

How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age, Part I

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Kim Lane Scheppele Do 9 Aug 2012

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By [KIM LANE SCHEPPELE](#)



Part One: The Decision

On Monday 16 July, the Hungarian Constitutional Court handed down its biggest decision of the year. It held that the sudden lowering of the retirement age for judges is unconstitutional because it gave the judges no time to prepare for the change and because it created an unclear framework in which different judges were set to retire at different ages. ([Decision 33/2012. \(VII. 17.\) AB határozat.](#))

The decision appears to be a major defeat for the government, delivered by a Constitutional Court that Prime Minister Viktor Orbán had packed with new judges.

Could it be that the Constitutional Court has remained an independent voice in today's Hungary after all?

In the 1990s, the Hungarian Constitutional Court was one of the most powerful courts in the world and successive Hungarian governments always tried to follow its decisions (though sometimes it took a while to muster the relevant 2/3rds majorities). In a unicameral parliamentary system, the Constitutional Court was the primary check on legislative majorities.

Now, as Prime Minister Viktor Orbán rushes to consolidation his power, [the Constitutional Court has been a key target](#). First, the procedure for electing judges was changed, so that the votes of Orbán's Fidesz party alone were enough to put judges on the bench without the support of any opposition parties. Then, the number of judges was expanded from 11 to 15 which, combined with the opportunity to fill some scheduled vacancies, permitted the Orbán government to name seven of the judges in its first year and half in office. Finally, the old *actio popularis* jurisdiction was eliminated and a German-style constitutional complaint was instituted with very limited options for abstract review outside that framework. While this allows individuals to challenge the constitutionality of concrete judicial decisions for the first time, it also reduces the primary leverage the Court used to have – which was to act immediately in abstract review proceedings to nullify laws before they did much damage. Admirable though the constitutional complaint mechanism is, the Court's new jurisdiction makes it much more difficult for it to reach constitutional issues involving separation of powers, independence of expert bodies and issues of institutional structure.

Given that the Court's competence had been changed so much and the new judges had not yet proven their independence from the government's agenda, the decision on judicial retirements was surprising. Most observers thought that the government's judges could block any challenge to crucial pillars of the Orbán centralizing program. Politics aside, this case should have been easy given the Court's own precedents, since the Court had ruled on a number of previous occasions that the legal security implied in the concept of the rule of law required that major legal changes affecting the life plans of individuals be phased in gradually.

In the judicial retirement case, the 15-member Court split 7-7 with one judge (Justice Bihari) not participating. Under the Court's rules, when there is a tie, the opinion joined by the president of the Court controls. All of the new Orbán

appointees dissented from the holding; the opinion was carried by those who were already on the Court when the Orbán government took office. Some of those who joined the controlling opinion have generally been thought of as conservatives likely to side with Fidesz on issues of substance even if they did not owe their appointment to the Orbán takeover, so this outcome was not obvious in advance.

The decision on judicial retirements contains both good news and bad news for those who hope that the Constitutional Court survives Orbánization. It's good news because the Court reached the clear constitutional right answer, defending the rule of law, the constitution and its own precedents. The Court not only found that the new retirement age was constitutionally dead on arrival, but it said that the law was unconstitutional from the moment it came into force on 1 January 2012. Constitutionally speaking, it was as if the law never existed. That would seem to be a total victory for those who have opposed Orbán's attempt to control the ordinary judiciary.

But the decision is also bad news because the Court waited so long to make it that most of the judges have already been fired, and the Court decision provided no sure way for them to get their jobs back. Now the judges are set to begin an arduous process to claim their victories, with no guarantees that they can resume the jobs from which they were unconstitutionally fired. In fact, the government has already shown every sign of evading the decision of the Court in practice.

In this post, I'll explain the decision. In the [next one](#), I'll explain the evasion.

The court ruled that the lowering of the retirement age violated the independence of judges, because such a sudden change in the ground rules for their continued service smacked of arbitrariness. Without allowing for a longer phase-in period, so that the judges would have time to plan and adjust their lives to a new term of office, the sudden change in the retirement age constituted an interference with the judges' independence. Moreover, the change in the judicial retirement age was made not in the cardinal law on the judiciary but instead in an unrelated law on pensions that did not have the same constitutional entrenchment, which the constitution required with regard to the key features of judicial appointments. Finally, the retirement age, though generally forcing judges to retire at age 62 instead of at age 70, was different for different categories of judges in the pension law and there had been no adequate explanation for why judges should be treated differently, depending on their prior expected dates of retirement.

The court added that the principle of judicial irremovability is a long-standing one in Hungarian law, pointing out that judicial protection from arbitrary dismissal had long been guaranteed, starting with the first judiciary act of 1869. In that law, interestingly enough, the retirement age for judges had been set at 70 and it had never been altered before now. The argument about the 1869 law was fascinating because the new constitution instructs judges to consider the "historic constitution" in interpreting what the constitution means. This was the first decision in which the new Hungarian Constitutional Court did so. It is an admirable reading of Hungarian history, which has many elements that should lead contemporary Hungarian constitutionalists to be rightly proud. (Perhaps, however, this was not what the government meant when it referenced the historic constitution in the new constitution's preamble.)

The dissenters wrote a number of separate opinions explaining their views. Some (Justices Balsai and Dienes-Oehm) argued that judicial independence only guarantees independence of decision making in the concrete case and not the guarantee of a continuing judicial appointment. As a result, judges may never be removed from particular cases, but the constitution does not protect them from being removed from their positions by a general law. As a statement of what judicial independence requires, this is actually quite shocking. But can judges be independent if they are faced with sudden removal from office as soon they leave their courtrooms, as long as no one removes them from a specific case while the case is going on? This seems to imply that the government is not violating judicial independence as long as the state official bearing the firing notice is waiting outside rather than inside the courtroom.

Others (Justices Szívós, Lenkovics and Szalay) noted that the retirement age was lowered both in the pension law and also in the transitional acts on the constitution, which have since been incorporated into the constitution itself.

They said that the fact that a reference to the new judicial retirement age was put into the constitution itself means that the Court cannot review it. These justices had a point: different sources of law said different things on the retirement age. But the constitution only says that judges must retire by the “general retirement age” and that is precisely what the Court’s controlling opinion said was inadequately justified in the new pensions law because in fact no retirement age was “general.”

Still others (Justices Pokol and Stumpf) argued that the judges had no standing to bring the case in the first place either because they should have gone first to the labor courts (Pokol) or because they had already been fired and so their cases were moot (Stumpf). Justice Pokol may have had a point about the new constitutional complaints procedure which requires exhaustion of remedies before it can be invoked; that said, had judges waited to go through the labor courts first, the labor courts had no jurisdiction to declare this clearly unconstitutional law unconstitutional – so the labor court judges could have done nothing to remedy the situation except refer the case to the Constitutional Court in any event. Justice Stumpf took the position that the damage was done already so there was no case to answer. That is truly a scary argument that one hopes we will not see again.

So, the judges who hit the precipitously early retirement age won. But what exactly did they win? The law under which they were fired has been declared unconstitutional from the first day of its operation. But the judges are all still out of their jobs.

(Continued in [Part Two: "The System Remains"](#))

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