out what a constitutional court is capable of doing. In fact, the court showed little respect for what they had expected to be a system of parliamentary sovereignty. Writing in 1996, Scheppele reports that

In the 6 1/2 years of its operation, the Constitutional Court has published about 1500 decisions on every imaginable constitutional question [Since 1990], the Court has struck down roughly one law in three that the Parliament has passed, affecting nearly every aspect of the reconstitution of Hungary (Scheppele, 1996).

It has, for example, struck down the death penalty, against the opinion of the overwhelming majority of the population and probably also of legislators. It found fault with the conservative governments' restitution plans, which included giving land that had been taken by the Communists, back to the peasants. It also became the center of attention in a conflict between the prime minister and the president, the so-called "media war." After the constitutional court had ruled against the government, the far-right wing of the MDF mobilized demonstrations against, among other things, against this decision in the streets of Budapest. This attempt to put public pressure on the court, however, failed after huge counter-demonstrations showed that the public was not going to tolerate this kind of politics.

Two decisions were especially controversial: When the government introduced a measure to punish those responsible for atrocities during the 1956 revolution by changing the statute of limitations, the court thwarted these plans. In its decision, the court declared that Hungary was a "Rechtsstaat" and that in a Rechtsstaat, it was not possible, for reasons of legal security, to retroactively expand the statute of limitations. When in 1994 the conservatives experienced a crushing defeat at the polls and the Ex-Socialists (MSzP) and the Social-Liberals (SzDSz) formed a new governing coalition, the court did not loosen its firm control of the legislative. The left-of-center government watched with disbelief how the tables were turned on them. In the so-called "Bokros-package" decision which annulled austerity measures that had been designed by finance minister Bokros to restore a balanced state budged, the court ruled that parts of the hastily enacted austerity laws violated the principle of legal security. This decision was a shock to the government, since it lost around a third of the savings already earmarked for the next budget. It sharply criticized the court, but complied. The court did allow similar measures to take effect some months later, but still insisted that legal security was a constitutional value which could not be abridged by political or economic considerations (Füzér, 2001).
2. The "explanation"

Why the Hungarian Constitutional Court was so strong in the first years of its existence? It would have been quite easy to restrict its competencies, or even to abolish the institution altogether: the constitutional court act could be altered by a simple majority, the constitution by a 2/3 majority (which the Socialist-Liberal coalition had in parliament). Alternatively, the government or parliament could have simply ignored the rulings, as it did with some low-visibility orders by the court to 12 create certain laws within a specific timelimit. While it was unlikely that politicians would try to reinstate the death penalty - Hungary's membership in the Council of Europe and its prospective membership in the EU effectively forbade this option - on other issues the compliance of the mostly hostile legislature is quite striking. After all, its suffices to look to its neighbour country Slovakia, where the autocratic prime minister Vladimir Meciar and the parties in his coalition government bullied judges and ignored many important rulings (Schwartz, 2000, Chapt. 5; Boulanger, 1999a). Not to speak of the already mentioned Russian case or the developments in Kazakhstan, where the President simply deleted the court from the constitution (Schwartz, 1998).

To be sure, there is a way of explain this phenomena in the language of interests. The so-called "International Socialization Theory" argues that it is rational for elites to take over normative commitments of the regional environment in exchange for material benefits (Schimmelfennig, 2000; Risse, 1999). If we apply this theory to our case, it predicts that Central Europe Elites interested in being integrated into the West European economic and political structures will adapt to what they perceive as the reigning norms "constitutionalism". Hungarian and Polish elites, who were determined to follow through with European integration respected their Constitutional Courts. In Slovakia, Meciar and his crownies, who were running the country using illegal and authoritarian measures could only lose by the establishment of West European standards, including a strong Constitutional Court.

But this is only half of the story. Why did the Hungarian elite think that the West cared whether they had a strong constitutional court or not? Why did they think that a constitutional democracy had to put up with such aggressive activism? Equally from a rational choice perspective, David Bartlett claims that it was in the interest of the political parties to follow the decisions of the Court. In the next elections, the other party might gain power. Only if they did not damage

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7 See Sajó, 2000. Many of the failures to comply with decisions were not, however, meant as defiance. They were due to the fact that parliament could not muster the necessary 2/3 majority necessary to pass certain laws.

