Restoring Constitutional Justice in Hungary

It Shall Be Done – But It Shall Be Done in a (European) Constitutional Manner

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29.05.2026 doi: 10.59704/bff851e1c390a587

On 12 April 2026, Hungarian voters rendered their judgment on a political and legal regime that could be described in many ways, but certainly not as a well-functioning liberal democratic constitutional order. Perhaps the most accurate description is that Hungary was neither a fully developed autocratic state nor a well-functioning liberal constitutional democracy. In short: it was a hybrid regime of electoral autocracy. Among the many questions facing the new constituent power probably the most important one is what could be done to restore liberal democratic constitutionalism in Hungary and what to prevent a new autocratic one from emerging.

The distinctive feature of the Hungarian legal system of the last 16 years is that it has kept the façade of a liberal democratic constitutional order. That said, laws and institutions have functioned to varying degrees depending on the issue at stake. The formal elements of liberal democratic constitutionalism remain in place, but they operate differently from how they would under normal circumstances, thereby creating a "Frankenstate". Indeed, the explanation lies in the fact that informal practices constitute the root of the "suffocating" nature of such regimes. Still, laws matter. For this reason, considering the broader picture outlined above, it is necessary to address an institution that – although it possessed the legal means from the perspective of formal law, except for the competence constrains in relation to budgetary laws and substantive review of constitutional amendments – failed to prevent rule-of-law backsliding from happening: the Constitutional Court of Hungary (CCoH).

About the CCoH in a Nutshell

Right after the former constitutional majority came to power in 2010, it began reshaping the CCoH. As for its composition, the number of members was raised from 11 to 15; the nomination procedure was altered from parity to majority (but members have always been elected by the two-thirds majority of the National Assembly); the 70 years old retirement age was abolished; the term of office was raised from 9 to 12 years but without the possibility of re-election and the President is now elected by the National Assembly by two-thirds majority. In short: altering the framework by the former constitutional majority hollowed out the guarantees. As a result, 11 of the current members have been nominated and elected by the former ruling constitutional majority alone. During a brief period in which the constitutional majority was lacking, four judges were elected in 2016 with the support of a former opposition party. Now, three judges, including the President, would remain in office until 2037.

Considering these changes, one may already – and rightly – ask whether the CCoH is an independent and impartial institution that provides constitutional justice in all cases. Unfortunately, the answer is negative. At the same time, however, as is often the case in hybrid regimes, the picture is not entirely black and white. In fact, determining whether (constitutional) judicial review has become abusive is a rather complex task. Nevertheless, certain factors may be indicative, such as court packing, procedural irregularities in case handling, or abusive judicial reasoning. Regardless, similarly to the phenomenon of abusive constitutionalism, what ultimately matters is that at the end of the day, the state of constitutionalism worsens. Several authors (for example, here, here, or here) have evalu-

ated the case law of the CCoH from various perspectives and reached similar conclusions: it has failed in its mission.

The CCoH's jurisprudence, however, cannot be evaluated without considering the situation in Hungary, as outlined above. Nor can it be assessed without regard to the legal changes affecting its structure. Thus, following the contextual assessment already applied by the ECJ, reasonable doubt may arise in the minds of individuals concerning the independence and impartiality of the CCoH in politically relevant matters (as regards reviewing the merits of final rulings of ordinary courts in politically sensitive cases, see the 2024 or the 2025 Rule of Law Report).

Restoring Constitutional Justice

Addressing hybrid regimes through law is challenging, but not impossible. First, in the EU context, there is Article 2 TEU, alongside Article 7 TEU and the procedures of the ECJ. Second, the constituent power may pass a judgment on its predecessor if it has earned the right to do so. However, at least in Europe, its actions are framed. Considering the principle of non-regression, and the idea that "[r]estoring the rule of law means rejecting the root of its backsliding: the idea that the winner takes all, that the majority may rule disregarding the rights and legitimate aspirations of the minority" suggest that not every direction is permissible, and certainly not every means are acceptable. These principles are also applicable to the future of the CCoH. In Hungary today, the constituent power shall aim at restoring liberal democratic constitutionalism to which Hungary has freely and voluntarily committed itself within the EU framework, and, more narrowly, at restoring independent, impartial, and effective constitutional justice capable of constraining public power. The problematic question, however, is *how* this can be achieved.

Options without Intervening with the CCoH's Composition

A spectrum ranging from softer to harsher measures may be outlined. Importantly, the mentioned limits concerning the CCoH's competences must be lifted in every scenario. Measures that do not affect the current composition of the CCoH – but aim at enhancing the effectiveness of constitutional justice in all cases – could include the following ones (which could also be combined).

The new constitutional majority could seek the opinion of the Venice Commission concerning draft laws that do have structural significance for (restoring) liberal democratic constitutionalism or impact on the protection of fundamental rights. Thus, if the CCoH was to operate afterwards in a manner serving certain identifiable political interests contrary to the European consensus, it would have to bear the political cost of doing so.

The new constitutional majority could prescribe that the CCoH must follow the case law of the ECtHR when interpreting the Fundamental Law and, at the same time, Hungary could ratify Protocol No. 16 to the ECHR.

The new constituent power might overrule the decisions of the CCoH that are at odds with European law. However, such a move is only acceptable – and this would be the major difference compared to the previous regime – if such a breach can be established without a reasonable doubt. Also, this cannot be exercised on a regular basis.

