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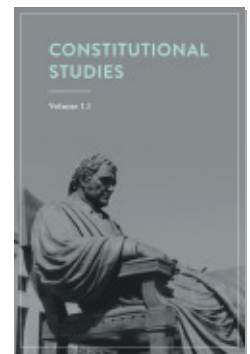
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Constitutional Court between 2010 and 2014

Zoltán Szente

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# THE POLITICAL ORIENTATION OF THE MEMBERS OF THE HUNGARIAN CONSTITUTIONAL COURT BETWEEN 2010 AND 2014

ZOLTÁN SZENTE<sup>1</sup>

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## ABSTRACT

The article explores the political orientation of the members of the Hungarian Constitutional Court between 2010 and 2014, when the government had a two-thirds majority in Parliament, and, thereby, was able to influence the composition and the operation of the Court. First, the study describes the basic features of the Court as it was established at the dawn of the transition to democracy in 1989/1990. Then it analyses the institutional changes shortly after the overwhelming election victory of the conservative right in 2010, specifying the measures which dismantled the guarantees of the organisational and political independence of the Court. In the third part, the author presents an empirical research about the political orientation of the judges. He shows that constitutional judges vote more or less consistently for their nominating (left-liberal or conservative) party. Zoltán Szente argues that the most plausible explanation for the extremely strong correlation between the voting behavior of the judges and the political standpoints of their nominating parties is the political orientation of the members of the Court: the judges support the

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1. Zoltán Szente is a professor of law at the National University of Public Service, Department of Constitutional Law, and a Research Chair, at the Hungarian Academy of Sciences, Institute for Legal Studies, Budapest, Hungary.

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political parties that nominated them, because they agree with policy or ideology of these parties.

KEY WORDS: *Hungarian Constitutional Court, Political Orientation of Judges, Constitutional Jurisprudence, Empirical Research on Judicial Behavior, Political Bias*

## INTRODUCTION

According to the traditional view, judges make their decisions only on the basis of what the law says. As Montesquieu famously said, the judges are “only the mouth that pronounces the words of the law” (Montesquieu 1980, 487). It is quite usual to take “judicial argument seriously as one of the major, if not the sole determinant of the decisions courts make” (Robertson 2010, 21). We can easily believe that this assertion was founded by judges, who did not want to seem to be politicians. However, the classical approach that only legal arguments are used in judicial decisions is no longer a universally accepted conception. Today, “there are probably no political scientists who would seriously suggest that judgments of constitutional courts can be unambiguously explained by the law” (Annus 2007, 24). The presumption of the politically neutral and impartial decision-making process, in which the moral value judgments of the judges do not have any role, is strongly needed for accepting the vast and legally uncontrolled power wielded by the constitutional courts. If we do not share this belief, it is hard to approve that an aristocratic and politically non-responsible body may repeal the policy decisions of the democratically elected representatives of the people on the basis of general and frequently elusive phrases of the constitution. The vision of the wise and unselfish judges who, taking apart their personal attitudes and feelings, always decide solely in behalf of the community, is a nice idea, as far as it seems to be from reality, at least in contemporary Hungary.

In general, constitutional law applies formal rules to legal institutions for many reasons. In the case of constitutional courts, for example, procedural guarantees, incompatibility rules, and other prescriptions are adopted for safeguarding the independence, impartiality, and legitimacy of these bodies, protecting them from external and unauthorized interventions of, among other things, politics. This formalism is often criticized by many as inadequate in a number of cases, and imperfect for attaining the goals for which it was adopted. These criticisms might sometimes be true, but the recent history of the Hungarian Constitutional Court provides an excellent example of how the destruction of these formal rules and institutional guarantees leads to the decline of the importance of a constitutional body, and, by this way, how the level of legal protection of rights and freedoms erodes. In addition, this special case exemplifies the way a strong, effective, and independent

counterbalance of the political power has been successfully neutralized or even occupied by a political supermajority in a consolidated democracy.

In any case, the question of whether the constitutional courts are political or strictly legal institutions (i.e., whether they may or may not legitimately use extra-legal—moral or political—arguments in their decision-making process) cannot be decided on a very formal basis, considering only their legal status or regulation, which highlights everywhere the independence, political neutrality, and impartiality of these bodies. Despite the clear legal status of the constitutional courts, there may still be some reasonable doubts as to whether a body can really make its decisions solely on legal/constitutional grounds, when its members are elected or appointed by politicians among their allies in order to decide the most important political controversies without any democratic accountability.

In the literature, there are three major theories of the decision-making of constitutional courts, which explain judicial behavior in different ways. Nevertheless, very recently, a new approach has emerged, as some scholars try to integrate the well-established theories.

The most traditional approach is the legal model, which was dominant for a long time. It postulates that judicial decision-making is based on legal reasons and considerations. When the court makes a decision, it takes only the facts of the case and the relevant law into account (Pacelle, Curry, and Marshall 2011, 32). The constitutional judges' activities differ from that of the elected officials' who bear political responsibility and make public policy. Even if we place the judiciary in political context, the judge still remains different from the legislator or other policy-maker, because the judge cannot choose so freely from the alternatives as the politician does. Thus, although constitutional interpretation usually provides some room for discretion, it is still judicial discretion, not policy-making (Pritchett 1969, 49).

The conventional approach has been sharply questioned by the so-called attitudinal model which openly criticized the “myth” of objective and impartial judging. While the well-known legal theories most often discuss normative requirements and rules, the ambition of the attitudinal doctrine is to explain the motifs and background of judicial behavior (Friedman 2005, 258–259). The attitudinal theory claims that judicial decisions are determined mostly (or exclusively) by the personal attitudes and preferences of the judges. In fact, judges follow their own policy goals (Segal and Spaeth 1993, 69; 2002, 86; Spaeth 2008, 760). The attitudinal model strongly relies on empirical surveys, seeking independent variables of the decisions of the individual judges.

Nevertheless, the convincing empirical evidence of the effects of personal preferences, attitudes, and ideological inclinations of judges has not persuaded

everybody. The advocates of the so-called strategic model of judicial decision-making emphasize the importance of other circumstances which can influence how judges decide (Spiller and Gely 2008, 41). Usually, the core thesis is that judges are motivated not only by their attitudes but by the fact that they think in a strategic way. As they are rational actors, they consider the reactions of other stakeholders to the court's decisions, and they take into consideration the institutional context of the particular cases. This theory often distinguishes internal factors (e.g., interpersonal relationships within the bench) and external impacts (e.g., the willingness of other power branches to execute the Court's rulings) (De Visser 2014, 334–337; Vanberg 2005, 14, 175).

