Dr. Attila Vincze, LL.M.

Reader in European and comparative public law

Andrássy University Budapest

Attila.Vincze@gmx.net

vincze.attila@andrassyuni.hu

Is the financial crisis a good excuse?

The financial crisis in the recent case-law of the Hungarian Constitutional Court*

The financial crisis of 2008 hit Hungary extremely badly. The socialist-liberal government (2008-10) and the right-wing government (2010-2014) were trying to tackle the challenges of the global economic and the home-grown excessive debt crisis. As more and more measures were taken the expression "economic crisis" – either in its meaning of a global or that of a national one – was used more and more often by the Constitutional Court as an argument for justifying government policy. Unfortunately, this rather led to a simplification of argumentation.

In order to better understand the recent case law, a short legal and factual background is set out (I.) and the role of sustainable finances in the new constitution of Hungary is described and assessed (II.). The third part of the paper is dedicated to the analysis of the case law portraying and assessing the argumentation before and after the global crisis broke out (III).

I. Some background information

A legal background

Hungary is a Member State of the European Union however it did not adopt the common European currency, the euro. The basic reason for doing so was the huge government debt and current deficit far beyond the point acceptable according to the founding Treaties of the EU. The founding Treaties – especially the market freedoms, state aid and competition rules– and EU secondary legislation are binding and applicable for Hungary however many elements of the Economic and Monetary Union are not. The prohibition of monetary financing (Art 123 TFEU), that of privileged access to financial institutions (Art 122 TFEU), the requirement of central bank independence (Art 131 TFEU) and the duty of a balanced

* This research was realized in the frames of TÁMOP 4.2.4. A/1-11-1-2012-0001 „National Excellence Program – Elaborating and operating an inland student and researcher personal support system" The project was subsidized by the European Union and co-financed by the European Social Fund.

budget (Art 126 TFEU) are though applicable for Hungary the EU has limited competences to fine the country for unbalanced budget or for excessive government debts. Nonetheless, in the meantime many fine-tuned measures have been adopted in order to restrict access to or to claim back financial aids from countries which have though not joined the euro-zone yet and are not capable to balance their budget.

A factual background

The government debt of Hungary was around 4 billion USD in 1973 which had been increased to 20billion USD in 1989 to an amount more or less equal to 60 percent of the GDP. During the turbulent times of the political transition from socialism to capitalism, the government debt had been further increased due to several causes and reached the peak of almost 90 percent to the GDP in 1992. Between 1992 and 2001, the successive governments had managed to reduce the debt ratio to 52 % of the GDP. This impressive result was partially due to privatisation incomes, some structural reforms (since 1995) and better economic performance after 1997. Since 2002, the debt to GDP ratio had been worsened from year to year until it reached its new peak at 82 % in 2011 (for details see figure 1).

The reasons for these recent negative developments are many folded.

First and foremost, the successive governments often simply disregarded fiscal discipline and the requirements of a balanced budget. In 2002, the outgoing right-wing government tried to gain votes by extending government spending. During the same campaign, the socialist party promised a welfare revolution which was actually carried out after winning the elections. The pay and pension rise, expensive – and sometimes overprized – construction project caused heavy burdens to the budget. The deficit spending heated though the economy to some extent; however, it has also contributed to an unsustainable debt level as the government often did not invest the money wisely but rather tried to cover current expenses such as pensions or salaries. These developments were criticized by the EU, however, there was no such an intensive pressure that would have stopped the socialist government borrowing and spending further.

Although the government had to promise higher and higher interest rates for bonds issued, the Hungarian currency, the forint, was somewhat overrated at that time, and therefore even a high government deficit was – at least for a short term – manageable. The government deficit peaked at a nearly 10 % level in 2006. As this debt level was not only contrary to European Union law commitments, and as such caused some political controversies with the Commission, but also clearly unsustainable the government undertook some austerity measures and tried to reduce deficit since 2006 (for further details of the government deficit see figure 2). These measures were highly unpopular and it became politically more and more difficult to carry them out. The difficulties caused

turbulences in the governing coalition, change of the Prime Minister in 2009 and a landslide victory of the opposition in 2010.

Unfortunately, not only government had huge debts but also private households. As the interest rates in Forint were in many cases unaffordable high, people tended to take mortgages and loans rather in other currencies typically in Euro or Swiss franc. Hence, not only the public but also the private sector became very dependent on credit from abroad, and the total (public plus private sector) international lending to Hungary has represented around 100% of GDP.

So, the financial crisis had some country specific issues: in Hungary there was a lending bubble as in many other countries meaning that many loans and mortgages were granted for those who were not capable to redeem them or to provide sufficient collaterals (a so called subprime lending).[1] Moreover, these loans and mortgages were granted in foreign currencies. As the 2008 crisis hit Hungary, its currency lost around 20 % of its value in line with some other CEE currencies. This resulted in an increase of government and private debts in real terms as most of loans were denominated in foreign currencies (for an overview of the external debt see figure 3).