8 "They hated us", several justices told me in interviews.
the authority of the court today, it would be able to protect them from the potential adversarial majority of tomorrow. Cooperation was thus more advantageous than defection (Bartlett, 1997:263-64). However, such explanation presumes that the political actors pursue long-run rather than short-run tactics, a claim that would have to be empirically backed up. How could the conservative parties know that the court would actually protect them in opposition? Also, if we assume that such far-sighted calculations are rational, how do we explain the behavior of Vladimir Meciar which I have mentioned earlier?

More convincing is András Sajós warning against a perspective which relies too much on "legitimacy" to explain the court's success. He argues that the political elite was too divided to retaliate against the court. The court always only mobilized a part of the elite and, sometimes, of the population against its decisions (Sajó, 1999:226). But even if we acknowledge that a part of the political elite's compliance can be explained "instrumentally", the compliance remains still striking. Stone-Sweet's model helps to explain a further part of the story. Hungarian politics became "constitutionalized" because the Court became an effective dispute resolution forum, especially in questions of state organization. For example, it had to resolve the ambiguities of the constitution outlining the relationship between the president and the prime minister. The mere existence of the court could avoid constitutional crises which would have arisen from struggles over the "correct" interpretation of the constitution. It was able to preserve its triadic legitimacy by the techniques that Stone Sweet outlines: First of all, it justified its decisions with legal, and not political arguments, therefore claiming to be a neutral body above politics. The Hungarian Court solved the "crisis of triadiadic legitimacy" by offering a jurisprudence based on a on the whole coherent system of principles which made it difficult for political actors to argue that the court was deciding the cases "politically". The message Constitutional Court President László Sólyom incessantly voiced in the decisions of the court, in interviews, and articles, was that the court's reasoning could not be ad-hoc or arbitrary (and therefore political), but based on a coherent system of principles. He first called this system the "invisible constitution" (Füzér, 1997). Since this concept implied that the court was not interpreting the written constitution, but resorted to natural law, it drew heavy criticism. Sensing that this term could not be easily defended, Sólyom abandoned it. In practice, however, the court continued to create this "invisible constitution": a system of principles which could not be derived from a textual reading of the constitution (Sólyom & Brunner, 2000). By basing its decisions on purely abstract principles, the court could even provide the loser of the cases a face-saving: it was not the political opponent who won the case, it was "the law" itself. Step by step, therefore, the court managed to introduce a practice which could hardly be questioned any more.
But again, this can only be a partial explanation, because there is no reason to believe that the Slovak Court, for example, could not have functioned the same way. Its decisions were prudent, and always based on constitutional principles (Vodicka, 2002). I argue that without looking at the elites to which the court's claim to legitimacy is directed, we cannot explain what happened in post-communist "judicial review" game. In Hungary, the Kádár - regime had undergone a slow legalization and rationalization of power in the late seventies and eighties (Zsidai, 1996). Communist ideology had lost all of the little legitimating force it might have had left after the 1956 uprising. In a Weberian perspective, legitimacy claims based on legality had replaced the first charismatic, and later neo-patrimonial legitimation of the Communist Party (Jowitt, 1983). This change of legitimation had some very concrete sources. On one hand, the legalization of political power was demanded by the quasi-bourgeoisie which thrived on the "second economy" of post-1956 Hungary. On the other hand, the peculiarity of Hungarian socialism is the extensive exposure of its scientific and economic elite to Western ideas. Many of critical intelligentsia was not thrown in jail, but rather sent off to the West to study or do research and afterwards coopted into the system or just left alone. It is no coincidence that the plans for a Constitutional Court came from the last socialist justice ministry which was led by the well-known Hungarian legal sociologist Kálmán Kulcsár. Some form of parliamentary constitutional oversight had existed in Hungary in the 80s, but, as can be predicted, this self-control had failed. Kulcsár cooperated with Géza Kilény, head of the Institute for Public Law at the Hungarian Academy of Science, who would later become one of the constitutional court judges. With substantial financial support from the government, Kilényi's institute started a project on comparative analysis of the different forms of constitutionalism in the world. A draft law on the constitutional court was produced, and the constitution amended even before the political events leading to the roundtable talks had started. The reformers inside the party shared with the opposition the belief that Hungary should become a "Rechtsstaat", a state ruled by law, long before the advent of democracy (see also Örkény & Scheppele, 1997). Such a consensus was missing in the Slovak case.9

To be sure, this does not mean that a strong constitutional judiciary was the inevitable result. "Rechtsstaat" is not the same as "Constitutionalism", and its relationship with judicial review is one of historical contingency rather than theoretical logic.10 Legal positivism is hard to reconcile with judicial review in its

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9 I have shown this comparatively in detail in Boulanger, 1999b.

