31 Reinventing Government

Constitutional Changes in Hungary

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The adoption of the new Fundamental Law of Hungary in 2011 and the following extensive legislative changes qualify as one of the most controversial state reforms in Europe within the past three decades. Several elements of the legal reforms in Hungary have received widespread legal and political criticism from organs of the European Union and the Council of Europe, from politicians, NGOs and academic scholars at home and abroad – the flow of critical studies, reports and procedures haven't stopped since the 2010 parliamentary elections. Do these developments seen in Hungary add up to an innovative transformation in the government system, amount to a paradigm shift in the concept of constitutionalism, or are they the signs of democratic decay? The newest book of Prof. Dr. István Stumpf, *Reinventing Government – Constitutional Changes in Hungary*, published at the end of the year 2017, does not aim to give us black and white answers. Rather, it gives us reliable information, analyses, and insights, based on which the reader will have a better picture to form her own judgment and phrase her own answers to these questions.

The author, István Stumpf, is a Hungarian lawyer, sociologist, and political scientist. He was the founding director of Századvég Foundation, the first Hungarian public policy think-thank; he led the Prime Minister's Office between 1998-2002 as Deputy Prime Minister. Presently, Stumpf is a Justice at the Constitutional Court of Hungary, a professor at Constitutional Law and Political Science Department of Széchenyi István University Faculty of Law, furthermore the president of the editorial board of the academic journal Új Magyar Közigazgatás (New Hungarian Public Administration), just to mention his main activities. His multifocal approach in the book reflects his rich expertise: he not only describes the legal regulatory framework, interprets decisions of the Constitutional Court, but at the same time often gives commentary placing legal developments into the context of academic and political debates. Currently, he is the justice with the longest tenure among the members of the Constitutional Court, which he joined in 2010, just a few months before constitutional changes in Hungary began to unfold. He started

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his judicial tenure under the force of Hungary's previous Constitution, and he was an active participant in forming the Court's jurisprudence at the time of the transition to the new Fundamental Law. On the one hand, as a justice, he witnessed several political-legal clashes between the parliamentary majority and the Court, always acting as a firm protector of constitutional principles and values, such as the separation of powers and the rule of law. On the other hand, as a researcher of public administration and as a former minister, he is also aware of the mindset and the practical needs of effective governance.

Reinventing Government is a collection of nine essays by the author written during his judicial tenure, divided into three chapters. This means that every essay in the book constitutes a whole and can be read independently from other parts of the book, which gives the reader the possibility to navigate in the book exploring the topics in order of her interest. If one decides to read the book from the beginning to the end, she might have a déjà vu experience from time to time, given the fact that certain topics (and sometimes even exact arguments) return several times in different essays. The reason of the recurrences – besides the collective nature of book – is probably that selected topics, such as judicial activism, separation of powers, the system change in USD or the constitution making in 2011, were clearly in the focus of the author, thus he deemed it important to discuss them in multiple contexts. As to their genre, some essays feature in-depth theoretic discussions citing a wide range of academic sources, others are built up like a section of a handbook of constitutional law with plenty of references to actual regulations and cases, while again in others the author develops his ideas in a less formal style (these might be written versions of speeches).

The main argument of the book is displayed right in the title of the first essay, phrased in a form of a question: "Why do we need a Strong but Constitutionally Constrained State?" The author clearly sets forth at the beginning of the book that "a strong, active and intelligent state is called for", equipped with adequate checks and balances in order to "to prevent this strong state from misusing its powers." All the essays in the book are connected to this thesis in a way, exploring different aspects of the problem.