As a result of the huge government debt combined with unwanted currency devaluation, Hungary became almost bankrupt at the end of 2008. The liquidity crisis due to the collapse of the financial markets generally and dramatically shortened the available assets, and Hungary – with some other countries together – faced serious problems. In order to overcome its difficulties Hungary applied for the assistance of the International Monetary Fund (in accordance of Article V. Articles of Agreement of the IMF) and for a medium-term financial assistance of the EU (in accordance with Council Regulation (EC) No 332/2002).

In 2009 and 2010, the socialist government – under a new PM – did manage to stabilize the situation. The right-wing coalition winning the 2010 general elections had a clear preference of tackling the challenges faced by the country in the aftermath of the financial crisis.

There were some new rules enacted partly on constitutional level in order to enforce fiscal discipline and some controversial measures were taken to secure some additional income and to regulate several sectors.

II. Financial discipline in the new Fundamental Law of Hungary

The controversial new Fundamental Law of Hungary[2] postulates as a general principle that Hungary pursues the principle of a balanced, transparent and sustainable budget (Article N).

[1] From the many analysis of crisis and of its causes see inter alia Stephen Wallenstein: "The roots of the financial crisis! *Capital Markets Law Journal*, Vol. 4, No. S8-S30, Rosa M.: "Lastra and Geoffrey Wood: The Crisis of 2007–09: Nature, Causes, and Reactions" *Journal of International Economic Law* 13(3), 531–550

[2] See: A Jakab & P Sonnevend, 'Kontinuität mit Mängeln: Das neue ungarische Grundgesetz'*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2012 pp. 79-102; A Vincze, 'The New Hungarian

This principle has to be respected by the Constitutional Court and by the ordinary courts. It is not quite clear what this provision means; however, as it will be shown, the Constitutional Court understood it as an invitation to defer to the legislative branch in number of cases.[3]

The meaning of the financial responsibility and its guarantees are elaborated among the institutional provisions of the Constitution.

In the first place, the Fundamental Law introduces a limitation of state debt and includes a mandatory rule compelling Government to reduce the actual debt level to a maximum of 50 % of the gross domestic product (which is still around 78 %). However, this will probably not happen in the upcoming decade.

A new institution, a so called Budgetary Council has been established and equipped with veto powers in case of a deficit higher than allowed by the Fundamental Law. If the Budgetary Council opposes the budget it can lead to a fall of the Government as Article 3(3) of the Basic Law empowers the President of the Republic to dissolve the Parliament if the Parliament does not adopt the central budget for a given year by 31 March of that year (which might happen if the Budgetary Council vetoes a budget)[4] So, the Government has immense political interest to deliver a modest and balanced budget.

The Fundamental Law also empowered the Parliament, in order to preserve balanced budget of local governments, to adopt a law requiring that local governments shall get the approval of the Government if the plan to borrow above a certain limit (Art 34 (5) Basic Law).

These rules may help to achieve a balanced budget. However, there are some regrettable peculiarities. The powers of the Constitutional Court are radically cut until the government debt ratio does not achieve the magical 50% level.[5] Until this time – which won't come tomorrow or the day after – the Constitutional Court is not allowed to review tax issues but for only a very limited and rather unlikely issues (such as the freedom of thought, conscience and religion, or in connection with the rights related to Hungarian citizenship).

The origins of this blatant violation of the requirements of the rule of law go back to 2010 as the newly elected coalition introduced a tax which imposed a 98 % tax on compensations for employees of the public sector whose employment was terminated. Compensations exceeding HUF 2 million became subject to a 98% tax. The bill justified the tax with reference

---

Constitution: Redrafting, Rebranding or Revolution?' *Vienna Journal on International Constitutional Law* 2012, pp. 88-109; A Vincze: 'Die neue Verfassung Ungarns' *Zeitschrift für Staats- un Europawissenschaften* 2004, pp. 110-129; A Vincze – M Varju, 'Hungary - The New Basic Law' *European Public Law* 2012 pp. 436-457.

[3] It is an accepted principle that courts have to exercise restraint when reviewing the decisions of a person or body possessed with specialist expertise or in financial, social and economic spheres. Cf. Richard A. Edwards: Judicial Deference under the Human Rights Act, 65 The Modern Law Review (Nov., 2002), 859 (860).

[4] These draconian powers were held to be undemocratic by the Venice Commission undemocratic: *Second Report of the Venice Commission* (n. 5), para 129.