10 In fact, in Germany, where this concept was coined, the official "Staatsrechtslehre" (the discourse produced by the most influential constitutional law scholars) explicitly rejected the idea of judicial review, and it took the horrors of National Socialism and the
modern form – that is, including basic rights. But in an environment of uncertainty and where constitutional courts as institutions where largely unknown, this difference was not noticed. The Constitutional Court claimed to interpret "the law", in this case, the constitutional law. And no Hungarian politician from the mainstream of the political elite was prepared to openly advocate "illegal" measures such as defiance of Constitutional Court. The only exception was the extreme right which openly advocated the abolition of the Constitutional Court. But they never gained significant influence.

Apart from the appeal to Hungary's identity as a "Rechtsstaat", there is a second source of legitimacy that lies outside of Hungary. Elemer Hankiss writes about public attitudes at the beginning of the 1990ies: "[It] was enough to utter the magic words DEMOCRACY, MARKET ECONOMY, EUROPE- words that resounded all around the country and everybody was happy" (Hankiss, 1994:35). While people did not associate the Court with market economy, ironically both "democracy" and "Europe" turned out to be symbolic resources for the court. Kim Lane Scheppele has conducted interviews with parliamentarians whose legislative projects had been frustrated by the veto of the constitutional court. Asked why they accepted the sweeping judgements of the court, many of them reacted with surprise – how should they not accept them given that a strong constitutional court was part an parcel of European constitutionalism. For Scheppele, the Constitutional Court half relied on, half constructed itself, a "national imagery". This imagery was in part based on the recourse to a 19th century myth, still alive in Hungarian collective memory, of a 1000-year old constitutional tradition. But, more importantly, the idea that Hungary has always belonged to Europe and was currently "returning" to it, was also very influential in Hungarian thinking. If we survey the public statements of the judges and its supporters, we find abundant references to Hungary's past as a constitutional country and the need to adapt to the European legal norms and values (see Scheppele, 1996 and Kulcsár, 1994). Whether these claims are correct in terms of legal history and comparative law is not important. What counts is whether they were effective arguments in the discursive political arena. According to Scheppele, Europe was seen as the base of liberal Constitutionalism, and having a powerful court was part of being "European." (Scheppele, 1996). Thus,

11 Interestingly, Hans Kelsen, the inventor of the continental form of judicial review, was a legal positivist. He therefore always urged against including adjudicable basic rights into constitutions because of their inherently vague character (see Stone, 1992:226-231).
damaging this picture in international opinion by attacking the court was out of
the question. And even if some MPs within the coalitions parties of the first and
second parliament harboured thoughts to leash out against the court, the Prime
Ministers would stifle any plan in this direction.

I have already pointed to the "confusion", in the public sphere (which in
Hungary is basically the Budapest public sphere), of positivist legalism and
constitutionalism which helped the court to established its authority. In a
different paper, Scheppele points to a different confusion: between democracy
and constitutionalism. According to Scheppele,

One way to see the other meaning of democracy – as a set of substantive commitments
directed to policy and not just as a set of procedures for getting there – was in daily
conversation (not with lawyers, but with others). It was common in the 1990s for
Hungarians to say that something was “undemocratic” when it violated basic rights.
(Scheppele, 2001:32)

I cannot discuss here Scheppele's somewhat problematic claim that "courts can
sometimes be more democratic than legislatures" (so the subtitle of her paper).
This would require a discussion of the meaning of democracy, which she
identifies as a "set of substantive commitments" and the possibility of
participation in the political process. For the purpose of my argument, it
suffices to note that in the Hungarian political discourse, the tension between
democratic parliamentarism and constitutional adjudication was not urgently felt.
There were few public critics of the court until late into its term, which ended
around 1999. Béla Pokol, who I have mentioned earlier, was largely abne in his
quest to denounce Constitutional Court activism. His views were very unpopular,