The book starts by comparing the rival 'good government' and 'good governance' paradigms, and the author unambiguously sides with the first paradigm based on the presumptions that the market mechanisms (and a state organized according to this logic) cannot provide adequate welfare, solidarity, and fairness to the society, so the state needs to correct market mechanisms for the good of the community and for the good of the market as well. According to this theory, this aim can be achieved by a strong centralized state, with clear liability and political accountability. There is a state reform model that is aligned to the good government paradigm, namely the Neo-Weberian State (NWS), which merges positive aspects of New Public Management reform model with Weberian considerations. After discussing the two paradigms and state reform models, the author outlines the major changes in the Hungarian constitutional system introduced by the new Fundamental Law and its amendments. Here he highlights the changes that affect the

state's capacity for action, and those others that limit government power through checks and balances. The Fundamental Law basically concentrates power with the Parliament, while setting up a few institutions that limit the power of the legislature and the executive in specific areas, namely the Budgetary Council and so-called 'autonomous regulatory organs'. The main check in the system–with general competence– that can balance the legislature is the Constitutional Court. However, the impact of this check can also be limited, since if the governing party factions hold a two-thirds majority in Parliament, the executive and legislative powers are basically identical to the power to amend the constitution, which is legally unconstrained.

The second essay takes us closer to the Fundamental Law, exploring the reasons for its creation, the process of constitution-making and some of the legal and cultural resources on which the document was built upon. Here the author also underlines certain characteristics of the new Fundamental Law. One of these is the strong symbolism and value-orientation of the text, which, as we will later see in the book, has relevance to the interpretation of 'national identity'. We take another look at the system of the separation of powers again, then move on to the foundations of judicial review and rules of interpretation. The Fundamental Law extended the competence of the Constitutional Court to review not only legal provisions but also court decisions (that is the conformity of the judicial interpretation with the Fundamental Law). The Fundamental Law stipulates interpretation rules in two separate Articles, the first being applicable only to itself, the second also to other legal acts. It is worth mentioning that since the publication of the book the latter regulation has been modified by the Seventh Amendment to the Fundamental Law. The previous version of Article 28 prescribed that "In the course of the application of the law, courts shall interpret the text of laws primarily in accordance with their purposes and with the Fundamental Law. When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good." The amendment has added a new clause to the above rules: "Determining the purpose of a law, primarily its preamble and the explanation of the relevant legislative or amendment proposal shall be considered." This basically means that now both the Constitutional Court and other courts of justice are ordered to interpret laws in an 'originalist' manner, that is following the original intent of the lawmakers.

The third essay entitled "Rule of Law, Division of Powers, Constitutionalism", which discusses these topics within the framework of legal and political constitutionalism, is one of the most insightful parts of the book. The author brings us back to the early 1990s, the time of the system change when the Constitutional Court became a key player in the democratic transition and a 'rule of law revolution' took place. According to many contemporary scholars, in its early years the Court used an activist approach concerning the interpretation of the Constitution and the powers of the Court, which – depending on the point of view – received applause from some scholars, while sharp criticism from others.

The essay presents the reader these debates, featuring definitions of activism and arguments from both sides. Interestingly, one of the scholars cited by the author framed a warning in 1992, that problems in the Hungarian political system related to judicial activism "may lead to the point where major political forces consider cutting back constitutional jurisdiction." These facts give a thought-provoking background to the heated debates after 2010 about the power of the Constitutional Court. According to the author and other scholars, in the 'constitutional revolution' of 2011-2012, we can detect the advancement of the logic of political constitutionalism, contrasting the dominant logic of European Union politics of turning political matters into legal problems. In Hungary, the Parliament sought to re-politicize political matters (including problems having both political and legal sides). This approach has naturally led to conflicts in the constitutional system of powers. In 2011-2012 the decisions of the Constitutional Court clearly showed that it could exercise constitutional control over the legislature. The situation became tenser at the end of 2012 and the beginning of 2013 when the Court partially annulled the Transitional Provisions of the Fundamental Law. This decision was followed by the Fourth Amendment to the Fundamental Law, which explicitly forbade the Court to review constitutional amendments (except their procedure), signaling the Court that the Parliament supermajority does not accept restrictions in exercising its power and is ready to overrule Constitutional Court decisions via amending the Fundamental Law.