[5] *Second Report of the Venice Commission* (n. 5), para 120-127.

to public morals; however, its real target was the outgoing socialist administration. Moreover the Act was applicable retroactively. The Constitutional Court found the relevant provisions unconstitutional because of its confiscatory nature and retroactive effect.[6] As a reaction to this unfavourable decision was a new bill introduced which essentially re-enacted the 98 % tax and the Parliament amended the Constitution in two points: first, expressly allowed retroactive taxation, and, second, limited the Constitutional Court's powers and the restricted the review of budgetary and tax issues to a very few heads of review.[7]

These restrictions were in some respect effective and hindered the Hungarian Constitutional Court to deal with tax issues, and therefore with the constitutionality of some exceptional taxes. Nonetheless, this did not stop the litigation before international courts, neither the ECtHR[8] nor the ECJ.[9]

The confiscatory (98 %) tax was filed in Strasbourg before the European Court of Human Rights and it was declared contrary to Article 1 of Protocol No. 1 of the ECHR. Regarding the confiscatory tax the Government pointed out before the ECtHR that this tax intended to pay attention to the circumstance that, in the midst of a deep world-wide economic crisis, not only the State but also others should bear burdens.[10] The ECtHR acknowledged, as it follows from its earlier case-law, that in the area of social and economic policies including in the area of taxation States enjoy a wide margin of appreciation, and hence they mas adjust, cap or even reduce the amount of normally payable severance. The tax was though declared contrary to the right to property, this has only happened because the tax was unproportional and discriminatory.[11] Nontheless, the ECtHR seemed to accept the financial crisis as a legitimate aim as part of the margin of appriciation in financial matters.

The ECJ had to rule on the compatibility of an exceptional tax with European Union law. The tax was imposed on retail trade activities, telecommunications activities and all commercial energy supply activities by the Law No XCIV of 2010 and was to be paid for three consecutive years on the basis of the turnover before tax.

---

[6] Decision no. 184/2010. (X.28.) AB. In detail see Somody B: 'Az Alkotmánybíróság határozata a 98 százalékos különadóról A visszaható hatályú adóztatás alkotmányossága' (2011) 1 Jogestek Magyarázatai 3-11

[7] Despite these limitations, the Constitutional Court annulled the five-year retroactive application of the 98% tax (Decision of the Constitutional Court 37/2011. (V. 10.)) In this decision, which the Venice Commission also cited in its second report (n.5), the Constitutional Court held that "[T]he retroactive taxation of a legal income, generated without infringing any laws, in a tax year which has ended, represents such a degree of public interference into an individual's autonomy that it lacks an acceptable reason, and thus, goes against human dignity…" On 9 May 2011 Parliament again re-enacted the retroactive application of the 98% tax providing that only relevant revenues earned after 1 January 2010 should be subject to the tax. On the decision see Chronowski N: 'Az Alkotmánybíróság második határozata a 98 százalékos különadó ügyében ' (2012) 3 Jogestek Magyarázatai 3-11

[8] ECtHR, Judgement of 14 May 2013, N.K.M. v. Hungary (Application no. 66529/11).

[9] ECJ Judgment 5 February 2014, in Case C-385/12, Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága.

[10] ECtHR, Judgement of 14 May 2013, N.K.M. v. Hungary (Application no. 66529/11), para 28.

[11] ECtHR, Judgement of 14 May 2013, N.K.M. v. Hungary (Application no. 66529/11), para 65-76.

The tax was also challenged before the Hungarian Constitutional Court which declined the case as it had no competence to deal with tax issues.[12] Nonetheless, this circumstance did not hinder either the Commission to challenge the case before the ECJ[13] or a national court to refer a preliminary question to the ECJ.[14]

In this latter case, the Hungarian Government though did not put forward any reasons to justify the exceptional taxes the ECJ needed to stress that any such tax might be justified either by the protection of the economy of the country or by the restoration of budgetary balance by increasing fiscal receipts.[15]

These circumstances needed to be put forward for several reasons. First, the Government backed up by a supermajority simply freed itself from constitutional limitations as to taxes and budgetary issues and therefore this most obvious tool of managing a financial and debt crisis is without constitutional control. Second, national limitations did not stop international courts ruling on tax issues which also show how futile was the whole attempt. Third, there is no national case law on tax and budgetary matters from the last four years and there is simply a constitutional lacuna: we do not know whether taxes are constitutional, how to justify a tax etc. Fourth, the Constitutional Court justified other measures than taxes by crisis.

III. Crisis as justification

The use of crisis as an argumentative element, as a *topos* has been multiplied in the recent years in Hungary. More and more measures were justified by the necessities dictated by the economic crisis. On the one hand, we are facing an expansion in quantitative terms and, on the other, we are facing a qualitative one as financial crisis was as an argument which might triumph over every other one.

a) A quantitative analysis

Thirty-six decisions of the Hungarian Constitutional Court contain the expression “crisis” in the period of time between 1990 and 2013. This number includes all the references to the expression either made by parties or by the court or by the law applied.

