Passivist Strategies Available to the Hungarian Constitutional Court

Petra Lea Láncos[*]

Abstract 971
I. Introduction: Research Question and Methods 971
II. The Constitutional Court in the Changing Hungarian Legal and Political Context 973
III. Passivist Strategies Enabled Under the Law on the Constitutional Court and the Rules of Procedure 983
1. Delay Tactics 984
2. Passing on the Case by Staying the Proceedings 988
3. Pronouncing Unconstitutionality Without Deciding the Politically Charged Question 989
4. Faux Dismissal With Gap-Filling Jurisprudence 990
IV. Summary 991

Abstract

The Hungarian Constitutional Court is operating in the context of a new Law on the Constitutional Court, new Rules of Procedure and a new, "moving target" constitution. To preserve its role in the Hungarian constitutional order, it seems that the Court is making use of passivist strategies to avoid confrontation with the government and the legislator and at the same time retain influence over safeguarding constitutional values. The present paper maps the passivist strategies pursued by the Court employed in cases involving "politically charged questions".

I. Introduction: Research Question and Methods

Safeguards for institutional balance generally guarantee that attempts at interfering with other constitutional bodies' jurisdiction are curbed. However, where balance is disrupted, the threat of encroachment upon the powers of the democratically elected parliament through judicial law-making or

* The author is researcher at the Deutsches Forschungsinstitut für öffentliche Verwaltung (Speyer) and associate professor at Pázmány Péter Catholic University (Budapest). The manuscript was submitted on 31 May 2019.

the disenfranchisement of constitutional courts by reactive amendments to the constitution becomes imminent.

This paper concentrates on the situation where a constitutional court comes under pressure, prompting it to develop passivist strategies in order to preserve its integrity and role in the national constitutional system. These passivist strategies may include delay tactics, passing on the case to external institutions, a focus on non-contentious issues and faux dismissal employed by an institution in the context of changing political power relations. In this paper I give an account of the recent changes in the Hungarian constitutional order as a possible narrative for the renewed use of passivist strategies by the Hungarian Constitutional Court. Then I attempt to map and systematise the passivist strategies pursued by the Hungarian Constitutional Court, focusing on the room for manoeuvre afforded to it by the Fundamental Law, the Law on the Constitutional Court (Abtv.)[1] and its Rules of Procedure.[2] These strategies will be illustrated with petitions submitted or rulings delivered in relation to politically charged questions.

Without entering into the scholarly debate on the definition of "political question" or its use in Hungarian constitutional law literature, I will instead refer to the term *politically charged question*, which, for the purposes of this paper, shall mean any policy or legal issue that has come to the fore of public and media interest. To illustrate the strategies unfolded in the present paper, I will describe selected decisions of the Constitutional Court, which have received ample media and/or scholarly attention due to the important social, political or economic issues underlying them. I will not discuss all Constitutional Court decisions rendered in such politically charged questions since the entry into force of the new constitution and other rules governing the operation of the Constitutional Court. Instead, I selected just a few decisions and petitions which seem to substantiate the use of the passivist strategies identified in this paper. Therefore, more research is needed to a) formulate a viable concept of political questions for the purposes of further research, and to b) identify and classify relevant Constitutional Court's decisions into the different passivist strategies formulated below.

The remit of the research is limited in time, concentrating on the practice of the Constitutional Court since the Fundamental Law (Hungarian consti-

[1] Act No. CLI of 2011 on the Constitutional Court.

[2] Based on Art. 50 para. (2) point c) of the Abtv. the plenary session of the Constitutional Courts adopts the Rules of Procedure. The Rules of Procedure in force are laid down in Decision No. 1001/2013 (II. 27.) AB Tü. of the Constitutional Court on the Rules of Procedure of the Constitutional Court (consolidated text with the amendments brought about by decisions No. 1001/2014. [III. 20.] AB Tü., 1003/2015. [VII. 21.] AB Tü., 1004/2015. [XII. 16.] AB Tü., 1002/2016. [IV. 21.] AB Tü., 1005/2016. [VI. 22.] AB Tü. and 1001/2018. [III. 8.] AB Tü.).

tution), the Law on the Constitutional Court and the Rules of Procedure took effect, for the strategies identified in this paper are facilitated by the legal framework provided by these measures. My research therefore relies on the assessment of official documents and the relevant scholarly literature, the laws and procedural rules governing the operation of the Constitutional Court, and the decisions and orders issued by the same since 1.1.2012.

II. The Constitutional Court in the Changing Hungarian Legal and Political Context

Drinóczi claims that

> "constitutional politics as well as approaches to constitutional procedures and dialogues and commitments to different constitutional principles and democratic constitution-changing and -making process changed dramatically after the 2010 election in Hungary".[3]

However, the relationship between the different branches of government by its very nature was never without conflict in Hungary,[4] ever since "the Constitutional Court defined its role as a real counterbalance of the parliamentary majority".[5] In fact, the early years after the establishment of the Hungarian Constitutional Court following the change of the political system were characterised by a strong, activist Constitutional Court, rapidly gaining international renown for being "the most active and most powerful constitutional court in the world".[6]

The early Constitutional Court was criticised for encroaching upon the political process, forcing their views on society, the legislative, executive and judicial branches and restraining any chance to change the system and enter into a new phase of nation-building.[7] Indeed, the first democratically elected Hungarian coalition government was taken aback at the strength the

[3] *T. Drinóczi*, Constitutional Politics in Contemporary Hungary, Vienna Journal on International Constitutional Law 10 (2016), 63.

[4] *I. Stumpf*, The Hungarian Constitutional Court's Place in the Constitutional System of Hungary, Civic Review 13 (2017), Special Issue, 242.

[5] *I. Stumpf* (note 4).

[6] *G. Brunner*, Development of a Constitutional Judiciary in Eastern Europe, Review of Central and East European Law 18 (1992), 539; *K. Kelemen*, Van még pálya. A magyar Alkotmánybíróság hatásköreiben bekövetkezett változásokról. Fundamentum 2011/4, 87; *B. Somody*, Fórum, Fundamentum 2010/1, 72.

[7] *C. Varga*, Jogmegújítás alkotmánybíráskodás útján?, in: B. Hajas/B. Schanda (eds.), Formatori iuris publici. Studia in honorem Geisae Kilényi septuagenarii, 2006.