The fourth essay focuses on the reinventing of the government, more specifically the executive branch in Hungary. Continuing the tradition of the previous twenty years, the Fundamental Law preserved the constitutional basics: parliamentary-type of government, where the executive is politically responsible to the Parliament. According to the author, social and economic challenges and the mediatization of politics transformed the nature and operation of the executive branch in Hungary and many other countries around the world. In Hungary, these underlying developments have also led to legal changes increasing the centralization of the Hungarian government. The Fundamental Law have strengthened the 'chancellor-principle' and so the Prime Minister's role and political power. Parallelly, legislation and government decrees transformed the Prime Minister's Office from an administrative organization of the Prime Minister into a governmental power center with a broad range of competences. These changes, in the author's view, even hold in them the possibility of turning into a presidential system. The book also gives an account of the inside structure of the government and the central administrative bodies. To be noticed, since the publication of the book the rules in 'Act XLIII of 2010 on the central administrative organs and the status of ministers and state secretaries' referred by the book were largely replaced by the new Act CXXV of 2018 on government administration, although without significantly altering the substance of the regulations.

The next two essays, placed in chapter II of the book, make a bypass from the previous chapter focusing on the changes related to central constitutional institutions, and elaborate more peculiar topics: constitutional limitations of state Interventions into property

rights and the character of Hungarian territorial public administration. Both studies are written based on the approach of the 'good government' paradigm and the NWS model. The first one (that is the fifth in the book) gives an overview of the case law of the Constitutional Court regarding the basic right to property from the system change until recent years, briefly presenting more than a dozen of decisions, sometimes making difficult to grasp the exact legal problem without a fuller context, but can serve as a good starting point if the reader is interested in specific topics. The next essay in the chapter discusses multiple reform plans regarding regionalism and self-governments and actually adopted legislation in the past two decades, up to the present day institutional framework of County Government Offices and District Government Offices. What I miss in this part is the assessment of the quality, efficiency of the actual mid-level territorial administration; although developing this might need further field research and detailed discussion of so many aspects that would not fit into this book.

The seventh essay, in chapter III, entitled 'The Hungarian Constitutional Court's position in the constitutional system of Hungary' discusses topics already familiar from other parts of the book: the role of the Constitutional Court in the different stages of Hungary's constitutional evolution and the problem of judicial activism. The author makes a notable argument here, pointing out that many critics of the Court misinterpreted the metaphor of the 'invisible constitution', which was never meant to be anything similar to 'eternity clause', on the basis of which even the written constitution (or its amendments) could be taken under revision.

The eighth essay deals with a topic which has been gaining more and more attention recently both in European politics and in academic discussions: the notion of 'national identity' (and 'constitutional identity'), which have become relevant in the context of the implementation of acts of institutions of the European Union. The summary of this part basically repeats the introduction, and at some points, like discussing the Fourth Amendment to the Fundamental Law, the essay strays from the main line of argument, but otherwise, it offers a comprehensive introduction to the subject. In the 1960s and 1970s, the European Court of Justice (ECJ) developed the doctrine of the primacy of EU law as an unconditional rule, meaning that in case of conflicting EU and national law, the EU law prevailed even over the constitution of a Member State. However, since the Treaty of Lisbon (which amended the Treaty on European Union), there has been an explicit restriction on the application of EU law, for the 'national identity' of the Member States receive protection. The author emphasizes that practically the most important question is that which institution (national or EU) does have the scope of authority to decide on what the constitutional identity of a Member State is, because these decisions delimit a sphere of autonomy for the Member State. His firm position is that the constitutional courts of the Member States are the competent institutions to interpret their own national-constitutional identity, protecting – permanently, cost-effectively and with due foresight – the most eminent circle of the national interest of their country, acting vir-

tually as a 'moderator' between the lawmakers of the Member State and the EU. The next question is how to do this interpretative work, how to define the 'inviolable core' of the state. The author offers two main guidelines to undertake this task. Firstly, the actual text of the constitution is a great source itself. The Fundamental Law ended the era of politically neutral constitutionality by citing characteristic values in the National Avowal (the preamble) and in the articles containing concrete regulations as well. Secondly, the Fundamental Law confirmed the role of the so-called 'historic constitution', embracing the historical perspective in legal interpretation, which has already had a long-standing tradition Hungarian legal thinking. Both elements offer a genuine basis on which national (constitutional) identity can be unfolded. These interpretative guidelines are in line with the Fundamental Law itself, which stipulates in Article R) section (3) that the "provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution." The Constitutional Court also accepted these guidelines working out a 'test for the protection of national identity' in its decision 22/2016. (XII. 5.) AB on the interpretation of Article E) section (2) of the Fundamental Law. This is again an area in which, since the publication of the book, the Seventh Amendment has brought an important change. It added a new rule to Article E), prescribing that the exercise of competences through the institutions of the European Union "shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure." Although the text here does not explicitly mention the notion of 'national identity' or 'constitutional identity', given the context and read together with Article 4 section (2) of Treaty on European Union, it is obvious that this section aims to define an 'inviolable core' of the state autonomy.