---

[12] Decision 1618/B/2010

[13] *Commission v Hungary* (Case C-462/12)

[14] ECJ Judgment 5 February 2014, in Case C-385/12, Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága.

[15] ECJ Judgment 5 February 2014, in Case C-385/12, Hervis Sport- és Divatkereskedelmi Kft. v Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága, 43-44. In detail see Vincze: Verletzt eine stark progressive Umsatzsteuer, die zwischen verbundenen und nicht verbundenen Unternehmen unterscheidet, die Niederlassungsfreiheit?, INternationale Steuerrundschau 2014/3, 102-104

Nonetheless, sixteen of them are dated between 2010 and 2013 and twenty of them were referred to between 1990 and 2009. This number shows that almost half of the references are from the time period of the financial and economic crisis and the expression has been used in this period four times more often than before.

This simple quantitative analysis shows the drastic increase of the cases, and, of course, highlights at least one thing: a crisis is perceived by the court or by the general public as a factor that should be taken into account. In order to get a more accurate picture we have to squeeze out irrelevant references and therefore we have to go through the cases and to analyse the context in which the word crisis was used.

In the period 1990-2009 there were five decisions in which the expression crisis was cited among the applicable legal provisions but the Court itself did not use the expression in any other way. These decisions should be excluded from the analysis.[16] Also those decisions are to be excluded in which only the parties refer to the crisis but the court does not[17] as crisis obviously did not influence the argumentation.

Twelve decisions remain from the period 1990-2009 which were substantially dealing with some kind of crisis. However, there are many kinds of crisis and therefore many kinds of crisis are referred to in the different decisions. Six of them were dealing with life crisis of psychological or medical nature like abortion, sterilization, drugs or crisis in childhood.[18] A further one was referring to a legitimacy crisis of criminal proceedings by quoting government materials and without explaining what the term might actually mean.[19] A further decision interpreting the presidential powers in crisis also referred to the term understanding it as a serious malfunctioning of the state.[20] There are actually only six decisions were dealing crisis in financial or economic meaning of the word.

The first decision of the Constitutional Court containing the word crisis at all is from 1991 and was dealing with the constitutionality of amending mortgage contracts as it was necessary by the transition from socialism to market capitalism. The Court did accept the exceptional nature of the transition period changing the original circumstances under which the mortgages were granted. And therefore the transition, as a crisis, does allow introducing unusual measures.[21] A later decision quoted this without adding any new element.[22] A further decision,[23] which was quoted once later,[24] was dealing with the assets of trade

[16]Decisions 227/B/1999. AB, 25/2002. (VI. 21.) AB, 14/1998. (V. 8.) AB, 41/2004. (XI. 3.) AB, 772/B/2004. AB.
[17] Decision: 140/B/1998. AB.
[18] Decisions 48/1991. (IX. 26.) AB, 48/1998. (XI. 23.), 1143/B/1998, 54/2004. (XII. 13.) AB, 43/2005. (XI. 14.) AB, 394/B/2006. AB.
[19] Decision 42/2005. (XI. 14.) AB
[20] Decision 36/1992. (VI. 10.) AB.
[21] Decision 32/1991. (VI. 6.) AB.
[22] Decision 1473/B/1991. AB.
[23] Decision 26/1992. (IV. 30.) AB
[24] Decision 668/B/2001. AB, the decision did not add any new elements to the

unions and the measures taken by the government in order to preserve them during the transition. There is a further reference to the crisis in the meaning of the extremely high inflation during the first years of transition.[25] A decision on the fund for safety of bank deposits does also refer to the crisis in the sense of triggering the safety fund however it is not a really important element of the reasoning.[26]

This analysis shows that there were only a few cases – three or four depending on the relevance of the reference – dealing with crisis in financial or economic sense of the word and the overwhelming majority of them was decided shortly after or during the transition and the court did accept that the extraordinary circumstances of the transition may justify an interference with sanctity of the contracts. Nonetheless, the cases are rather few and there are hardly any cases for more than fifteen years applying economic crisis as an argument despite of the fact that there were several economic crisis, such as the Mexican crisis of 1994/95, the Asian Financial Crisis of 1997, the Russian financial crisis of 1998, the Turkish economic crisis of 2001, the Argentine economic crisis of 1999-2002 or the dot-com bubble at the beginning of the 21st century.

Since 2010 there are sixteen cases in which the crisis were mentioned in different cases. Three of them were filed before the crisis and do not deal with economic crisis.[27] One of the cases filed in or after 2009 was dealing with mass demonstrations in Hungary in 2006 and as such with a political crisis.[28] A further one dealt with transmission operator fees payable by the gas retailers and it was alleged that they are unconstitutional as the retailers do not receive any service for the fees. The expression crisis is referred to among the duties of the transmission operator and played no role in the argumentation.[29]

There are eleven cases in which the parties or the court did refer in some form to the economic crisis. There were three cases in which only the parties referred to the crisis: one was dealing with employment law,[30] one with mortgage contracts[31] and one with a referendum on mortgages.[32] Even if the court declined the cases *a limine* – without dealing with the merits – all of them were deeply rooted in the economic crisis.