Finally, it is worth referring to some new attempts to integrate the traditional approaches. The common starting point of the former ones is that although all conventional theories have some explanatory power, none are able to provide a comprehensive explanation for the decision-making process of constitutional tribunals. The typical method of the integrative theories is that the influencing variables are defined at various (micro, meso, and macro) levels,<sup>2</sup> and these theories always derive the factors affecting the final decision from the concrete institutional, legal, and other contexts. In this way, it is the common feature of these approaches that they do not exclude the possibility of the recognition of any potential impacts.

In this study, I examine whether political influences can be identified in the jurisprudence of the Hungarian Constitutional Court between 2010 and 2014, when the government coalition had a two-thirds majority in Parliament. For this purpose, I will analyse systematically the “voting behavior” of the constitutional judges. In particular, I am primarily interested in the significance of their political orientations, as we can draw some conclusions about the political preferences, attitudes, and ideologies of the individual judges if we compare their views represented in the Court with the positions of the political camp which had nominated them. In the context of judicial behavior, the “political orientation” of the judges means their support for particular political ideologies, values and attitudes, and/or political organisations. Political orientation is an explanatory variable of the “politically biased” judicial decisions or standpoints which embrace all judicial opinions or votes that cannot be justified purely by legal arguments, but they reflect—partly at least—the personal political preferences or value judgments of the judges.

First, I describe the basic features of the Hungarian Constitutional Court as it was established at the dawn of the transition to democracy in the 1980s and

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2. The various authors define these factors in different ways. See for example Dyevre 2010, 317–318; Pacelle, Curry, and Marshall 2011, 49–50.

1990s. Then I will analyse the institutional changes shortly after the overwhelming election victory of the conservative right in 2010, specifying the measures which dismantled the guarantees of the organisational and political independence of the Court. Finally, I will examine the practical effects of these actions have had so far on the behavior of the judges of this Court.

## I. THE GENESIS AND THE FIRST TWO DECADES OF THE HUNGARIAN CONSTITUTIONAL COURT

Before 1990, constitutional review had no traditions in Hungary. Although a so-called Council of Constitutional Law was set up in 1983, it had no power to annul unconstitutional statutes. The Constitutional Court was one of the new institutions established by the constitutional amendment of 1989. During the roundtable negotiations, both sides saw it as a guarantee for democracy, and, since then, the nomination has always been a complicated political bargaining process.

The distrust of judges by the communist party-state and the political mistrust between the negotiating parties during the transition period led to establishing an independent constitutional court with wide-ranging responsibilities. Basically, the Court was established on the pattern of the German *Bundesverfassungsgericht* (Halmai 2007, 693), establishing a “European” or “Kelsenian” model, that is a centralised system of constitutional review<sup>3</sup>: the Constitutional Court has exclusionary power to examine the constitutionality of legal acts through abstract judicial review.

The main task of the Constitutional Court was the *ex post* judicial review of legal rules. Since anybody could submit any statutory act to the Court for review (*actio popularis*), virtually all important laws landed before the body. In certain areas, *ex ante* examination of the constitutionality of legal acts (e.g., international treaties) fell also within the competence of the Court, which was also empowered to investigate conflicts between international treaties and the national law. The Court decided on individual constitutional complaints too, but in fact, this was an indirect judicial review of the statutes on which the individual judicial decisions were based.

The Court was established as a quasi-judicial organ; though it bore some characteristics of judicial tribunals (like the structural independence or the irremovable status of the judges), other classical judicial principles and guarantees were missing in its procedure (there is no adversarial procedure, for example) (Sólyom 2001, 114–115; Sólyom and Brunner 2000). The body consisted of eleven members, who were elected by a qualified majority of Members of Parliament (MPs).

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3. On the major characteristic of this model, see Favoreu 1986, 16–31.

Parliament elected members of the Constitutional Court from among learned theoretical jurists (university professors or scholars having a doctorate degree from the Hungarian Academy of Sciences) and lawyers with at least twenty years of professional experience. They were elected for nine years and could be re-elected once. Although there were strict incompatibility rules, the objective of which was to keep party politics separate from the Court,<sup>4</sup> the way of selecting its members (i.e., parliamentary nomination and election) brought the body close to party politics; actually, during its existence, only two or three judges were all-party candidates, while most justices were nominated by the government or the opposition parties.

From 1990 on, the Constitutional Court established a rich and extensive jurisprudence; virtually, it had dealt with almost all classical issues as is usual in those western countries which have much longer constitutional traditions. Undoubtedly, the Court reached a pre-eminent position in the Hungarian constitutional system and had a great performance in elaborating and standardizing the living constitutional law. It is a commonly shared view among scholars that the Court, in the first nine years of its operation (which period is generally called *Sólyom* Court after its first president) followed a strongly “activist” practice, relating both to its jurisdiction and to interpretive practice (Halmai 2002, 189–211; Schwartz 2000, 87–108).<sup>5</sup> There is good reason to think that this activism was, to a degree, unavoidable; just as every attempt between 1990 and 2011 to make a new constitution proved to be unsuccessful, the legislature was not able to resolve certain constitutional conflicts, and it failed also to correct or modernize those basic institutions the regulation of which demanded a qualified majority in Parliament. Thus, the Court was the only institution to have enough power to solve the great constitutional (and, often, political) conflicts at a time when the institutional setting was paralyzed.<sup>6</sup> The Court did not hesitate to play this role; since, from the very beginning of its existence, the

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4. E.g., the members of the Constitutional Court may not pursue political activities or make political statements, and only those can be elected who have not filled leading political or governmental positions in the former four years.

5. In Hungarian literature, the term “jurisdictional activism” refers to the efforts of the Court to extend its powers, while “interpretive activism” means the practice that relies on extraconstitutional sources in the Court’s reasoning.

6. It is sure, however, that the Court acted as on a sovereign, quasi-lawmaker power in legal areas where it could also have grounded its reasoning on a well-established and crystallized body of law. The Court’s conceptual innovations have extended, for example, to criminal procedure and private law, stressing that constitutional concepts of property or guarantees of criminal law are independent from traditional approaches. See e.g. Balogh 2000, 123.