Options that Intervene with the CCoH's Composition

Normally, the irremovability of judges is a cornerstone of the rule of law. Under EU law, it stems from Article 19(1) TEU and in the view of the ECJ, "[w]hile it is not wholly absolute, there can be no exceptions to that principle unless they are warranted by legitimate and compelling grounds, subject to the principle of proportionality." The ECtHR, following the lead of the ECJ, has taken basically the same stance. It is also clear that Article 19(1) TEU applies to the CCoH. Moreover, should any measures affect the retirement age, anti-discrimination law would also become relevant.

Second, Articles 6, 8 and 10 of the ECHR may be considered. In relation to employment disputes concerning civil servants, the *Vilho Eskelinen* test should be recalled as it determines when Article 6 may not be applicable. Inapplicability only stands if

national law expressly excludes access to a court, and that exclusion is justified on objective grounds in the State's interest. In connection with Article 8 and 10 ECHR, the tests of lawfulness, legitimate aim, and necessity must be met to find an interference acceptable. The ECtHR, concerning the dismissal of constitutional judges from office noted that "utmost caution and detailed reasons are particularly crucial with regard to the dismissal of Constitutional Court judges and in circumstances where the decision to dismiss them is taken by Parliament." It should also be recalled that the Venice Commission, in connection with the restoration of the rule of law, emphasises: in such situations a holistic approach must be followed, especially when changes concern the composition of the courts; reforms should address systemic flaws; and they should not re-create the previous system, but establish a better one.

In view of these, there are basically four options as regards intervening with the current composition of the CCoH but only the last two ones might be in line with the European standards.

First, the new constitutional majority could simply replace one or more members. However, this move would not improve the situation; rather, it would apply the same winner-takes-all approach that characterized the previous hybrid regime.

Second, the new constitutional majority might reintroduce 70 years retirement age and as such, create vacancies. While this would mean returning to the pre-2013 regime, this option is not problem-free either. Lowering the retirement age may be justified, for example, by social policy considerations, implemented gradually. However, it has not been tested under European standards whether it is acceptable – proportionate – if it serves to counter previous manipulations with the composition of the court.

Third, the CCoH could be abolished altogether claiming that this model simply did not work in Hungary. Instead, the judiciary, or a chamber within the *Kúria*, could provide constitutional justice. While this option could be – in principle – justifiable on part of the constituent power, it must not be implemented without thorough evaluation and perhaps even a complete constitutional reset. Also, ineffectiveness stems from the attitude of the CCoH not from its competences, except for the mentioned limits. In any case, abolishing the CCoH and transferring the power of constitutional review to the *Kúria* within a relatively short time would most probably eliminate constitutional adjudication as we know it for the foreseeable future. As such, this seems to be a high price for the change in the composition of the CCoH.

Lastly, the constituent power may declare – considering the outlined contextual factors – that the CCoH, in its current composition, has failed in its task of providing constitutional justice in all cases and counterbalancing public power. As such, the composition shall be changed. In this scenario, the compliance with European standards depends on the *how*. To begin with, the *modus operandi* must not follow a winner-takes-all approach. The new composition would have to be structured with the involvement of the political opposition, perhaps through a parity-based nomination system or by electing members with a four-fifths majority in the National Assembly. As the opposition could refuse to cooperate, a carefully designed anti-deadlock mechanism should be introduced. For example, after two rounds, the threshold could be lowered to a two-thirds majority. Also, the nomination process could be diverse. Namely, some of the members could be nominated by a consortium of law faculties and the Hungarian Academy of Sciences, some by the judiciary, and some by the National Assembly (in a way mentioned before). It may make this option even more justifiable if the four current members of the CCoH who were elected on a by-partisan compromise would not be removed. A staggering mechanism – most probably by a lot – should be added to not have vacancies of the whole institution at the same time. Moreover, the current members of the CCoH shall have the opportunity to get nominated. Also, the current members should keep their benefits for a sufficiently lengthy transitory period.

Lastly, it should be mentioned that under the CCoH Act the plenary session decides on the exclusion of a member of the CCoH without the possibility of judicial remedy. This factor, in combination with the

already elaborated justification, suggests that the *Vilho Eskelinen* test regarding the inapplicability of Article 6 ECHR might be met.

Takeaways

Restoring liberal democratic constitutionalism, and more narrowly constitutional justice in Hungary, is complex and challenging. Also, in a transition process after hybrid regimes trade-offs are inevitable. That said, it must be done but in line with European constitutionalism. Options can be put on a scale but one shall remember: the honest narrative is that the root of the problem is the current composition of the CCoH stemming from the winner-takes-all approach of the previous regime. The constituent power has the mandate to change the system but only for the better and only in certain ways. Taking everything into consideration, the lastly sketched possibility might be the way to go. Such a move has not happened in Europe but on the other hand, such a scenario has not occurred either. Under normal circumstances it would not be acceptable and again, the compliance with European standards ultimately depends on the *how*: the reform can only enhance the independence and impartiality of the CCoH and, as such, restore constitutional justice in Hungary.

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SUGGESTED CITATION

Detre, László: Restoring Constitutional Justice in Hungary: It Shall Be Done – But It Shall Be Done in a (European) Constitutional Manner, Verfassungsblog, 29.05.2026, doi: 10.59704/bff851e1c390a587.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260529-173516-0.