If we only consider the cases in which the crisis was used in an economic sense of the word there are eight of them. In pure arithmetic terms there are twice as many references than in

[25] Decision 579/B/1990. AB
[26] Decision 624/E/1999. AB.
[27] Decision 88/B/2007 is dealing with a special court procedure which allegedly causes a crisis in criminal proceedings, the case was declined a limine (without dealing with the merits). Decison 43/E/2007 wa dealing with the bank deposit safety fund again, the crisis did not play any role in the argumentation. Decision 10/2011 (III.9.) AB was dealing with associations and the crisis was referred to in a context of „organizational chaos".
[28] Decision 24/213 (X.4.) AB.
[29] Decision 1107/B/2520
[30] Decision 3197/2013.
[31] Decision 232/E/2009.
[32] Decision 77/2011 (X.28.) AB.

the period 1990-2009, and two and half times more per year if we weight the results. This is in itself a significant increase.

The results are however more dramatic if we consider how and in which context the court used these arguments. Therefore we need a qualitative analysis of the cases, a short overview and an assessment of the decisions and the crisis as argumentative *topos* in these cases.

b) Overview of the case-law since 2010

The first decision was concerned with state guarantees provided for household mortgages if the debtor lost his or her job after 30. September 2008.[33] According to the Act challenged by the ombudsman, the state paid the mortgage instead of the original debtor. The ombudsman alleged that fixing the date might be discriminatory. The Constitutional Court stressed that the law was passed in order to mitigate the consequences of the financial crisis and the guarantee is provided under some very strict conditions. This guarantee was considered as an *ex gratia* payment for those who suffered due to the economic crisis. The Parliament has broad margin of appreciation by providing such an assistance limited by the financial capabilities of the state. As the exact starting date of the crisis cannot be established, the Constitutional Court stated, it was not unjustified to set the date at the 30th September of 2008.

The second case[34] concerned the gas retail prices which are subject to governmental regulation in Hungary. Though these prices are fixed the wholesalers buy the price from the market and pay in USD as Hungary needs to import the most of the gas. As a result of the 2008 crisis the Hungarian currency lost approximately 20 % of its value which caused huge losses to the wholesalers because the currency devaluation was not taken into account as the retail prices were fixed. A decree was therefore adopted obliging the retailers to compensate the losses of the wholesale companies. This decree was challenged before the Constitutional Court. According to the CC the regulation addresses the financing of a very problem arisen due to the economic crisis. It was a very unique constellation and therefore – at least according to the majority of the Court[35] – there was no applicable legal provision for the case in the whole legal system. As the court held one may not reasonably expect a rule on every eventual future question of economic policy. Moreover, the Constitutional Court stressed that the calculation of the losses and its distribution is no question of constitutional law. The decree was upheld.

[33] Decision 775/B/2009. AB
[34] Decision 813/B/2009. AB
[35] there were 3 dissenting opinions

The third case dealt with the suspension of trading with some volatile securities.[36] The court held that a suspension is a widely accepted measure to tackle stock market difficulties and pointed out that this option was part of the legal regulation also before the crisis, and as the crisis hit very badly the market it was not unjustified to apply it.

The fourth case was dealing with the confiscatory taxes. This, as it was shown above, was held to be unconstitutional because of its confiscatory nature and retroactive effect.[37] Nonetheless, the court did not exclude explicitly that a very high tax rate might be constitutional for unreasonable high bonuses or payments. These payments may be regarded contrary to the sense of justice especially during a crisis, and therefore withholding or reassessing them or taxing them in order to retrieve back at least a part might be justified. However, as the tax was applicable for everybody without exemption, the special circumstances could not be taken into account and therefore the tax was held to be unconstitutional.