Court has made clear that the general and abstract concepts of the Constitution are not dead letters but real and living rules, and it is the primary task of the Court to determine and set out the exact content of these provisions from case to case. Although the Court was frequently criticized for its jurisdictional and interpretive activism, this conceptual approach soon became widely accepted, at least for two reasons. Firstly, all political actors believed that even the considerably revised constitution would only be a transitional one, as its preamble said, “in order to facilitate a peaceful political transition to a constitutional state”. The Parliament established the new text of the basic law, “until the country’s new constitution is adopted”. Secondly, due to the growing hostility between the rightist and leftist parties, there was no real chance for putting the issue of the new constitution on the political agenda, neither was it seen as an exigent political question; the most important modifications (which were necessary for Hungary’s accession to the NATO in 1997 or the European Union in 2004) were adopted, and the activist jurisprudence of the Constitutional Court filled the gaps of the old constitution.

Finally, the behavior of the Court was basically influenced by the dispute resolution approach of constitutional review, shared by the majority of the first Court. According to this view, the Court should decide all constitutional controversies which were submitted to it, rather than escape from the responsibility of the ultimate decision. The Court tenaciously persisted in this view throughout its working.

The Hungarian Constitutional Court regarded the Constitution as a holistic unity of principles and rules. This approach paved the way for the concept of the “invisible constitution”, even if it emerged firstly in a concurring opinion of the first president of the Court, László Sólyom.<sup>7</sup> According to this theory, the invisible constitution embraces all the background or underlying principles that are necessary to understand the written constitution and makes a coherent body of constitutional law. It is to be noted that in the post-Sólyom era, the Court began to change its earlier activism, moving in a self-restraining direction. This image of moderate judicial behavior was strengthened as landmark decisions have already been taken earlier, and the Court frequently has sought middle-way solutions in the remaining hard cases. But the body, even if in a quiet way, continued its eclectic interpretive practice and largely based its jurisprudence on earlier decisions (Szente 2013).

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7. Decision No 23/1990. (X. 31.) of the Constitutional Court, and Sajó 1995.



## II. INSTITUTIONAL CHANGES SINCE 2010

The general elections of 2010 brought about a landslide victory for the conservative parties that had been in opposition for eight years beforehand. The main government party, the Fidesz and its satellite coalition partner, the Christian Democrats, owing to the disproportionate election system, gained a two-thirds parliamentary majority. Although the question of a new constitution was not a featured issue in the election campaign, the new coalition felt that their election victory provided a proper mandate for them to reorganise the whole state, including accepting a new basic law. The old constitution was replaced by a new one in the spring of 2011. But the new constitution has suffered the great and hardly remediable defect of being a partisan constitution, in a sense that the basic rules of the game were set unilaterally by the government majority. The circumstances of the constitution-making process might raise the issue of legitimacy, even if the Fundamental Law was approved by the two-thirds majority of the National Assembly, as required by the old constitution. Nevertheless, the original constitutional function of this majority requirement, namely enforcing a compromise between the government and opposition of the day, could not prevail because the government parties themselves were able to provide the formally necessary majority.<sup>8</sup>

Besides the legitimacy problems, the content of the Fundamental Law also generated huge conflicts in inner politics and heavy criticism in international fora. The curious paradox of the new constitutional regulation on the exercise of public power is that, while the state organisation system has changed only moderately, it has had significant political impacts in practice. In general, it can be said that the institutional balances of executive power have considerably weakened: some of the balances have lost their independence or some of their control powers.

All these defects and problems affected the Constitutional Court, which was for two decades the most effective and strongest counterbalance of the Executive. Just a few months after its formation, the new government, based on its two-thirds parliamentary majority, transformed the way of nominating Constitutional Court judges, practically introducing partisan elections of the members of the Court. Until the new regulation, the parliamentary majority and minority had been forced to compromise on the new members of the Court, as the composition of the parliamentary committee responsible for nominating Constitutional Court judges had

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8. It is to be noted also that the opposition parties, with the exception of the extreme right *Jobbik*, boycotted the parliamentary discussions of the new constitutional text, saying that they did not want to assist in the backsliding of constitutional democracy.

been based on parity between the government and opposition parties, thus each candidate had to gain the support of both sides. According to the new rules, a parliamentary committee, composed in proportion to the members of the parties represented in Parliament, propose candidates, who are elected by Parliament with a qualified majority of two-thirds. In this way, the Fidesz government, enjoying such a parliamentary majority since autumn of 2010, has been able to appoint solely its own people to the Constitutional Court.

Besides all these changes, the number of constitutional judges was increased from eleven to fifteen. Although the explanation of this measure was to help the Court tackle its workload, which was expected to grow in parallel with the Court's new function of handling constitutional complaints, the measure was really a "court packing", as the government majority exploited the possibility to choose the new judges without opposition input. Thus, in 2010, two, and in the spring of 2011, five more justices were elected by the government party's MPs, ignoring the protest of the opposition parties.<sup>9</sup> In this way, the government managed to place its loyal supporters on the Court, who reached a stable majority of the Court's members. As a matter of fact, all the nine new judges elected since 2010 were chosen by the government majority (see Table 1). This was possible because the law on the Constitutional Court contains a "cooling period" of four years only for leading officials of political parties as well as members of the government before they can be elected as judges to the Constitutional Court, but this incompatibility rule does not extend to party membership or parliamentary mandate, which means that even front-runner party politicians or backbenchers cannot be kept from the Court.

This partisan control of the Court was extended by the new Fundamental Law, empowering Parliament to elect the head of the Court (before that, he or she was elected by the justices themselves).<sup>10</sup> The president of the Constitutional Court is elected by the Parliament as in some other countries, like Germany; still, this idea was strange in the Hungarian context, where the government parties themselves may decide who will chair the body without any compulsion to compromise with the opposition.

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9. One of the reasons for the protests was that some nominees failed to meet qualification conditions set by law.

10. The political motivations for these changes can be demonstrated by the fact that the changes were enacted by modifying the old constitution, that is, not waiting for the effect of the new Fundamental Law. Otherwise, the Constitutional Court, in its old composition, would have been able to decide on some politically hot issues, and elect its own president for another three years.

**TABLE 1.** The division of members of the Court according to the parties nominating them before July 2010 . . .\*

Left	Consensual	Right
András Bragyova, András Holló, László Kiss, Miklós Lévay	Péter Paczolay	Elemér Balogh, Péter Kovács, Barnabás Lenkovics, László Trócsányi
<b>Total</b>		
4	1	4

\*There were two vacant positions when the new government was formed in 2010.