Constitutional Court displayed from the very beginning, with the Court showing little respect for the Parliament as the legislative branch, striking down one in three laws passed.[8] The Constitutional Court decided highly political questions, including the abolition of the death penalty,[9] strengthening the protection of the unborn child,[10] defeating the law on changing the prescription period for the 1956 atrocities[11] and striking down the "Bokros-package" of austerity measures.[12] This activism spanned several governments, all coalition governments enjoying a simple majority. As *Sajó* pointed out: "The political elite at the time was not in the position to reign in the Court."[13] The political elite begrudgingly accepted this state of affairs due to its inability to control the Court[14] and as part and parcel of democratic transition and "international socialization" processes.[15] They also regarded the strong Constitutional Court as "an instrument to keep one another in check".[16]

Meanwhile, voices in scholarly literature formulated harsh criticism against the activism of the Court already at that time. Those criticising judicial activism emphasised the legitimacy of deciding political questions by democratic majority as opposed to the unchecked use of judicial discretion.[17] The latter, in fact means that

> "relatively unaccountable individuals and groups [pour] their own hierarchies of values or 'personal predilections' into the relatively empty boxes of […] vague concepts",

---

[8] *C. Boulanger*, Europeanisation Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and Hungary's "Return to Europe", 9, citing *K. L. Scheppele* (1996).

[9] No. 23/1990. (X. 31.) AB decision.

[10] No. 64/1991. (XII. 17.) AB decision; No. 43/1995. (VI. 30.) AB decision.

[11] No. 53/1993. (X. 13.) AB decision.

[12] No. 43/1995. (VI. 30.) AB. For details on the Bokros-package and its background, see, *I. Guardiancich*, Pension Reforms in Central, Eastern and Southeastern Europe, 2013, 107 et seq.

[13] *A. Sajó*, Educating the Executive: The Hungarian Constitutional Court's Role in the Transition Process, in: J. J. Hesse/G. F. Schuppert/K. Harms (eds.), Verfassungsrecht und Verfassungspolitik in Umbruchsituationen, 2000, 226.

[14] "The most important decisions of the Court (aboition of death penalty, decisions on compensation and transitional justice acts, drawing the line between the competences of the president and the executive) often generated strong political reactions, sometimes even anger." *I. Stumpf* (note 4), 242.

[15] *C. Boulanger* (note 8), 10.

[16] *C. Boulanger*, Hüten, richten, gründen: Rollen der Verfassungsgerichte in der Demokratisierung Deutschlands und Ungarns (doctoral thesis), 2013, 337.

[17] *B. Pokol*, Az alkotmánybíráskodás szociológiai megfigyelése. Jogelméleti Szemle 2014/3, 159 et seq., 163.

notes *Cappelletti*.[18] *Pokol* argued that where there is no specific constitutional provision to decide a legal question, the Constitutional Court should reject the petition,[19] without expanding into the purview of judicial lawmaking. Of course, the picture even at the time was more complex than a simple case of constitutional court activism: while the Hungarian Constitutional Court appeared to be activist in certain issues, it exercised judicial self-restraint in others.[20] In fact, passivist strategies also appeared at that time[21] – and as such, did not have to be reinvented by later compositions of the Constitutional Court, they merely had to be adapted to the rules governing the institution. In summary, activism, judicial self-restraint and passivism were never mutually exclusive phenomena in the practice of the Hungarian Constitutional Court, it was rather the dominance of one strategy over the other that marked the different eras of the Court.

With the 2010 Hungarian parliamentary elections, a shift from the divided political elite to a super-majority of the governing party in the Hungarian Parliament took place. Enjoying the support of the Parliament, the Hungarian Government launched a large-scale and comprehensive legislative programme[22] spanning several terms to reform the electoral system,[23] public education,[24] allowances for those living with disability,[25] public procurements,[26] the status of churches,[27] the labour code,[28] the law on misdemeanors,[29] the criminal code,[30] the civil code,[31] referenda,[32] procedural laws[33] etc.

---

18 *M. Cappelletti*, The Judicial Process in Comparative Perspective, 1989, 150.

19 *B. Pokol*, The Constitutionality of Legislation, in: V. Gessner/A. Hoeland/C. Varga (eds.), European Legal Cultures, 1996, 454.

20 See in detail *G. Halmai*, Az aktivizmus vége? A Sólyom-Bíróság kilenc éve, Fundamentum 1992/2, 8 et seq.; *L. Sólyom*, Introduction to the Decision of the Constitutional Court of the Republic of Hungary, in: L. Sólyom/G. Brunner, Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court, 2000, 4.

21 *G. Halmai*, Hátrányos passzivizmus. Fundamentum 2000/4, 70 et seq.

22 *Á. Rixer*, Features of the Hungarian Legal System After 2010, Patrocinium, 2012, 14.

23 Act No. CCIII of 2011. "[T]he new electoral design was created to fulfil two requirements: to provide extra advantages to the largest party so that it could benefit from a two-thirds majority, while a party with only a modest relative majority could not become predominant. […] The main explanation given for the reform was that parliament needed downsizing, which was an easy point to sell, with populist overtones: too many politicians cost too much money." *R. Várnagy/G. Ilonszki*, The Conflict Between Partisan Interests and Normative Expectations in Electoral System Change. Hungary in 2014. Corvinus Journal of Sociology and Social Policy 8 (2017), 9 et seq.

24 Act No. CXC of 2011 on public education.

25 Act No. CXCI of 2011 on allowances for persons with disabilities and the amendment of certain pieces of legislation.

26 Act No. CVIII of 2011 on public procurement.

27 Act No. CCVI of 2011 on the right to freedom of consience, religious freedom and the status of churches, confessions and religious communities.

2010 brought a marked change in the composition and the operation of the Constitutional Court: the number of judges was increased to 15 and their office was extended from nine to 12 years under exclusion of reappointment.[34] The fact that the President of the Constitutional Court was no longer to be elected by the judges themselves, but instead, by the Parliament, meant a great change in respect of the institution's autonomy.[35]

Next, Act No. CLI of 2011 on the Constitutional Court brought considerable institutional and competence-related changes to the operation of the forum. It replaced Act No. XXXII of 1989 on the Constitutional Court, which, although considered to be flawed and contradictory, was rarely amended.[36] The idea that the powers of the Constitutional Court should be rearranged, emerged early on: many considered the Court to be deeply politicised, proceeding in abstract review cases "filling the gaps of the constitution"[37] according to their own political and legal convictions and derailing legislative efforts of the democratically elected Parliament.[38] The new Law on the Constitutional Court was to promote a more neutral constitutional review through abolishing the *actio popularis* and transferring petition rights to those concerned, i.e. persons, whose constitutional rights had been violated or "experts", such as the courts, the Ombudsman ("Commissioner

28 Act No. I of 2012 on the labour code.

29 Act No. II of 2012 on the law on misdemeanors.

30 Act No. C of 2012 on the criminal code.

31 Act No. V of 2013 on the civil code.

32 Act No. CCXXXVIII of 2013 on referendum initiatives, the European Citizens' Initiative and the referendum procedure.

33 Act No. CL 2016 on Administrative Procedure, Act No. CXXX of 2016 on Civil Procedure, Act No. I of 2017 on Administrative Proceedings.