12 According to her, the Hungarian constitutional court became a forum for the general
population. Whenever the government and the political parties often looked "like the
communist-era government in the way they treated the citizenry (claiming laws should be
applied retroactively, tampering with the media, picking out favorites for special
treatment, picking out enemies for deprivations of rights)", the people could address all
their complaints to the court by way of the action popularis, and the "court sprung into
action". However sympathetic one might be towards the jurisprudence of the Hungarian
Constitutional Court, it seems to over-stretch the concept of democracy to describe the
Hungarian constitutional review system. The "action popularis" was basically a petition
system which left the judges with broad discretion as to what they wanted to decide. One
basic element of a democratic arrangement, it seems to me, is accountability. This was
not present in this system – the judges could not be recalled by the electorate for their
decisions. Moreover, this is not how the judges themselves viewed their role. They did
not think of themselves as serving the majority of the day. Their task, as they saw it, was
to re-establish the "majesty of the law" in times of turbulence and short-sighted political
passions.

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especially among the liberal press in Budapest, which cheered the court's censures of the conservative government of the first four years. When the socialist-liberal government's legislative projects were equally censured by the court, the practice was too well established already.

If we want to stay in the Weberian framework, one could say that the constitutional court's authority was not so much based on rational-legal legitimation, as one would expect. In Weber's understanding, this rational-legal form of legitimacy is based on positivist legal thinking. A person or an institution can claim obedience because of clear, written rules which contain the scope of his/her/its authority. While this is true for the general competencies of the court (which are clearly contained in the constitution and in the act on the constitutional court), this does not hold for decisions reached on the basis of derived principles or on the basis of the "invisible constitution". Here, the court's appeal is to the "charisma" of (natural) law (Boulanger, 2001). The court, for a short period of time, became the "hero" of reason, the philosopher-king, the "saviour" of common sense in contrast to the dirty struggle of politics. The Hungarian public reacted with deep disillusionment and disappointment to the fact that democracy was not like they had thought it would be. László Sólyoms mission to establish the court as the "guardian of the rule of law revolution" succeeded, because the "constitution" turned out to have a higher prestige than "democracy".

**Conclusion: The contextual nature of legitimacy**

Mauro Cappelletti's has argued that for "mighty problem" of judicial review – namely the implications of its counter-majoritarian character for the theory of democracy– there "can only be a relative solution, determined by contingent variables such as a given society's history and traditions, the particular demands and aspirations of that society, is political structure and processes, and the kind of judges it has produced." (Cappelletti, 1989):149-150). Looking at the case of Hungary, he certainly has a point. Cappelletti takes both dimensions of legitimacy into account. While stressing that there is a legitimacy problem with the practice of judicial review, he does not – like Béla Pokol – based this argument on purely abstract considerations. As Stephen Holmes argued, a judicial review practice that might have legitimacy empirically in one context, might not in another. But as we have seen in the Hungarian context, this approach did not keep Holmes from overgeneralizing himself: he predicted that

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13 This is also shown by public opinion data, which ranked the court consistently higher than parliament, the government, and the political parties.
each and every Constitutional Court in the whole post-Communist region was doomed if they remained committed to a "Kantian" approach of subjecting politics under abstract universal principles. In the Hungarian case, the balance sheet looks more positive. The anti-legalistic movements that Holmes feared remained marginalized. Finally, Bugaric's advice that the Courts should stop pronouncing decisions based on abstract principles and start acting like pragmatic dispute resolution devices seems, from the perspective developed here, not helpful. I would argue that much of the authority of Constitutional Courts is based on self-legitimation through appealing to the charismatic character of natural law. If they appear to be pragmatic decision-makers just like other political actors, a large part of their authority might be lost.