**TABLE 2.** . . . and after July 2010\*

Left	Consensual	Right
András Bragyova, László Kiss, Miklós Lévay	Péter Paczolay	Elemér Balogh, <i>István Balsai, Mihály Bihari, Egon Dienes-Oehm, Imre Juhász, Péter Kovács, Barnabás Lenkovics, Béla Pokol, László Salamon, István Stumpf, Péter Szalay, Mária Szívós</i>
<b>Total</b>		
3	1	11

\*The members elected after July 2010 are marked in italics

All these changes badly violated the independence of the Constitutional Court, as the goal of the special selection method of judges is just to guarantee the political neutrality and legitimacy of the Court. In contrast, the new regulation provides a unilateral and unjustified influence on the composition of the Constitutional Court from the executive branch. From a constitutional point of view, this is a self-contradiction, as one of the main functions of the Court should be the control and counterbalance of the executive. The only positive changes were the abolishment of the possibility of re-election for Constitutional Court judges and the simultaneous extension of the term of office for judges from nine to twelve years.

Besides these measures, when the Constitutional Court had declared unconstitutional and annulled a law that imposed with retroactive effect a ninety-eight percent tax on extreme severance payment, the government majority immediately curtailed the Court's most important power of constitutional review.<sup>11</sup>

11. The political pressure proved to be partly successful; after repealing two versions of the retroactive legislation introducing ninety-eight percent tax for earlier incomes [Decisions No 184/2010. (X. 28.)

Since then the Court has only been able to review and annul budgetary laws and acts on taxes, duties, pensions, customs or any kind of financial contributions to the state if they violate the right to life and human dignity; the right to the protection of personal data; freedom of thought, conscience, and religion; and the rights related to Hungarian citizenship. At first sight, this truncation of the Court's powers was only political revenge for an unfavourable decision, but it proved to be part of a long-term strategy to neutralize the Court's controlling role. One of the major instruments of the government coalition's financial recovery programme was to nationalize private pension funds, also expropriating their savings. Allegedly, if this measure was repealed as an unconstitutional one (feasible in normal circumstances), the budgetary deficit would jump to about seven percent instead of the three percent that Hungary undertook to keep as an EU member.

In spite of promises that this limitation on the jurisdiction of the Court would be only a short-term solution, it was put in the new Fundamental Law as well, which stipulated that this restriction of the Court's power will last as long as state debt exceeds half of the GDP. Although pulling some issues out from judicial review is not unprecedented in Europe (Wheare 1966, 102), since constitutional review is an institutional guarantee of the rule of law, its elimination, even only for a deemed transitional period, brings up the assumption that constitutional constraints on the executive power can be put aside in economically difficult times.

In addition, the so-called *actio popularis* (i.e., everybody's right, even without any personal interest, to turn to the Court to review the constitutionality of a statutory act) was abolished, though it had been the most effective tool to launch a judicial review procedure in constitutionally controversial cases for a long time.

Nevertheless, the Constitutional Court has been compensated to a degree for the loss of its fundamental power; the new constitution, on German pattern, introduced the politically neutral institution of individual constitutional complaint.

The fourth amendment of the Fundamental Law in March 2013 struck the final blow on the Court's independence, repealing all Constitutional Court rulings prior to the entry into force of the new Fundamental Law.<sup>12</sup> The goal of the

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and 37/2011. (V. 10.) of the Constitutional Court] the Court finally approved of a third law, declaring the constitutionality of the retroactive taxation if it extends only to the beginning of the current tax year.

12. It is worth noting here that this constitutional amendment virtually overturned a lot of decisions of the Court, as it incorporated many things into the constitutional text that had been objected to by the Court in its earlier rulings.

government majority was clear: to compel the Constitutional Court to change its jurisprudence, adapting it to the values of the new majority.<sup>13</sup>

### III. EMPIRICAL RESEARCH ON THE POLITICAL ORIENTATIONS OF THE CONSTITUTIONAL JUDGES IN HUNGARY

While the formal safeguards for the institutional independence of constitutional tribunals cannot guarantee the political neutrality of these courts in every case, the recent trends in the jurisprudence of the Hungarian Constitutional Court provide a good opportunity for studying how the absence or distortion of these rules affect the interpretive practice of such a court. Notwithstanding, the real political attitudes of judges can hardly be measured with scientific accuracy. Even if the members of the Constitutional Court have political commitments and prejudices, they always deny them vehemently. Despite these obvious problems, the behavior of the judges can exactly be measured through classifying their positions in the Court's rulings, from which strong consequences can be drawn for their motives in exercising their high office.

#### A. Method

To achieve this goal, I made an empirical study examining the correlation between the voting behavior of the judges as the dependent variable and the political view of the political camps (governmental or opposition parties) that nominated the judges as the independent (explanatory) variable. In other words, I am interested knowing whether the members of the Constitutional Court meet the probable expectations of the parties which supported them in the nomination process. It is to be noted that in the Hungarian context, "voting behavior" is not a precise definition, because, while the Constitutional Court holds official voting on the merit of every case before it, the results of these votes are not public, and those judges who did not agree with the majority are not obliged (but are allowed) to prepare a dissenting opinion. Thus I reconstruct the judges' opinions, including concurring and dissenting opinions, from the final decisions of the Court, as published by the Official Gazette. Therefore, whenever I say "voting behavior" of the judges, I refer to their published position which is either confirmatory (joining the majority decision) or dissenting (attaching a dissenting opinion to the Court's ruling).

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13. Most of these changes attracted heavy criticism not only in academic literature (see e.g. Müller 2011, 7; Bánkuti, Halmai, and Scheppele 2012b, 139–140; Jenne and Mudde 2012, 148, 152), but in international organisations (see e.g., Venice Commission) as well.

If the quantitative analysis shows a very strong correlation between the voting behavior of the judges and the positions of their nominators (in the same cases), it is enough evidence of the political orientation of the judges concerned.

I examined the constitutional review cases between 2010 and 2014, when the Court reviewed statutes or other legal acts approved by the new government majority. These rulings were adopted by the Constitutional Court mainly as the result of so-called abstract constitutional review, with the exception of some cases when the Court reviewed the constitutionality of a law in the course of constitutional complaints. Among these decisions, I took into account only those which were made by the full Court and in which the final vote was divided, because only these inform us about the ideological, political, or professional cleavages of the judges. Between the summer of 2010 and 2014 a total of thirty-seven cases met these criteria, of which twenty-nine rulings were made in constitutional review cases while eight decisions were taken in constitutional complaint procedures.