34 Some were of the view that increasing the number of judges was to ensure possible court-packing endeavours of the new government, while others noted, that it enabled the speeding up of decision-making by dividing the case-load among a higher number of judges. The latter is substantiated also by the fact that due to the changes in Constitutional Court competences, less cases are assigned to the plenary, with the majority decided in chambers of five judges. *P. Tilk/G. Naszladi*, Az Alkotmánybíróságra vonatkozó szabályozás átalakulás 2010 után, in: F. Gárdos-Orosz/Z. Szente, Jog és politika határán. Alkotmánybíráskodás Magyarországon 2010 után, 2015, 43.

35 *P. Tilk/G. Naszladi* (note 34).

36 *M. Csirik*, Az alkotmánybíráskodás művészete és egy új alkotmánybírósági törvény koncepciója. De iurisprudentia et iure publico 7 (2013), 2.

37 *L. Sólyom*, The Rise and Decline of Constitutional Culture in Hungary, in: A. von Bogdandy/P. Sonnevend (eds.), Constitutional Crisis in the European Constitutional Arena, 2014, 10; *L. Trócsányi*, Magyarország alaptörvényének létrejötte és az alaptörvény vitatott rendelkezései, Kommentár 2011/4, <http://kommentar.info.hu>; *M. Csirik* (note 36), 6.

38 *J. Szájer*, in: B. Ablonczy, Az Alkotmány nyomában. Beszélgetések Szájer Józseffel és Gulyás Gergellyel, 2011, 135.

for Fundamental Rights"),[39] the Members of Parliament, the Government, the President of the Republic, the President of the Kúria, and the Chief Prosecutor. These petitioners are directly involved in concrete legislative or adjudicatory processes, submitting concrete questions for constitutional review. Owing to the rearrangement of the Constitutional Court's powers and the scope of petitioners, the proceedings of the Constitutional Court were to be more neutral and more focused on actual legal and constitutional issues. In summary, the changes brought about by the new Law on the Constitutional Court include the abolition of the *actio popularis*[40] which did not require individual concern to be demonstrated for submitting a petition for ex post review, the amendment of the constitutional complaint (Arts. 26-31 Law on the Constitutional Court) and changes made to the scope of those entitled to seek constitutional review (Art. 6 (2) and (4) of the Fundamental Law). Importantly, review of the Court is now limited to those put forward in the petition submitted to it (Art. 51 Law on the Constitutional Court). As indicated above, the number of judges was increased from 11 to 15, and members lost the right to elect the president of the Constitutional Court, this right was transferred to the Parliament (Art. 24 para. 8 of the Fundamental Law).[41]

---

[39] The petition right of the Ombudsman as the guardian of citizens' fundamental rights is meant to counterbalance the fact that the *actio popularis* was abolished. In her comparative analysis *Kelemen* emphasises that the *actio popularis* was a unique instrument in constitutional review, justified by historical circumstances surrounding the change of the political system: it was the most efficient way to ensure the "weeding out" of unconstitutional regulations. *K. Kelemen* (note 6), 88. Meanwhile, following the early years of contributing to a democracy built on the rule of law, even certain judges of the Constitutional Court were of the view that the *actio popularis* should be abolished. Besides alleviating the case-load of the Court, abolishing the *actio popularis* meant that judges would be held to decide strictly constitutional questions, refraining from deciding policy issues. *A. Bragyova*, Fórum, Fundamentum 2010/1, 59.

[40] The abolition of the *actio popularis* was widely regarded as a means to reduce the case-load of the Constitutional Court. *A. Lörinc/P. Ruff*, Élet az *actio popularis* után, avagy az ombudsman kiemelt indítványozói szerepe, Fontes Iuris 2015/1, 15; *N. Chronowski*, Az alkotmánybíráskodás sarkalatos átalakítása. MTA Law Working Papers 2014/8, 5. *M. Csirik* (note 36), 9; *K. Kelemen* (note 6), 88.

[41] See in detail, *N. Chronowski* (note 40). Changes include the restriction of competences related to the unconstitutional omission of the law-maker, by "extinguishing" all ongoing proceedings regarding the rectification of unconstitutionality by omission, if the petition was not submitted by those petitioners specified in Art. 24 (2) e) of the Fundamental Law (Art. 71 para. 2 Abtv.). However, this procedure was never deemed successful, since the Parliament rarely complied with the Constitutional Court's decision to adopt a constitutionally required law. *M. Csirik* (note 36), 11. For an overview of omission cases before the Constitutional Court (and the Curia) since the entry into force of the Fundamental Law, see: *L. Kovács/Z. Pozsár-Szentmiklósy*, A mulasztás jogintézménye az Alkotmánybíróság és a Kúria gyakorlatának tükrében (2012-2016), MTA Law Working Papers 2016/12.

Another prominent change was the adoption of a new constitution within a year of the new Government taking shape. Namely, the Government holding a super-majority in the Parliament could unilaterally amend or even adopt a new constitution without having to build consensus with opposition parties, thereby speeding up the constitution-making, and ultimately, the constitution-amending process.[42] As a result of the "rapid constitution-making process",[43] as of 2012 the Hungarian Constitutional Court, was bound to work with a new constitution (strongly reminiscent of the 1949 communist "constitution"[44] it was meant to overcome), and, as mentioned above, the law governing the institution itself was also recast (Act No. CLI of 2011). In the first few years following the adoption of the Fundamental Law the Constitutional Court seemed to be working with a moving target: since its entry into force on 1.1.2012 the Fundamental Law has been amended seven times, with several of these amendments brought in reaction to decisions of the Constitutional Court.[45]

---

[42] *B. Pokol*, judge of the Constitutional Court since 2011, explains: "One may ask whether the parliamentary majority has the competence to overrule the decisions of the constitutional judges or to change its organizational conditions; there are, in this respect, big differences among the countries. Ultimately, however, it depends on the extent to which the constitutional court has superior power over the parliamentary majority, and by these judges the majority will be utterly suppressed or only a moderate suppression takes place. The more difficult it is to amend the Constitution [by] the parliamentary majority, or to change the laws on the constitutional court, the greater the degree of the constitutional court's monopolized access to the constitution is. Conversely, the [easier it is to amend the Constitution], or at least the process of rewriting the law on the organizational conditions of the constitutional court by the parliamentary majority is, the stronger the parliamentary majority will be as opposed to the juristocratic power." *B. Pokol*, The Juristocratic Form of Government and Its Structural Issues, Pázmány Law Working Papers, 2016/9, 9.

[43] *László Sólyom*, former President of the Constitutional Court noted: "In Hungary, we are in the midst of a rapid constitution-making process. The new constitution is to be enacted before the end of April so there is no use of any further discussions on the necessity of a new constitution, or about the normal course of preparatory work." Address at the Conference "The Right to a Healthy Environment and the Representation of Future Generations' Interests in the new Hungarian Constitution" of the Hungarian Parliamentary Commissioner for Future Generations in Budapest, 14.2.2011.

[44] "We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid." Recital of the National Avowal of the Fundamental Law of Hungary. The constitution replaced by the Fundamental Law was Act No. XX of 1949.