A further decision dealt with an amendment of the Electricity Act concerning the long distance heating.[38] The starting point was an earlier energy policy change as the earlier government aimed to foster building of gas instead of coal power stations. As a result of this policy change new power station were built and old ones were amended to function as gas powered power stations. Power station producing long distance heating could not operate rentable only by producing heat especially because the price of long distance heating was regulated. Therefore it was enabled them to produce electricity as well and a price were guaranteed them for a so called investment period which was higher than the market price. The investment period could have been prolonged until the end of 2015. This Act was modified in the aftermath of the crisis in 2009 and in 2010. The guaranteed price has been reduced for 2011 by 15 % for 2012 by 30%. In March 2011 the whole system of guaranteed retail prices was unexpected abolished and all licenses to participate in the guaranteed price system were withdrawn irrespectively of the fact as to whether the so called investment period had been expired or not. The investors lodged a complaint at the constitutional court. The Constitutional Court stressed that the economic and financial crisis did justify the amendments. The Court stressed the social policy impacts as far as a group of citizens enjoyed the benefits of cheaper distance heating but the whole society paid for it, and therefore – according to the court – the state was obliged to review the system. The constitutional court acknowledged as a fact that the global economic and financial crisis of 2008-09 with sensible effects still in time of making the decision and the Hungarian economic, financial and budgetary situation caused a situation in which an assessment of the price guarantees system and the introduction of a new system of subsidies were necessary. The court acknowledged that the Parliament may only interfere with contracts in extreme

[36] Decision 70/B/2009

[37] Decision no. 184/2010. (X.28.) AB. In detail see Somody B: 'Az Alkotmánybíróság határozata a 98 százalékos különadóról A visszaható hatályú adóztatás alkotmányossága' (2011) 1 Jogestek Magyarázatai 3-11

[38] Decision 3062/2012. (VII. 26.) AB

situations; however such an extreme situation was caused by the financial crisis. Therefore no violation of vested rights could have been established

A further decision was concerned with the ratification of the six-pact and fiscal pact.[39] These pacts had been negotiated at EU level in order to cope with the consequences of the fiscal crisis. The Constitutional Court found no objection why these should not be ratified.

A further decision concerned the Law on protection of home ownership.[40] The challenged Act enabled for home owners with mortgages denominated in foreign currency to redeem the mortgage under favorable conditions, in a currency course lower than market price. The Act was applicable for a limited period of time until the 1st of April 2012. According to the Constitutional Court, the conditions of the mortgages denominated in foreign currencies have been changed due to the economic and financial crisis beyond the normal and foreseeable risks. The economic and financial crisis affected a great number of mortgage debtors whose situation has been worsened. The high volume of debts denominated in foreign currencies made a quick reactions necessary in interest of the debtors and in order to avoid the huge material and social damages. Therefore it is unfounded – according to the Constitutional Court - to claim that the legislative interference would forfeit the trust in the binding force of contracts - *pacta sunt servanda* - or would violate legal certainty and freedom of contract. The Parliament, according to the CC, reacted to a huge and exceptional situation created by an international crisis that justifies the act. The Court, however, did not deal with the aspect that the banks had to cover the difference between the market price and the subsidized rate.

The next case concerned the abolition of privileged retirements enabling a retirement before the legal age limit.[41] The Constitutional Court acknowledged that privileged retirements were not sustainable under the worsening demographic conditions and these options had a meaningful role in the high debts of the country.[42] The Constitutional Court stressed that under present the economic and budgetary conditions caused by the financial and economic crisis it was necessary to reduce the debts as a short term priority. This priority triumphed over many – under normal circumstances – acceptable and fair claims. The CC highlighted the constitutional duty of a sustainable budget according to Article N of the Fundamental Law. This constitutional provision emphasizes the necessary paradigm shift in pension and limitations of early retirements which were considered by the CC as ex gratia pensions. Therefore a lowering, restriction, elimination or transformation of these pensions into social benefits relies on the constitutional principle of sustainable, transparent and balanced budget. The challenged Act served therefore the execution of the Fundamental Law, which – according to the CC – *ab ovo* excluded a violation of the fundamental law.

[39] 22/2012. (V. 11.) AB határozat
[40] Decision 3048/2013. (II. 28.) AB
[41] Decision 23/2013. (IX. 25.) AB. In their concurring opinion, *Dienes-Oehm Egon* and *Béla Pokol* stressed that the CC had no competence at all to rule on the question as it was related to the budget, which is excluded by Art 37 (4) and Art N of the Fundamental Law of Hungary.
[42] Nonetheless this statement was made without any evidence.

There are two further cases in which the majority of the court did not mention the crisis as a possible justification of a measure; however, the concurring opinions did so: one on university tuition fees and the second one on the constitutionality of the transitory provisions of the Fundamental Law.

The Act on Higher Education enabled to require tuition fees from university students. The details should have been governed by a decree of the government. The problem was that these issues were policy issues which were subject to parliamentary legislation, and therefore was the decree annulled as formally unconstitutional decree.[43] Nonetheless, in the concurring opinion of Justice *Lenkovics, Balsai and Szívós* did not share the idea that tuition fees and their amount is not a policy issue. They highlighted – and therefore is the concurring opinion important – that in light of the economic and financial crisis and that of emigration of graduated youngster it is possible to evaluate the investment of the society in the education and therefore the question is closely connected to the requirements of sustainability in Art N of the Fundamental law which might justify a system of tuition fees or requiring students to work in Hungary for a time after graduation. The point might or might not be true, however this should not influence the question as to whether the government might or might not issue a decree or not. According to the minority, the crisis might even justify unlawful delegation of legislative powers to the Government.