The selection of constitutional review cases has only instrumental function; the underlying presumption is that more often than not these have serious political implications. If the constitutional judges really have political preferences and policy goals, they can pursue them through these procedures. Although the political importance of various laws can be largely different, it is undeniable that most statutes that gave rise to constitutional disputes and were brought to the Court were highly important in those turbulent times. Between 2010 and 2014 the government majority approved a new constitution (Fundamental Law of 2011) and deeply transformed the whole legal system and the market economy. In this period, the Constitutional Court reviewed statutory acts regulating the liberty of conscience and the legal status of churches, the freedom of the press, the legal definition of families, the legal guarantees of judicial independence, the electoral system, the standing orders of Parliament, and other hot topics of politics and controversial moral questions. Under such circumstances, upholding of the constitutionality of disputed laws, or, conversely, the invalidation of them, even if only in formal sense through a constitutional review, could have demonstrated the political orientation of the judges—as long as this behavior was permanent and consequent. In fact, tendentious behavioral patterns are only proxy variables (Landfried 2006, 229–230; Spaeth 2008, 760), as the judges—understandably—always deny charges of political bias. On this ground, I coded pro-government standpoints with “1”, while opposition “votes” were indicated by “0”.

Although the cases examined here amounted only to a part of all cases with which the Court dealt in this period, every constitutional review was taken into account, so in this sense, the survey was complete.

In some cases, I cleaned the data; when the majority annulled some irrelevant small details of a law or when it approved the objective substance of the legislation under review, I counted the case as indicative of a pro-government viewpoint, provided that the minority would invalidate the whole law or its essential parts. Furthermore, sometimes those judges are on the same side, writing dissenting opinions to the ruling of the Court, for example, who really occupy extremely different positions in the particular controversy. The same instrument can be used to different purposes. Thus, when some judges may oppose the majority decision arguing for the overrule of a law because of its alleged unconstitutionality, others might write dissenting opinions for the full protection and upholding of the same legal act. In all such cases, the proper classification can be made only by qualitative analysis of the reasoning behind the judges' votes.

The applied methodology may raise some theoretical difficulties; ignoring consensual decisions, for instance, can conceal the judges' willingness to build compromises rather than insisting on a special political stance. To put it differently, the unanimously adopted Court rulings can give information about the judges' non-partisan attitudes, as the divided decisions can do for the opposite attitude. The high number or proportion of consensual rulings may be suitable to prove that members of the Constitutional Court do not form their own judicial opinions on political grounds, even if typical or recurring disagreements can occur.<sup>14</sup> But it was not the case for constitutional review after 2010. In most of these rulings, there were dissents, so divided voting was typical, unlike consensual voting.<sup>15</sup> So it is justified to draw the reverse conclusion: those few decisions, which were passed unanimously, cannot prove the political neutrality of the judges.

Another methodological consideration might be whether the constitutional review cases really have political implications from which the political orientation of judges can be inferred. To accept the constitutionality of a law is not the same as to support it in political terms.

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14. This argument is, however, questionable because even a high proportion of unanimous decisions in itself would not indicate the political impartiality of the Court, as the Hungarian Constitutional Court cannot exclude the clear-cut or easy cases in which unanimous rulings should be made.

15. In the period under investigation, the Court issued only nine unanimous decisions (17.6% of all cases) of which seven rulings could be taken account applying the method of data cleaning (i.e., excluding the decisions about the same object). The major trends and indicators would have not changed significantly even if we would have calculated the unanimous decisions (in the extreme cases, the individual indicator would shift from 0.966 to 0.971 for judge Balsai, from 0.027 to 0.151 for András Bragyova, while the change would be minimal even in the case of the most balanced chief judge Péter Paczolay (0.432 and 0.478, respectively).

Nevertheless, the adoption of laws always requires political will behind them. In addition, the divided decisions of the Constitutional Court were made almost always in cases which have caused sharp political conflicts and confrontation between the government and opposition parties. Most of the legislation has raised serious constitutional concerns and has been criticized by a number of international organisation like various EU institutions or the Venice Commission of the Council of Europe, on the grounds that these laws brought about different constitutional problems from restrictions on freedom of the press and public media to the violation of the independence of the Judiciary.

So the argument is that if the viewpoints, represented by a judge in a whole series of the particular cases which are so extremely different in nature, strongly support the political side which nominated him, then the only plausible explanation for it is the background political orientations of the individual members of the Court.

## B. Analysis

In the period under review, there were altogether eighteen members of the Court.<sup>16</sup> Seventy percent of them were candidates of the conservative parties, four judges were elected after nomination from the left-liberal parties, while only one joined the body as a compromise candidate. It is to be noted that, whereas until 2010 the candidates had been only loosely linked to the parties nominating them, after the change of government in that year, the new members' linkages were much more direct and revealed. For example, one of the new judges was a minister in the first Orbán government between 1998 and 2002 and an adviser to the Prime Minister just before his nomination in 2010, while three other new judges were earlier MPs of the conservative coalition. In 2011, for the first time, a politician directly replaced his parliamentary mandate with the judicial robes (and another politician followed suit in 2012). Moreover, some of the new members of the Court had not been backbenchers in their parties but were influential and veteran party politicians who were directly involved in the ideological struggles of the political sphere.

Analysing the voting behavior of the judges, it is striking what a high proportion is of those cases in which the judges voted in favor of the political side that had nominated them. The record of those judges who were nominated (or, after

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16. One of them, Mihály Bihari, the president of the Court between 2005 and 2008, for his first mandate between 1999 and 2008 was nominated by the leftist Hungarian Socialist Party. Another member, judge László Trócsányi, in October 2010 became the Minister for Justice of the Orbán government, so his record could not be evaluated throughout this study.