[45] Of the original text of the Fundamental Law, 27,52 % has been amended, with 30 of the 109 constitutional provisions affected by the amendment. Certain provisions have been amended several times and today, the text of the Fundamental Law is 60 paragraphs longer than when it entered into force seven years ago. In *Szente's* view, "the Fundamental Law is not characterized by a continuous adaptation to changing societal needs, but much rather the servicing and legitimization of short term political interests", *Z. Szente*, Az Alaptörvény (2012-2015), in: A. Jakab/G. Gajduschek (eds.), A magyar jogrendszer állapota, MTA TK JTI

In its decision 45/2012 (XII. 29.), upon the petition of the Ombudsman ("Commissioner for Fundamental Rights") the Constitutional Court reviewed and annulled the "Transitional Provisions"[46] of the Fundamental Law deciding that the uncertain status of the Transitional Provisions of the Fundamental Law meant a violation of the principles of the rule of law and legal certainty.[47] In response, the Transitional Provisions were then integrated into the Fundamental Law with the first amendment. The second amendment was meant to introduce voter registration in the Transitional Provisions, followed by a highly contested legislation on voter registration for voters outside of Hungary. In its decision 1/2013 (I. 7.) the Constitutional Court annulled the legislation governing voter registration. The third amendment was to protect arable land and forests, foreseeing that a cardinal law[48] shall lay down the rules governing the ownership and the use of these holdings.[49] The fourth amendment of the Fundamental Law was the most comprehensive one, among others extending the scope of those entitled to request ex post constitutional review (President of the Curia, Chief Prosecutor, Art. 24 para. 2 item e)), determining a tight 90 day deadline for constitutional review in pending court cases (Art. 24 para. 2, item b)), restricting the Constitutional Court's review competence regarding the Fundamental Law and its amendments to procedural requirements (Art. 24 para. 5)

(2016), 238 et seq. For a detailed assessment of the effects of these amendments on constitutionality itself, see *L. Sólyom* (note 37), 19 and 25.

[46] The Transitional Provisions were meant to enable a smooth transition from the 1949 constitution to the new Fundamental Law. In detail, see *Z. Szente*, The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014, Constitutional Studies 1 (2016), 214.

[47] These rules did not form part of the Fundamental Law, at the same time, it also contained provisions of non-transitional nature, relating to the judiciary, the churches, national minorities, the constitutional complaint, the organization of the Hungarian National Bank etc.

[48] Cardinal laws are laws adopted with a 2/3 majority of MEPs present (Art. T para. 4 of the Fundamental Law) to regulate areas of particular concern, such as the detailed rules governing public institutions, the status of churches and national minorities or citizenship. While such "constitutional laws" also existed at the time of the 1949 constitution, they were meant to regulate "static" elements of the polity as "supplements to the constitution"; meanwhile, the Fundamental Law extended the application of cardinal laws also to "dynamic", i.e. political issues of public policy, such as the protection of families (Art. L para. 3), arable lands and forests (Art. P para. 2), pensions (Art. 40). See in detail *A. Jakab/E. Szilágyi*, Sarkalatos törvények a magyar jogrendben, MTA Law Working Papers, 2015/32, 3.; *H. Küpper*, A kétharmados/sarkalatos törvények jelensége a magyar jogrendben, MTA LAW Working Papers, 2014/46, 2 et seq.

[49] Act No CXXII of 2013 on the transfer of agricultural lands and forests, found most recently to be in contravention of the free movement of capital in CJEU cases C-52/16 and C-113/16 (SEGRO).

and in respect of financial legislation (Art. 37 para. 4).[50] It also repealed decisions of the Constitutional Court taken prior to the entry into force of the Fundamental Law (Closing and Miscellaneous Provisions, item 5). It laid down the constitutional foundations for affording different statuses to religious communities (Art. VII) and basic rules on the National Office for the Judiciary, the organ of judicial self-government in Hungary (Art. 25 paras. 5-6). As an issue most recently garnering strong media and political attention, Art. XXII para. 3 of the amended Fundamental Law stipulated "that staying in public space as a habitual dwelling shall be illegal".[51] In its decision 12/2013 (V. 24.) the Constitutional Court emphasised that in light of the restriction of its competence to review the Fundamental Law from merely procedural perspective, since the Standing Orders of the Parliament and the Fundamental Law were not violated, the petition contesting the fourth amendment must be dismissed.[52] In reaction to criticisms voiced by international organisations and bodies, as well as international developments, three further amendments of the Fundamental Law took place, relating to, among others, the judicial system, the status of churches and the public supervision of the financial system (Art. 41 para. 2); the special legal order and the state of emergency (Art. 48); the constitutional identity of Hungary (Art. R para. 4) and the prohibition of the settlement of "foreign population" (Art. XIV para. 1).

Some interpreted the adoption of these changes as taken "not against, but much rather with due consideration to the decisions of the Constitutional Court,"[53] making the amendments necessary as prescribed by the constitutional review forum. Others, however, saw it as an instrument to undermine the standing of the Constitutional Court.[54] *Gardbaum* even goes so far as to state:

---

50 For the criticism of the restriction of the Constitutional Court's powers in this respect, see *K. Kelemen* (note 6), 92 et seq.

51 Act No XLIV of 2018 amended the law on misdemeanors (Act No. II of 2012), laying down "the violation of rules governing habitual dwelling in public spaces" foreseeing a sanction of fines or detention.

52 For a detailed discussion of the decision see *A. Vincze*, Az Alkotmánybíróság határozata az Alaptörvény negyedik módosításáról. JeMa 2013/3, 3 et seq.

53 *K. Gáva*, Az Alaptörvény módosításai, Pro Publico Bono 2014/2, 30.

54 CDL-AD(2013)012-e, Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14.-15.6.2013, para. 147. See in detail *D. Tímea*, Többszintű alkotmányosság működésben – alkotmányos párbeszéd Magyarországon, Doctor of the Academy Thesis, (2015), 138 et seq.

> "[T]his attempt by the government to curb the Constitutional Court is a clear – albeit delayed – response to its record during the period in which it was widely viewed as the most activist in the world."[55]

Whether a delayed form of reigning in the constitutional forum or an attempt to "modernize" the Court, many were convinced that the reforms resulted in a system,

> "where politically, and as such, effectively, the Constitutional Court has lost even the temporary final say in constitutional matters. Consequently, the forum can no longer fulfil the functions expected of it in a constitutional democracy".[56]

One narrative for signs of judicial self-restraint, or passivism on the side of the Constitutional Court may therefore be that in situations of imbalance, courts may have to adapt their strategy to remain relevant. Citing *Epstein*, *Knight* and *Shevtsova's* research, *Boulanger*, specifically referring to the case of the Hungarian Constitutional Court underlines, that

> "there are certain strategic imperatives Constitutional Courts have to respect if they want to command obedience from other branches of government. If they disregard the interests of the major political players, they have no chance of survival."[57]

As *Shapiro* most eloquently puts it (in respect of the Supreme Court, but equally applicable to any constitutional court): "It has neither the purse nor the sword."[58] These lie with the executive and the legislature, meanwhile,

---

[55] *S. Gardbaum*, Are Strong Constitutional Courts Always a Good Thing for New Democracies?, Colum. J. Transnat'l L. 53 (2015), 296.