To be sure, this is just what critics like Pokol, Holmes, and Bugaric would welcome. More authority might return to the legislature, the "democratic imbalance" might be corrected. This would also work against Stone Sweets hypothesis of the increasing constitutionalization of politics. And interestingly, something like this did happen in the Hungarian case. As Scheppele explains,

the days when the Court actively plays this role are over. The crisis point started in 1998 with the near-simultaneous retirement of all of the founding judges on the court. [...] [The] political parties that had turned against the Court at the time of the Bokros package cases still were running the government and they never forgave [Constitutional Court President László Sólyom] for his decisions in those cases. [...] [The] government proposed a set of nominees that generated a political consensus since they were primarily highly respected law professors with distinguished reputations (like the first set of judges) and not all apparently of one view. What the MPs who voted on 19 these nominees probably did not know was how close many of the new judges were personally to the Prime Minister. No doubt he had picked them precisely to have a critical number of the new judges in his pocket. When the new judges were in place later in 1998, it was immediately clear that something had changed (Scheppele, 2001:34); see also Scheppele, 1999).

The new president of the Court, János Nemeth, is a professed legal positivist who had openly declared that he rejected the "invisible constitution" approach of his precursor Sólyom. Scheppele's interpretation of the situation seems like a vindication of Martin Shapiro's thesis that

[no] regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints. To the extent that courts make law, judges will be incorporated into the governing coalition, the ruling elite, the responsible representatives of the people, or however else the political regime may be expressed. (Shapiro, 1981:34)

Of course, the story is more complicated than that. The Németh court did not in each case grant a victory to the government. The decisions did not follow a
simple partisan logic. As comparative research has shown, this is seldom the case. Rather, courts are divided over the relations between individual rights on one side, and the prerogatives of the "raison d'état" or the prevailing norms in the political community, on the other. Since he was able to cast the decisive vote, President Német was able to exploit the division of the court to strengthen his position towards the government. And it seems as if the Németh-court has taken Bugaric's advice to heart. According to observers, the judgements of the "new" court have been ad-hoc, undertheorized, and result-oriented. The court has avoided confrontation with both parliament and the government. In the legal profession, however, the prestige of the court has dramatically decreased because of the low standards of legal argumentation. It seems, however, that the general public has not noticed the change in the court yet. In public opinion surveys, the prestige of the Court remains consistently high.

The judges of the new court maintain that the era of the constitutional revolution is over. Hungary seems a well-established constitutional democracy by now. Maybe an activist court is no longer necessary, and "judicial activism" in the spirit of the Sólyom court might no longer be viewed as legitimate. Whether it is or not – only Hungarians can decide this question. Do they in certain fundamental questions trust law professors more than a polarized political elite? That remains largely an empirical question. As Mauro Cappelletti pointed out, there is no textbook answer to the legitimacy of judicial review.

What does all of this teach us about the nature of legitimacy and legitimation? First, I have argued that legitimacy is not just a function of interest congruence. The case of Hungary is one where the "charisma" of law, historical narratives, and the construction of a central European, post-Communist Hungarian identity have had an important influence on establishing the authority of the Constitutional Court. A second, related point is that legitimation practices can no longer (or more to the point: could never) be understood solely in a national context. Legitimacy can be drawn from sources outside: this was the case in Sólyoms quest to establish "European constitutionalism". Third, a point that I

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14 This was a standard complaint I heard when conducting interviews in Budapest in early 2002.

15 According to Péter Paczolay, a former councellor at the court. Interview, 19.2.2002, Budapest.

16 In interviews I conducted with several of them, they seems to react to criticism which I had not raised in my questions: that they were to deferent to the executive and legislature.
have already repeated several times in this essay, while the attempts to establish abstract, de-contextualized theories of legitimacy in the field of political or legal philosophy might present us with interesting intellectual challenges, they cannot explain much about what is "really going on". An empirically informed debate on the concept of legitimacy remains, therefore, a fruitful endeavor.\footnote{For a different opinion, see O'Kane, 1993.} Add finally, social scientific theories of legitimacy have to take the role of law in legimation processes more seriously. Here, Max Weber's theory of legitimacy provides some provocative contributions. As often has been criticized, he does not even mention the democratic principle as a source of legitimacy. A Weberian perspective assumes that democracy can only be realized through law. Law, in turn, can express itself in legal positivism or in "natural law" jurisprudence (Boulanger, 2001). Which legal thinking prevails in the given historical context cannot be modeled in the abstract. It depends on the available "local knowledge" and the socio-cultural nature of political elites and the broader public.

**Reference List**