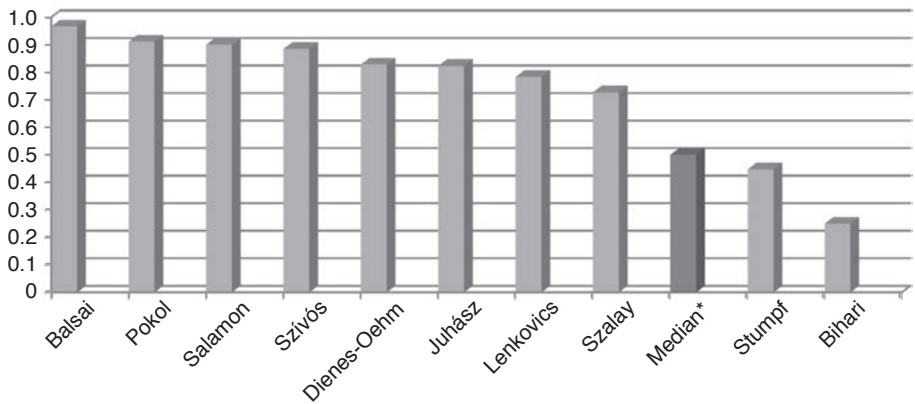
**TABLE 3.** The rate of support for the government’s policies through the voting behavior of the judges nominated by the rightist parties

Judges	Proportion pro government
<i>István Balsai (30)</i>	0.966
<i>Béla Pokol (34)</i>	0.911
<i>László Salamon (20)</i>	0.9
<i>Mária Szívós (35)</i>	0.885
<i>Egon Dienes-Ohm (35)</i>	0.828
<i>Imre Juhász (17)</i>	0.823
Barnabás Lenkovic (37)	0.783
<i>Péter Szalay (33)</i>	0.727
Elemér Balogh (37)	0.432
<i>István Stumpf (36)</i>	0.447
Péter Kovács (36)	0.361
<i>Mihály Bihari (12)</i>	0.25

Judges elected after July 2010 are in italics. The number of decisions in which the judge took part are in parentheses.

2010, practically appointed) by the rightist parties, shows that the judges really support the conservative government’s policies which emerge in laws reviewed by the Court. These members of the Court usually uphold the constitutionality of the newly adopted legislation, whatever its subject-matter is. Table 3 quantifies the extent to which the judges nominated by the rightist parties supported the government’s policies on a scale where “1” would mean the uphold of all new legislation, while “0” indicates the rate of denial.

It is clear that the newly elected judges are more loyal to the government’s policies, compared to the older ones, upholding the vast majority of the laws of the new government (see Figure 1). In fact, the three former members of Parliament (MP) unconditionally supported the constitutionality of all government sponsored laws. Actually, if we take only the judges elected after the conservative political turn (with the sole exception of Mihály Bihari who had been originally a Socialist MP and constitutional judge candidate between 1999 and 2008), there is an eighty-one percent chance that the new judges (nominated by the new selection system) will support the government side, regardless of the matter in the particular cases.



**FIGURE 1** The rate of pro-government votes of the judges elected by the new government majority between 2010 and 2013

\*For all possible opinions.

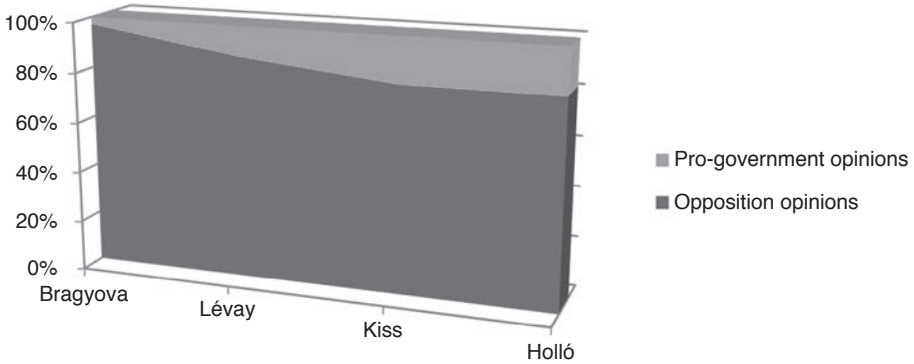
Similar tendencies can be observed in the case of those judges who were nominated by the leftist parties as Table 4 shows. In these cases, the probability that the leftist judges will vote against the constitutionality of any new legal act in the future is even higher than the support from rightist-nominated judges: eighty-five percent (Figure 2). In all likelihood, the behavior of these members of the Court was pushed towards a steady opposition by the emergence of the new generation of conservative-rightist judges.

The political orientation of the judges is also spectacular if we take our complete ranking according to their voting behavior in upholding or rejecting the constitutionality of the legislation of the new government in constitutional review cases.

All these results show that most members of the Constitutional Court follow the views of those political camps which nominated them.

**TABLE 4.** The rate of support for the government's policies through the voting behavior of the judges nominated by the leftist parties

Judges	Proportion pro government
András Bragyova (36)	0.027
Miklós Lévy (37)	0.135
László Kiss (27)	0.222
András Holló (18)	0.222



**FIGURE 2** The rate of pro-government and opposition opinions of judges nominated by left-liberal parties, 2010–2014

**TABLE 5.** Absolute ranking of the judges according to their voting behavior

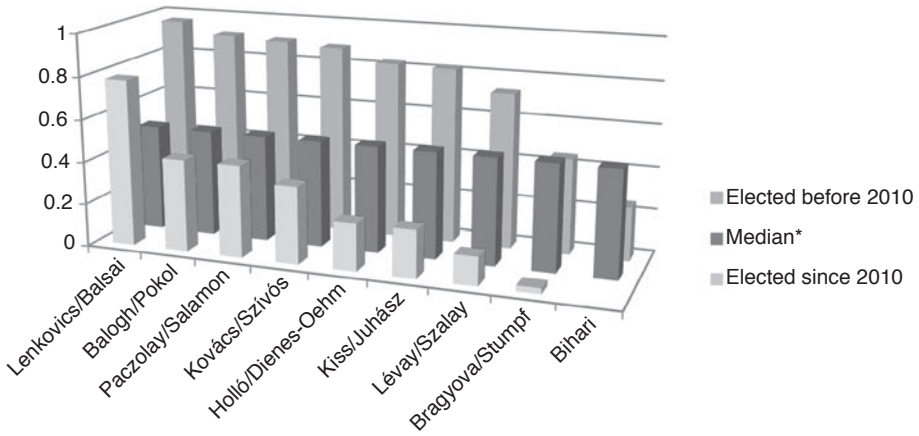
Judge	Nominating party	Proportion pro-government
István Balsai	Rightist	0.966
Béla Pokol	Rightist	0.911
László Salamon	Rightist	0.9
Mária Szívós	Rightist	0.885
Egon Dienes-Ohm	Rightist	0.828
Imre Juhász	Rightist	0.823
Barnabás Lenkovic	Rightist	0.783
Péter Szalay	Rightist	0.727
István Stumpf	Rightist	0.447
Péter Paczolay	Consensual	0.432
Elemér Balogh	Rightist	0.432
Péter Kovács	Rightist	0.361
Mihály Bihari	Rightist	0.25
András Holló	Left-Liberal	0.222
László Kiss	Left-Liberal	0.222
Miklós Lévay	Left-Liberal	0.135
András Bragyova	Left-Liberal	0.027