[56] *T. Drinóczi* (note 3), 278. *Chronowski* adds that the constitutional amendments adopted in November 2010 started a practice of preventive sanctioning, causing the Constitutional Court to be more cautious, *N. Chronowski* (note 40), 4. Others summarise the situation as follows: "[D]ue to the above-mentioned 'court-packing' and the modified ways of the election of the members and the president, plus due to the competence restrictions, the Constitutional Court has lost much of its actual relevance compared to the period before 2010." *E. Bodnár/F. Gárdos-Orosz/Z. Pozsár-Szentmiklóssy*, Hungary. Developments in Hungarian Constitutional Law, in: R. Albert/D. Landau/P. Faraguna/S. Drugda (eds.), 2016 Global Review of Constitutional Law, 2017, 4, 78. *Chronowski* and *Varju* describe the situation as the "instability of the Fundamental Law which followed from its frequent, politically-driven modifications, the imposition of serious limitations on the constitutional review exercised by the Constitutional Court, and the open struggle between the Constitutional Court and the government acting in parliament for the supreme constitutional authority in the country". *N. Chronowski/M. Varju*, Two Eras of Hungarian Constitutionalism: from the Rule of Law to rule by law, Hague Journal on the Rule of Law 8 (2016), <http://real.mtak.hu>.

[57] *C. Boulanger* (note 8), 6.

[58] *M. Shapiro*, Judicial Modesty: Down with the Old – Up with the New, UCLA L.Rev. 10 (1962), 533, 535.

constitutional courts must "budget" with their prestige to guarantee that their voice remains relevant and they can fulfil their task in the constitutional system they operate in. Since the exercise of judicial review will generate conflict with the other branches of government, "it would be best then for the Court to avoid the direct challenges to its more powerful governmental neighbours",[59] paving the way to judicial deference, or even passivism. Some scholars have already identified such passivist trends in the Hungarian Constitutional Court's jurisprudence,[60] although it should be pointed out that the Court had long been accused of passivism, even before recent political and constitutional changes.[61]

Naturally, beyond the narrative of a constitutional court on the defensive, other factors may also contribute to passivism. These include a narrative of the political capture of the Constitutional Court through court-packing by a government-friendly Parliament,[62] or a dominant mindset among acting Constitutional Court judges that rejects activism, drawing the boundaries for policing constitutionalism tighter around the Fundamental Law. Scholarly efforts to trace the effect of court-packing in view of the super-majority held by the Government and the increase in the number of judges seem to substantiate the fact that the majority of judges appointed after 2010 support the Government's policies.[63] Finally, Constitutional Courts do not ex-

[59] *M. Shapiro* (note 58).

[60] *A. Vincze* (note 52), 12; *A. Vincze*, Az Alkotmánybíróság határozata a hallgatói szerződések alkotmányosságáról, JeMa 2012/3, 27 et seq.; *Á. Kovács*, A passzív nem puha, avagy miért nem igazolható az Alkotmánybíróság gyakorlata a politikai konstitucionalizmus alapján?, in: F. Gárdos-Orosz/Z. Szente (note 34), 254 et seq.

[61] *G. Halmai* (note 21), 70 et seq.

[62] *Z. Szente* (note 46).

[63] "[T]he 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 spring of 2011, five more justices were elected by the government party's MPs, ignoring the protest of the opposition parties. 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." *Z. Szente* (note 46), 131. In a more cautious vein, *Sólyom* notes: "[i]n Hungary, even with the new judges no sure government majority emerged. Yet the 'time' is coming and 'switches' occur from case to case. Of course, I do not question the impartiality and independence of any member of the Constitutional Court. I speak of the institutional guarantees embodied in their nomination and election. An analysis of the opinions in the politically sensitive recent decisions is outside the reach of this chapter. But in fact, the Court became extremely divided following the 'packing', and the narrow majority finding unconstitutionality of laws in the present legislation is continually growing smaller." *L. Sólyom* (note 37), 23; for an opposite view, see *L. Trócsányi* (note 37).

ist in a vacuum: they react to important issues affecting the society and public opinion, rely on existing constitutional traditions and practice and reflect on other countries' constitutional jurisprudence.[64]

It is not the purpose of the present paper to decide whether signs of passivism regarding politically charged questions in the jurisprudence of the Hungarian Constitutional are a result of an imbalance between the branches of government, the political capture or the judicial modesty of the Constitutional Court's judges. Nor do I wish to prove that the Hungarian Constitutional Court is more passive since the amendments of the Fundamental Law and the promulgation of the new Law on the Constitutional Court. Instead, I assert that the Rules of Procedure of the Constitutional Court enable it to circumvent or delay deciding on politically charged questions, of which the Court makes extensive use. In what follows, I focus on the possibilities for pursuing strategies of passivism based on the Rules of Procedure of the Constitutional Court and try to illustrate the use of these strategies with reference to select decisions rendered in cases involving politically charged questions.

III. Passivist Strategies Enabled Under the Law on the Constitutional Court and the Rules of Procedure

Before turning to the institutional passivist strategies of the Constitutional Court, it is worth noting that – as it is customary in judicial organisations – the President plays an outstanding role in orientating the course of cases through his powers of assignment and his deciding vote. Besides the strong role of the President, it is clear, that individual strategies of judges may also have an effect on when and with what substance a case is decided.[65] Never-

[64] *M. Csirik* (note 36), 2.

[65] The RoP furnish the President of the Constitutional Court with ample powers to influence the duration of proceedings. Indeed, the President may – in light of his competence to ensure the disposal of cases within reasonable time – determine the date of the hearing, extend the deadline for presenting the draft decision, determine date or deadline for the resubmission of a draft and track the keeping of deadlines (Art. 16 para. 5 points a)-d)). The President may order the disposal of the case with priority or urgency of his own accord or upon request of the Secretary General, the judge-rapporteur or the chairman of the panel. Deadlines applicable to cases disposed of with urgency shall be half of the otherwise applicable deadlines (Art. 55 paras. 1-2 RoP). Although the President of the Constitutional Court has the power to intervene if he sees fit, he shall do so at his discretion; otherwise judge-rapporteurs may delay presenting their draft decisions as they wish.

theless, in the following, I try to exclude individual strategies, capturing the different processes ongoing in the Court as institutional strategies.