The second one was dealing with the Act on the transitory provisions to the fundamental law of Hungary which was found to be partially unconstitutional as it governed issues which should have to be part of the Fundamental Law itself. [44] The interesting point is rather the concurring opinion of Justice *Lenkovics.* He was dealing with the crisis in broader terms. He was very critical of the transition and democratic development of Hungary between 1989 and 2010, and stressed that this whole political process – at least in his opinion – led to a deep crisis in political, economic, financial, social and moral sense of the word. He thought that this crisis was caused partially by internal (the shortcomings of the rule of law) and partially by external factors (EU and global influences). Tackling the sincere results of crisis requires – at least according to him - huge and unusual measures, a rethinking the role of fundamental rights and justifies cutting these rights back, stressing personal responsibility and duties. He thinks that the new fundamental law of Hungary was born under these circumstances, and therefore a redesign or restriction of the fundamental institutions such as cutting back the competences of the Constitutional Court or limiting fundamental rights especially the economic, social and cultural rights. He stressed that critical times need exceptional solutions also on constitutional level. Tackling crisis is only possible if the government is effective and operational which was aimed by the new Constitution.

c) An assessment and some conclusions

[43] Decision 32/2012. (VII. 4.) AB
[44] Decision 45/2012. (XII. 29.) AB

In these briefly described cases the Constitutional Court or some of its Justices lowered the requirements of constitutionality step by step by using the crisis and crisis management as an argument that might triumph over everything else.

The few first decisions concerned rather subsidies than regulatory measures, such as a state guarantee for home mortgages or a compensation of the gas wholesalers. In both of these cases the state offered a financial assistance which does not require such an intensive justification as regulatory matters. As far as the state is pursuing factual objectives it is free to offer any assistance and the courts have no reason to review it.

The latter cases were concerned with measures of rather regulatory nature: reassessing power plant investment regulations, mortgages contract conditions or cutting back retirement options were meddling with vested rights, interests and legitimate expectations and therefore are not - or at least should not be – so easy to justify as financial assistance programs.

There are some common elements in the cases.

Firstly, the Constitutional Court was not looking for evidence in any of the cases. Decisions on gas retail prices, power plant investments, retirements or mortgages were made without any hard facts just by simply stating that crisis needs to make some economies.

Moreover, the Constitutional Court did not really assess any arguments contrary to the government position. In the case of the power plants the CC did not ask the question as to whether the investment period expired or not, or the investor did receive a fair return or even tried to get some evidence on these issues but simply assumed that the power plants received a higher than market price and this cannot be held up in times of crisis. Very similar is the redeeming of the mortgages at a lower than market rate. The losses of the banks or the feasibility of the program was not considered at all. A maybe more drastic decision is the one on the abolition of early retirement. The CC simply stated that the requirement of a balanced budget does *ab ovo* (without any further need of justification) excludes the unconstitutionality. I do not think that early retirements were good or financially sustainable solutions, however, the constitutionality of their abolition needs more rigorous review than simply stating the a balanced budget requires it. The problem is quite obvious: as long as a country has a huge government debt the debt has to be reduced in order to achieve balanced budget. If therefore balanced budget rules justify anything without any further ado anything can be abolished or restricted in order to achieve some economies. The absurdity of such an oversimplified argumentation is clearly demonstrated in the concurring opinions in which the constitutional justices tried to justify not only the constitutionally of an incredible delegation of powers to the government but also the whole new constitution of Hungary.

The most destructive effect of the financial crisis might be therefore on the constitutional reasoning. As the crisis and its aftermath, the economic and political instability are covered by national and international media on a daily basis which seem to be something that does not need any further justification. The media coverage of the years-long crisis has a psychological effect like the burning twin towers had after 9/11[45] and hardly anybody in the Constitutional Court is ready to question the necessity, the long run sustainability or even the constitutionality of any measures taken in name of sound public finances.

The discussion on the constitutionality of these measures has left the realm of legal discussions.[46] The Court was not intending to find an internal justification, a logical deduction of the verdict from constitutional rules. At many occasions, it was simply stated that there are no rules which would govern the case or in other words that crisis needs exceptional solutions. This plainly means that crisis management does not underlie any rules at all but the vague imperative of debt reduction. The other imperatives of the constitution were being set aside such as the rule of law, protection of vested rights, property or to some extent even democracy.