It is noteworthy that in case of some judges there is not a strong correlation between their behavior and the viewpoints of the political side which nominated them. It is not surprising as regards the president of the Court, Péter Paczolay, who was a consensual candidate. Two more judges, Elemér Balogh and István Stumpf also pursued a balanced behavior, voting alternately for upholding and rejecting the constitutionality of the new laws. However, István Stumpf, who had been a front-runner politician during the first Orbán government between 1998 and 2002 and a political advisor just before his nomination for constitutional judgeship in 2010, proceeded with a “swing policy”, supporting some emblematic laws of the conservative government and opposing other ideological issues. Furthermore, while he voted more frequently against the Fidesz government’s laws in the first two years of his mandate, since then, he has noticeably moved toward the position of the pro-government judges. Even more astonishing is Péter Kovács’s position, since he had been nominated by the conservative parties in 2005, but he took a moderate opposition line between 2010 and 2014.

In the light of the above mentioned data, it is not surprising that some strong personal “voting coalitions” developed between same-side judges. According to the stable political orientations of the judges, there were some firm covoting relationship on both sides. For example, András Bragyova and László Kiss took a similar position in 88.88% of cases, in which they both participated, while the strongest right-wing alliance was formed between Mária Szívós and Péter Szalay (78.78%).

Besides political orientation, it is striking how great a difference there is between the judicial behavior of the constitutional judges elected before and after the change of the nomination system in 2010, as Figure 3 demonstrates. Whereas the “old” judges, whose election had needed the support of both the government and opposition parties, were much more skeptical about the constitutional conformity of the legislation of the new government majority, the new members of the Court, who were selected and sent to the body unilaterally by the government parties, proved to be much more friendly towards the law-making of the conservative coalition. But this cleavage between the old and new judges does not refute the determining effect of political orientation on the decision-making process of the Court, as the latter’s impact prevails in both groups of judges.

In the period under review, there was only very moderate collegial congruence between the constitutional judges standing on opposing sides of political orientation. According to the data, the ideological distance between the judges nominated by the leftist or the rightist parties was so great that the chance for collegial consensus was low and continuously decreasing. Although initially the Court was able to make some unanimous decisions, after April 2013—when the judges appointed



**FIGURE 3** The opinions of the “old” and “new” judges (elected before and since 2010) according to the scale of the pro-government and opposition views (1.00–0.00)

\*For all possible opinions

unilaterally by the government parties got a majority in the body—the rate of unanimous decisions drastically waned. So the term of 2010–2014 was not a static period, but as the Court was getting increasingly packed by the government majority, the rulings of the Constitutional Court became more and more favourable to the Fidesz government.

In contrast, the Constitutional Court showed an extremely strong polarization, as the opposing camps showed cohesion. This was due to steady conflict—and likely the ideological struggle—between the pro-government and the opposition judges, each group of which pushed the other to more extreme ideological positions.

Overall, the strong political alignment of the majority of constitutional judges is quite surprising; according to conventional wisdom, most candidate judges nominated to constitutional or higher courts generally tend to be more politically moderate (as it makes it easier for such candidates to be elected), and therefore may be more prone to compromise and to speak with one voice in order to preserve the Constitutional Court’s prestige and to ensure the implementation of the decisions of the Court (Sunstein et al. 2006, 83–85; Wesel 2004, 216). However, after 2010—and especially from April 2013 onwards—the situation was different in Hungary. Although it may well be argued that there was a cleavage between the “old” (consensual) and the “new” (unilaterally candidated) constitutional judges for a while, the significance of this presumed division was declining as the Court was dammed by the conservative coalition with new judges. As the analysis of the data reveals,

owing to the new, non-consensual selection system of judges, more partisan conservatives got onto the bench after 2010 than beforehand, when the other political side, having an absolute veto power in nominating process, had been able to eliminate the unqualified and extreme candidates.

As a result of the radical change in the composition of the Constitutional Court, and the upset of the internal balance of the body, there was simply no longer any constraint that would have led the new majority to seek a compromise. Thus, the collegial effect, which is so present in other constitutional courts, reduced to a minimum in Hungary, if there was any such effect at all.

It is notable also that the earlier jurisprudence of the Constitutional Court was not so strongly entrenched in the constitutional culture that it could eliminate the ideological differences between the judges on that base that if the law is clear, the judges will also agree even if they have significant differences in their individual perceptions and attitudes (Sunstein et al. 2006, 83). As a matter of fact, the political orientation of the constitutional judges overwrote almost all previous constitutional consensus and led to upholding some legal acts and measures which were previously considered seriously harmful for the rule of law.

It is important to note that it cannot be deduced from the data that the political orientation of the judges would be the only independent variable influencing their personal choices, and in the case of some judges, even its decisive role has not been justified. Since the opinions represented by constitutional judges are not entirely consistent with the interests of the political parties that nominated them, other factors must have motivating effects on the judges' personal decisions. Nevertheless, the empirical research presented here cannot be used to assess these impacts and their extent.

Even though the aggregate data of the voting behavior of the constitutional judges provide convincing evidence for the decisive impact of the political orientation of the judges' opinions, it is advisable to consider whether the data really measured what was intended; that is, we need to verify that the conclusions are reliable and credible. To consider possible doubts also provides an opportunity to carry out an in-depth analysis of this survey results.

Presumably, some scepticism might be raised against the conclusions of this analysis. One objection is whether the fact that there is a great coincidence between the judicial opinions of the individual judges and the political positions represented by those parties that promoted them indeed proves that these judges strongly support political standpoints of the respective parties. Perhaps this congruence is just the result of specific judicial philosophies with which judges identify themselves. In other words, the voting behavior of the judges, even if it is very close to the political

views of the government or the opposition side, can be guided by other, non-political variables like a special set of professional values or moral convictions. The constitutional arguments are always different from political considerations, even in the case where the same subject matter is concerned (Möllers 2011, 317). But this is not a satisfactory alternative explanation compared to the independent variable of the political background. It is worth noting that in case of the most judges, there is an extremely strong correlation between their voting behavior and the standpoints of the political side that nominated them. If the constitutional judges would decide solely on the basis of constitutional text or legal considerations, their opinions would not coincide with the political viewpoints of their nominating parties to such a great extent. In reality, two-thirds of the judges represent almost the same positions (at an 80% ratio) as their nominating parties, no matter the subject matter or the constitutional problem in the individual cases. The battle lines between judges are anchored along the same cleavages. No ad hoc coalitions developed between them, but there are persistent associations.