Furthermore, it is clear that the recent reorganisation of the competences of the Constitutional Court through the Fundamental Law and the Law on the Constitutional Court may have certain effects on the jurisprudence of the forum. Nevertheless, the framework of the Court's new, somewhat restricted competences still allow for identifying passivist strategies.[66]

Based on my analysis of the rules governing the Constitutional Court's proceedings, practice and decisions rendered in respect of politically charged questions, I identified four main strategies available to the constitutional review forum: 1. delay tactics, 2. passing-on the decision to another forum, 3. avoiding deciding on the politically charged question by focusing on another point of unconstitutionality, and 4. faux dismissal.

1. Delay Tactics

In an interview, *József Szájer* of FIDESZ, an alleged author of the Fundamental Law[67] declared:

> "[I]t is clear that constitutional adjudication is a political counterweight in every jurisdiction. It is no coincidence that it is the politically more relevant issues that received special treatment by the Constitutional Court more recently. Either by speeding up their procedure, or by taking it slow."[68]

The Constitutional Court must decide petitions requesting the preliminary review of laws adopted by Parliament but not yet promulgated, Parliament's Rules of Procedure, as well as the review of the conformity of international treaty or a provision thereof with the constitution (Art. 23 paras. 1, 3 Law on the Constitutional Court) within 30 days.[69] According to the Law on the Constitutional Court, the President of the Court shall ensure

---

66 *Á. Kovács* (note 60), 231 et seq.

67 *P. Smuk*, Nemzeti értékek az Alaptörvényben, in: K. Szoboszlai-Kiss/G. Deli (eds.), Tanulmányok a 70 éves Bihari Mihály tiszteletére, 2013, 448; *I. Vörös*, A történeti alkotmány az Alkotmánybíróság gyakorlatában, Jogtudományi Közlöny 71 (2016), 495 et seq.; *F. Hoffmeister*, Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?, in: A. von Bogdandy/P. Sonnevend (note 37), 212.

68 *B. Ablonczy* (note 38), 134.

69 Those entitled to submit a petition for preliminary review are the President of the Republic, the Government, the Speaker of the National Assembly (President of the Hungarian Parliament) (Art. 23 paras. 4-5 Abtv.).

that the case is put on the agenda of the Court in good time to keep the statutory deadline, while the Court decides on the petition with priority, but within no more than 30 days (Art. 23 paras. 2, 6 Law on the Constitutional Court).[70] For these cases, the Rules of Procedure foresees that the case should be assigned to a judge-rapporteur within two working days, who shall prepare a draft decision within five days for the plenary session. Observations to the draft may be made within five days and the case will be put on the agenda of the plenary with priority (Art. 51 paras. 1-2 Rules of Procedure). Meanwhile, in case of laws which the Constitutional Court found to be unconstitutional, following their repeated debate and adoption in the Hungarian Parliament, a new petition for their review may be submitted. In such cases, the Constitutional Court shall decide with priority and within ten days (Art. 6 para. 8 Fundamental Law). Here, the Rules of Procedure provides that the judge-rapporteur should be assigned on the day following the receipt of the petition, and the draft decision is due within three working days (Art. 51 para. 3 Rules of Procedure).

Another 30 day deadline applies to the review of the adoption or the amendment of the Fundamental Law from a procedural perspective (Art. 24 para. 5 Fundamental Law)[71] and the review of resolutions of the Parliament ordering or dismissing the ordering of a referendum (Art. 33 para. 1 Law on the Constitutional Court).[72] Finally, in cases referred by judges proceeding in an individual case, the Constitutional Court must decide with priority,

---

[70] Art. 23 Abtv. is to implement Art. 6 paras. 4, 6, 8 of the Fundamental Law:

(4) If the President of the Republic considers the Act or any of its provisions to be in conflict with the Fundamental Law and no examination under paragraph (2) has been conducted, he or she shall send the Act to the Constitutional Court for examination of its conformity with the Fundamental Law. […]

(6) The Constitutional Court shall decide on the motion under paragraph (2) or (4) as a priority but within no more than thirty days. If the Constitutional Court establishes a conflict with the Fundamental Law, the National Assembly shall hold a new debate on the Act in order to eliminate the conflict. […]

(8) The Constitutional Court may be requested to conduct another examination, under paragraph (2) or (4), of the conformity with the Fundamental Law of the Act debated and adopted by the National Assembly in accordance with paragraph (6). The Constitutional Court shall decide on the repeated motion as a priority but within no more than ten days.

[71] Those entitled to request this review are "a) the President of the Republic in respect of the Fundamental Law or the amendment of the Fundamental Law if adopted but not yet promulgated; b) the Government, one quarter of the Members of the National Assembly, the President of the Curia, the President of the Administrative High Court, the Prosecutor General or the Commissioner for Fundamental Rights within thirty days of promulgation" (Art. 24 para. 5 of the Fundamental Law).

[72] Art. 33 para. 1 Abtv. prescribes that anyone may submit a petition for the review of the Parliament's resolution. The deadline may be shorter in case the judge-rapporteur presents a draft decision on the merits (Art. 53/A RoP).

but within 90 days at the latest, on the constitutionality of legal rules to be applied in the case pending before the referring court (Art. 24 para. 1 point b) of the Fundamental Law).

However, other deadlines only foresee the latest point in time, where the very first draft of a decision must be presented to the proceeding panel. This includes cases where the judge-rapporteur must present within 45 days the first draft decision upon petitions submitted by judges proceeding in concrete cases in progress, requesting the review of the legal regulation they perceive to be contrary to the Fundamental Law (Art. 25 Law on the Constitutional Court and Art. 52 Rules of Procedure), or where the first draft of the decision on an admissible constitutional complaint must be presented within 180 days (Arts. 26-27 Law on the Constitutional Court and Art. 33 para. 2 Rules of Procedure).

Based on the above, it may be concluded, that the Court is bound by only a few deadlines, with the consequence that in most cases, it can delay delivering its decision. Not only are the statutory deadlines and those foreseen under the Rules of Procedure few and far between, there are absolutely no sanctions foreseen for failing to observe these deadlines. Based on the statistics compiled by the Constitutional Court on its operation, we may state that the Court keeps the deadlines for priority cases (preliminary review, review of parliamentary resolutions on referenda and petitions from the courts). However, the deadline for presenting the first draft of the decision is not always met and since there are no mandatory deadlines for presenting the further drafts, enabling the Constitutional Court to drag out the procedure for whatever reason.

While the average disposal time of cases is between two to three years, it is not necessarily the cases that are dragged out beyond this time that may indicate passivism, since certain cases involve a matter of urgency and even a shorter disposal time may have consequences allowing for a classification of the decision as passivist.