The ninth, last essay in the book discusses the politics of constitutional reforms, focusing on judicial independence. Constitutional courts in Central-Eastern Europe played an important role in the democratic transitions of the early 1990s. After two decades of stable functioning, constitutional courts and ordinary courts in both Hungary and Poland began facing challenges from the countries' new political majority. This essay also reviews the role of the Constitutional Court of Hungary in the democratic transition, the problem of judicial activism and the concept of political constitutionalism as a possible guiding idea behind constitutional developments in Hungary and Poland after 2010. The reader might meet here recurring themes from other parts of the book: separation of powers, the 1989-1990 system change, the 2010 constitution making, and power struggles between the Hungarian Parliament and the Constitutional Court. Where is the thin red line where democracy ends, and an authoritarian system begins? It is not easy to tell. One of the most warning signs, if the parliamentary majority starts to openly disregard the norms embedded in the constitution. In a parliamentary form of government, the only checks on the power of the parliamentary majority are the constitutional court and an indepen-

dent judiciary. In Hungary, if a political party wins with a large margin at the parliamentary elections, it can easily become both the governing and constitution-making majority. I would say that this means that the constitutional system in Hungary is not especially resilient, but its flexibility makes it easier for a political majority to pursue its policies in a manner respecting the rule of law. The constitutional structure of Poland seems to be more rigid, withstanding more pressure, but this can inspire a determined political power to hack it or forcefully break it. The author notes, that in Hungary, the parliamentary majority haven't made radical reforms of constitutional protection and of the judiciary, although some (mainly personal) changes were made. Regarding judicial independence in Poland, experts paint a grimmer picture. What can constitutional courts do in politically dubious situations, where the preservation of democracy at stake? The author's firm answer might as well be considered as his creed as a justice:

> "constitutional courts in situations of democratic crisis should exercise their competences to their limits to protect the constitutional foundations of the state such as the separation of the branches of government, in particular, the independence of the judiciary, and all those political rights and democratic institutions […] which enable the political system to self-correct in a democratic way."

He also adds

> "However, the constitutional courts should be careful not to elevate themselves above the constitution and the valid rules governing their competences and procedures – whatever valid cause they claim to defend -, because overstepping the limits would be contrary to the rule of law and detrimental to the culture of the rule of law and democracy (which may potentially backfire at a later point in time). Moreover, judicial activism violating the competences of other branches of government can serve as a means of direct (and willful) encroachment upon the democratic process."

The book doesn't give a full picture on each and every aspect of Hungary's new Fundamental Law, even less on the legal system built on it or on the performance of the parliamentary majority which created both. The author has gathered selected elements of the constitutional system that he considered most interesting as a judge or a scholar. These are pieces of the puzzle which the reader can use to complement her own picture.

In my assessment, the author supports most of his arguments with a precise legal background and a substantial bibliography. One of the values of the book is that the author makes efforts to consider competing values and reveal arguments from multiple sides in many debates; in fact, he does explicitly state at the beginning of the book that he

believes that "in a rational debate one must understand rival positions before rejecting or supporting their arguments." Nevertheless, he is not afraid to declare his unambiguous preference for values and ideas such as democracy, rule of law, service of the public good and national interest, the good government paradigm and the Neo-Weberian State model, just to name a few. Many times, he also voices his subjective opinions on the matters he writes about; I don't feel the necessity to argue against any of these.

Reinventing Government – Constitutional Changes in Hungary by István Stumpf is a valuable book from an insider offering an overview of the recent constitutional changes in Hungary and an introduction to certain aspects of the new Fundamental Law. Above all, I would recommend it to international legal scholars and political analysts, but it can give useful insights to Hungarian professionals in these fields as well.