Neither a coherent method of constitutional interpretation nor any particular judicial philosophy can be recognized from the majority or minority opinions. Simply, there is no other convincing explanation for the very strong correlation between judges' voting behavior and the political background of their election. The qualitative analyses of the mainstream majority and dissenting opinions do not show any strong commitment to a well-established legal method (see, for example, Halmai 2014). The only detectable organising principle for these groupings was, more or less, the origin of their seat: that is, their political support before and when they were elected.

As to the role of other possible factors and strategic behavior, including institutional context, dominant public opinion, the clarity of relevant law, etc., this research cannot exclude their effects on the decision-making process of the Constitutional Court. However, even if one supposes the influence of these effects, they do not explain the very strong correlation between the judges' personal opinions and the political interests of their nominating political sides. Perhaps some judges read their preferences into the constitutional text in good faith, but this does not make their choices less politically biased.

Actually, only the political orientation of the judges has real explanatory power to understand why constitutional judges support the political parties that nominated them. The explanation is simple: members of the Court occupy identical positions with the parties that nominated them because their political orientation is linked to those parties or to their ideology. Similar tendencies were shown by research on other countries, too (see, e.g., Segal and Cover 1989, 557–565; Hönnige

2007; Hönnige 2009, 963; Garoupa et al. 2013, 513–534; Garoupa 2010, 46, 48; Amaral-Garcia et al. 2009, 381; Franck 2009, 262). The alignment of judges to their nominating party also plausibly explains why political parties considered the nomination process of constitutional judges so important in the past.

Another question is whether the judges represent party interests or whether their voting behavior is determined by their personal preferences. In all likelihood these motivations cannot be separated from each other, but it is not necessary to separate them; the point is that judicial behavior is determined by political reasons, rather than legal considerations. For this conclusion, it is enough to prove that the political orientations of the judges have a decisive role in judicial decision-making, and it does not really matter why the judges do behave in this way. In fact, political orientation seems to be an intermediary concept in the sense that while it may give plausible explanation for judicial behavior, it does not reveal the deeper motivations of the particular judges (whether they support a political party or movement because of political/ideological commitment, opportunism or for personal gain).

Whatever the reason, the great majority of judges to a large extent adjust their views to those of their nominating political sides. Nevertheless, there might be an alternative explanation of behavior for the opposition judges. It can be said that these judges really do not adapt their opinions to their own political sympathy but they merely resisted the demolition of the rule of law. This approach relies on the assumption that the new government, exploiting its overwhelming majority, transformed the whole constitutional system and downgraded the constitutional democracy.<sup>17</sup> This kind of argument can be strengthened by the fact that a number of laws that have been reviewed by the Constitutional Court were often criticized by international human rights organisations and the institutions of the European Union and the Council of Europe, which claimed that the laws did not conform with the values and principles of modern European constitutionalism. However, even if this argument can be true to a degree, it does not explain the strong correlation between the voting behavior of the “opposition judges” and the views of the left-liberal parties which nominated them. Besides, the international actors do not develop their own judgments on the basis of the Hungarian Fundamental Law (as Hungarian constitutional judges do), so similar stance of the leftist judges to these international bodies in many debated issues is not a compelling argument for the political neutrality of these members of the Court.

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17. For a more detailed description of this process in English, see Kovács and Tóth 2011, 183–203; Jakab and Sonnevend 2013; Bánkuti, Halmai, and Scheppele 2012a, 2012b, 237–268; Pogány 2013; Müller 2011. For an apologetic presentation of the new Fundamental Law, see Csink et al. 2012.



## CONCLUSION

It is remarkable that in the period of a two-thirds parliamentary majority, between 2010 and 2014, when the conservative political camp was able to prepare and approve a new constitution and to change the composition of the Constitutional Court, the judicial behavior of the most constitutional judges was favourable to those political parties that had nominated them. In fact, what had been planned by the Roosevelt presidency in the 1930s in the United States was achieved by the Orbán government in Hungary in this period: court packing by appointing as many new judges as necessary to assure the standing support for government policy. This effort proved to be successful as most constitutional judges' votes coincided to a great extent with the political views of their nominators, regardless of the particular constitutional problem or the subject matter of the case under investigation by the Court. There were only three judges of the seventeen, who voted alternately for and against the constitutionality of laws adopted by the new government majority after the spring of 2010. Consequently, political orientation played a decisive role in the judicial behavior of all judges nominated by the leftist or liberal parties and of almost all former conservative candidates. This is the only convincing and plausible explanation for the strong correlation described above. Accordingly, constitutional judges vote more or less consistently for their nominating (left-liberal or conservative) political side because they tend to agree with their policy goals and/or ideology. It does not exclude, but rather, in an indirect way, confirms, that besides the personal political orientation and preferences of the judges, there are some other factors and circumstances that influence their judicial behavior. So the attitudinal model (see the Introduction), even though it has persuasive power, does not provide a sufficient explanation for judicial behavior. However, this empirical research was not able to identify other relevant explanatory variables or assess their real impact on the decision-making of the Constitutional Court.

But it is sure that when members of the Constitutional Court, who are the ultimate arbiters of the most important political controversies, are selected by the political parties for political reasons, the personal choices of the constitutional judges will always be largely influenced by politics, whether that means the judges' own political preferences or the interests of the political actors who sent them to that body.

Certainly, we could say ironically that a partisan constitution deserves a partisan guardian—that is, a constitutional court with politically biased members—but it would be as sad as it is ironic. The recent trends in Hungarian constitutional development—the step-by-step limitation of the power of the Constitutional Court,

the openly political selection of its members, and, most of all, the recent trends towards politically motivated jurisprudence—can legitimately raise the question of what should be the way of constitutional review in the future, or, put it even more clearly, of whether it is worth preserving the Constitutional Court or accepting that this institution proved to be unsuccessful in Hungary.

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