A vivid example for the consequences of a delay in deciding a case is the decision of the Constitutional Court on the law foreseeing the premature retirement of judges in Hungary.[73] The Ombudsman sought the review of the provisions of Act No. CLXII of 2011 on the status and remuneration of judges, arguing that the law violates judicial independence and a transitional period should be introduced for phasing in the new retirement age without infringing the principle of the non-removability of judges. While the Constitutional Court indeed found the relevant provisions of the law under

[73] No. 33/2012. (VII. 17.) AB decision.

scrutiny[74] to be unconstitutional, due to the timing of the decision (rendered seven months after the petition was submitted), several scholars claimed that the Court failed to provide remedy to the judges forced into early retirement.[75] Namely, the judges concerned had been removed from office before the decision was published, leaving them to seek remedy individually before the competent labour court. This also voided the constitutional complaint of its main function, namely to provide remedy to the complainant.[76] As *Scheppele* observes,

> "in practicing new judicial deference, a court makes a brave decision on the law but then fails to give the claimant the relief she sought. The claimant wins big on principle. But if you are actually the claimant who brought the case seeking some change in your situation, you discover that you got only words. The claimant wins the principle but the other side wins the situation on the ground that the claimant went to court to change."[77]

Another example would be the *Lex csicska* (poster law)[78] adopted hastily before the elections, which foresaw that bodies and legal persons receiving funds from the budget (i.e. for example: parties) can only campaign with bills posted at the previous years' market price (according to critics, the aim of the law was to prevent opposition party Jobbik from posting bills on billboards at a significantly reduced price). The Government did not have a 2/3 majority in Parliament at the time and failed to adopt the law under the procedure governing legislation on party finances. The provisions were repackaged into a law regulating the conservation of built-up area landscapes and passed with a simple majority in June 2017. One-fourth of the members of Parliament turned to the Constitutional Court in July 2017, however, the Constitutional Court only decided to dismiss the case in December 2018,[79] more than half a year after the last parliamentary elections were held, rendering the decision of the Court obsolete for the purposes of the political process it related to.

---

[74] Arts. 90 point h) and 230 of Act No. CLXII of 2011 on the status and remuneration of judges.

[75] *G. Halmai*, Alkotmányvédelem jogvédelem nélkül? Konfliktuskerülő és lojális alkotmánybírák a bírói függetlenségről, Fundamentum 2012/2, 105 et seq. *K. L. Scheppele*, How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age, Part II. Verfassungsblog (9.8.2012).

[76] *G. Halmai* (note 75), 106.

[77] *K. L. Scheppele* (note 75). See also *K. L. Scheppele*, Understanding Hungary's Constitutional Revolution, in: A. von Bogdandy/P. Sonnevend (note 37), 118.

[78] Act No. CIV of 2017 on the amendment of Act No. LXXIV of 2016 on the conservation of built-up area landscapes.

[79] Order No. II/1483/2017.

As the examples described above indicate, the Constitutional Court has ample leeway beyond the few deadlines set forth under the law, to delay taking a decision on politically charged issues. This way, the Constitutional Court can avoid confrontation with the legislator, while still taking the decision.

2. Passing on the Case by Staying the Proceedings

Art. 45 of the Rules of Procedure allows the Court to exceptionally suspend its proceedings, when, according to Art. 60 of the Law on the Constitutional Court, the decision of the Constitutional Court on the merits of a case depends on the preliminary decision of an issue pending before a court, authority, other state body, an institution of the European Union (EU) or an international body. Such suspension must be justified by legal certainty, a particularly important interest of the petitioner or any other particularly important reason, which must be included in the motivation of the order.

In March 2017 the *Lex CEU* draft bill[80] was submitted and adopted a mere one week later by Parliament.[81] Many considered the law as a move to force the *George Soros* founded Central European University (CEU) out of the country for political reasons, while the Government argued, that it wishes to standardise rules applying to foreign universities present in Hungary and level the playing field between them.[82] In reaction to the new law, a fourth of the members of Parliament submitted a petition for the *ex post* review of the law before the Constitutional Court on 21.4.2017. Just six days later, the European Commission launched an infringement procedure against Hungary for breaching its obligations under the Treaty by restricting the free movement of services with *Lex CEU*. Instead of deciding the case, on 4.6.2018 the Constitutional Court suspended its proceedings[83] with due consideration to the proceedings pending before the Court of Justice of the European Union.[84] The Constitutional Court proceeded in the same way in respect of the so-called Law on Civil Society Organisations,[85] which foresees the registration of such organisations which receive funding from

80 T/14686 on amending Act No CCIV of 2011 on national higher education.
81 Act No. XXV of 2017.
82 See in detail *N. Chronowski*, Egyetemi autonómia – akadémiai szabadság – jogállamiság. and *K. Arató*, A CEU-diskurzus politikatudományi elemzése, Közjogi szemle 2017/2, 1, 9 et seq.; *L. Valki*, A lex CEU és a nemzetközi jog normái, <https://168ora.hu>.
83 Order No. II/1036/2017.
84 Case C-66/18, *European Commission v. Hungary*.
85 Act No. LXXVI of 2017 on the transparency of organizations funded from abroad.

abroad and suspended its proceedings[86] in view of the infringement procedure launched by the European Commission.

By passing on the decision in politically charged questions to an external forum, such as the Court of Justice of the European Union or the European Court of Human Rights, the Constitutional Court avoids confrontation with the legislator. Meanwhile, the suspension strategy also ensures that the Constitutional Court does not render a decision which may prompt the Parliament to change the Fundamental Law. At the same time, suspension ensures that the Court foregoes bringing a decision that may later turn out to be incompatible with the Court of Justice of the European Union (CJEU) or European Court of Human Rights (ECtHR) judgement. Finally, after the external forum had passed its ruling, the Constitutional Court can resume its proceedings and in the spirit of "constitutional dialogue" bring a decision with due consideration to the CJEU's or ECtHR's judgment.

3. Pronouncing Unconstitutionality Without Deciding the Politically Charged Question

The so-called "bell-rope doctrine" was developed over the years by the Constitutional Court[87] as a means to dispose of cases involving politically charged questions without deciding on the politically charged questions of the case.[88] Based on the bell-rope doctrine, where legislation is unconstitutional on several grounds, the Constitutional Court may choose to annul the legislation in question for any grounds of unconstitutionality. Once it has done so, it may refrain from making findings on other points of unconstitutionality.

An example for the use of the bell-rope doctrine would be the decision of the Constitutional Court on the postal voting rules. The Act on the election procedure[89] excluded those citizens from voting by postal ballot who had an address in Hungary but were abroad on the day of the parliamentary election. In his petition, the applicant claimed that the rules violated the right to vote and amounted to discrimination. The Constitutional Court

[86] Order No. II/1460/2017.

[87] The specific origin of the bell-rope doctrine and when it was developed is not documented in scholarly literature, however, *Péter Kovács*, former Constitutional Court judge and current judge of the ICC refers to the practice in his essay: Gondolatok és emlékek az alkotmánybíráskodásról és a legcsendesebb alkotmánybíróról […], in: A. Halustyik/L. Klicsu, Cooperatrici Veritatis, 2015, 327 et seq.

[88] *Á. Kovács* (note 60), 255.

[89] Act No. XXXVI of 2013.

dismissed the application on the basis that the applicant had an address in Hungary and as such, was not individually concerned by the rule in question.[90] However, this approach seems somewhat cynical, since it actually excludes anyone negatively affected by exclusion from postal voting from bringing an application for the review of the rule (since these citizens will all have a Hungarian address), effectively rendering the challenge of the rule by natural persons impossible.[91]

Thus, with the bell-rope doctrine, the Court can avoid making pronouncements on politically sensitive issues. While the Rules of Procedure or the Law on the Constitutional Court do not specifically provide for the application of the bell-rope doctrine, nothing precludes the Constitutional Court from refraining to review substantive constitutional issues once formal unconstitutionality has been established. *Ágnes Kovács* criticises the practice of the bell-rope doctrine, considering it as going beyond mere judicial deference, with the Court "skirting its constitutional mandate on unjustified grounds".[92]

4. Faux Dismissal With Gap-Filling Jurisprudence

The Constitutional Court may decide to dismiss the application as unfounded, at the same time adding certain constitutional requirements to the decision, which specify under which terms the legal rule under scrutiny may be applied in conformity with the Fundamental Law. In such cases, the line between unconstitutionality and constitutionality is narrow, since the Court could decide to annul the reviewed provision or establish unconstitutional omission for failing to legislate on crucial aspects. This way, however, the Constitutional Court – making full use of its leeway under Art. 46 para. 3 Law on the Constitutional Court – may determine constitutional requirements flowing from the Fundamental Law, which must be observed in the course of the application of the rule under scrutiny.

An example for this type of jurisprudence would be the recently decided *Stop Soros* case. In May 2018 the Hungarian Minister of the Interior published the draft bill[93] on what is widely known as the *Stop Soros* law. This

[90] Order No. 3048/2014. (III. 13.).

[91] *Á. Kovács*, Fényevők? A hazai alkotmányelmélet "esete a politikai konstitucionalizmussal", Fundamentum 2015/2-3, 29; *E. Bodnár/J. Mécs*, Az alkotmányjogi panasz szerepe a választójog védelmében, MTA Law Working Papers 2018/3, 11.

[92] *Á. Kovács* (note 60), 255.

[93] Draft Bill No. T/333 on the amendment of certain laws related to measures to combat illegal immigration.

law was to amend the Criminal Code to penalise "facilitating illegal immigration".[94] The law was adopted by the Hungarian Parliament in June and in October 2018 Amnesty International submitted a constitutional complaint, pleading that the new law violates constitutional principles governing criminal law. In particular, it asserted that the law violates legal certainty for lack of legal specification and that it excessively restricts fundamental rights, such as freedom of expression and freedom of assembly. On 25.2.2019 the Constitutional Court dismissed the application as unfounded, in particular, since there is no legal practice attached to the rule under scrutiny, therefore, one cannot assert that the terms employed by the new provision are unclear. Meanwhile, the Court also pronounced that all acts of humanitarian relief are beyond the scope of the provision, since helping the poor and those in need is an obligation under the Fundamental Law. Only speech inciting illegal immigration is sanctioned, public debate surrounding immigration is protected under the Fundamental law. As such, the Constitutional Court carved out the vast majority of possible speech and activities related to immigration from under the scope of the provision, affording them constitutional protection under the Fundamental Law.

This strategy enables the Constitutional Court to engage in constitutional gap-filling, effectively supplementing the rule under scrutiny, instead of simply dismissing the application as unfounded. This way, the Court has more influence on the application of an otherwise problematic piece of legislation, than by annulling it outright, under the threat of the Government amending the Fundamental Law and integrating the provision into the body of the constitution or adopting a different law. Meanwhile, this instrument is non-confrontational, allowing the Government to save face, while also safeguarding constitutional values by setting forth constitutional requirements for the application of the contested provision.

IV. Summary

The Constitutional Court is an outstanding institutional guarantee for safeguarding the rule of law and the protection of fundamental rights in Hungary. In light of the recent shift in power relations between the different branches of government manifested in a Government enjoying the support of a super-majority in Parliament, the Court must make use of certain procedural strategies available to it in order to maintain its integrity and

[94] Art. 353/A of Act No. C of 2012 on the Criminal Code.

preserve its role in the new Hungarian constitutional order. In the present paper, I explored the passivist strategies of the Constitutional Court enabled by the Law on the Constitutional Court and the Rules of Procedure to avoid or postpone decision-making in respect of highly political questions.

Based on the findings of my preliminary research, the Hungarian Constitutional Court may delay adopting its decision, pass on the decision to an external judicial forum, avoid making a decision on politically charged questions via the bell-rope doctrine and engage in constitutional gap-filling under the guise of dismissing the petition. While some of these strategies seem self-serving to avoid confrontation with the other branches of government, they may also have important functions in safeguarding the integrity of the Fundamental Law and upholding constitutional values.

Namely, passivist strategies are not necessarily used by the Hungarian Constitutional Court as an instrument of judicial deference. Instead, by making use of its leeway under the Law on the Constitutional Court and the Rules of Procedure, the Constitutional Court may engage in constitutional dialogue to add further legitimacy to the prospective decision involving European constitutional values or fundamental rights. It may also choose to admit cases that are formally flawed or make use of its discretionary power to establish unconstitutional omission on the side of the legislator and set constitutional requirements for the application of problematic legislative provisions instead of annulling them. By setting requirements for their application, the Court has more influence on the legislation concerned, than by annulling them for reasons of unconstitutionality. As a result, passivist strategies help preserve the Constitutional Court's role in the constitutional system, possibly contributing to safeguarding constitutional values, while at the same time avoid confrontation with the government and the legislator.

Following this first snapshot of passivist strategies within the framework of rules governing the Constitutional Court, further research is necessary. Based on the concept of "political question", more restricted in scope than the working notion of "politically charged question" a corpus of cases decided by the Court under the new Law on the Constitutional Court and Rules of Procedure should be compiled and analysed to better understand the use of passivist strategies by the institution.

1. Table on the Competences of the Hungarian Constitutional Court

Hungarian Constitutional Court (***Fundamental Law, Act No. CLI of 2011***)	**Competences**
	• Constitutional complaint procedure (Law on the Constitutional Court § 26-30) • Review of the constitutionality of legal rules applicable in a specific, pending court case (Law on the Constitutional Court § 25) • Ex ante review of constitutional conformity (Law on the Constitutional Court § 23) • Ex post review of constitutional conformity (Law on the Constitutional Court § 24) • Review of conformity with international treaties (Law on the Constitutional Court § 32) • Review of Parliament's resolution ordering a referendum (Law on the Constitutional Court § 33) or recognizing a religious organization (Law on the Constitutional Court § 33/A) • Opinion on the dissolution of unconstitutional municipal councils (Law on the Constitutional Court § 34) or religious organizations (Law on the Constitutional Court § 34/A) • Impeachment procedure (Law on the Constitutional Court § 35) • Resolving jurisdictional conflicts (Law on the Constitutional Court § 36) • Interpreting the Fundamental Law (Law on the Constitutional Court § 38)