The decisions of the Constitutional Court just simply rubber-stamped government policy without taking the faintest effort to ask their constitutionality. The last two decades of constitutional developments in Hungary were far from being perfect however some basic principles of constitutional justification and argumentation have been adopted – even if neglected in some cases. One of these principles is proportionality[47] requiring a legitimate aim for a measure, the necessity of that measure meaning that are no other less onerous means to achieve the aim and the measure must be reasonable, considering the competing interests of different groups at hand. The Constitutional Court simplifies the question to answering the first criterion and not regarding the further ones. The first criterion is easy to answer in the most cases especially in light of the constitutional provisions requiring a balanced budget. However, simplifying the constitutionality to this and only this criterion makes constitutional review more or less obsolete.

It must be, of course, added that fiscal and monetary policy have not been subject to rigorous scrutiny for long time as a legacy of the criticized Lochner-era.[48] A judicial deference may also be justified by the principle of separation of powers, that it is not the task of the Constitutional Courts to usurp the power of the purse vested into the Parliament and by the

[45] It must be stressed nonetheless that the House of Lords was ready to scrutinize Government policy like in A & Ors v. Secretary of State for the Home Department [2004] UKHL 56 (16 December 2004) [2005] 2 AC 68, [2005] 2 WLR 087, [2004] UKHL 56, [2005] 2 WLR 87.

[46] On the speficific requirements of a legal discourse see Robert Alexy Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung, Frankfurt a.M. 1991.

[47] Cf. Johannes Sauer „Die Globalisierung des Verhältnismäßigkeitsgrundsatzes“ Der Staat 51(2012), pp. 3-33

[48] Cf. Matthew J. Lindsay: “In Search of “Laissez-Faire Constitutionalism” 123 Harv. L. Rev. 55 (2010).

fact that the executive and legislative branches have special expertise in financial and monetary matters which makes them better equipped to decide certain questions of fact.[49]

However, the Hungarian Constitution does not give a full power of the purse for the Parliament and the Government but sets constitutional limitations and in this sense the principle of separation of powers cannot be applicable to the fullest extent. Moreover, the institutional deference is based on a presumption that the executive or the legislative branch is better equipped with expertise. This presumption can only apply if the decisions are based on a fair a balanced analysis and assessment of the facts. This can be disputed in the case of the Hungarian Constitutional Court as it either did not require a fact finding from the government and to give an evidence on the financial impacts of a measure restricting fundamental rights of the investors, banks, energy providers etc.; or it or at least some of its members did defer also in cases in which the financial sustainability or soundness was not the question, such as in the case of the delegation of powers.

The Constitutional Court used the phrase financial crisis in order to favour government policy and to cover its servility. As this the financial crisis has an undoubtedly overwhelming effect requiring sometimes draconian measures it was easy to disguise this judicial behaviour. Nonetheless, reducing and simplifying constitutional questions to the one of debt reducing may have long lasting damaging effects on constitutional reasoning by creating dangerous examples.

[49] As Jeffrey Jowell made an important distinction between constitutional competence and institutional competence Jeffrey Jowell "Judicial deference: servility, civility or institutional capacity" [2003] PL 592.

Figure 1

Figure 2

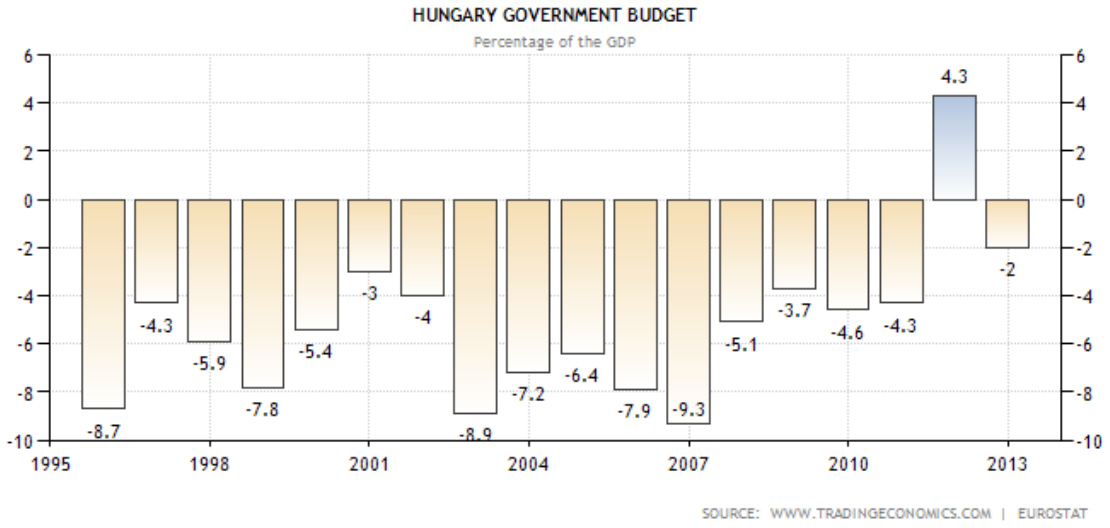
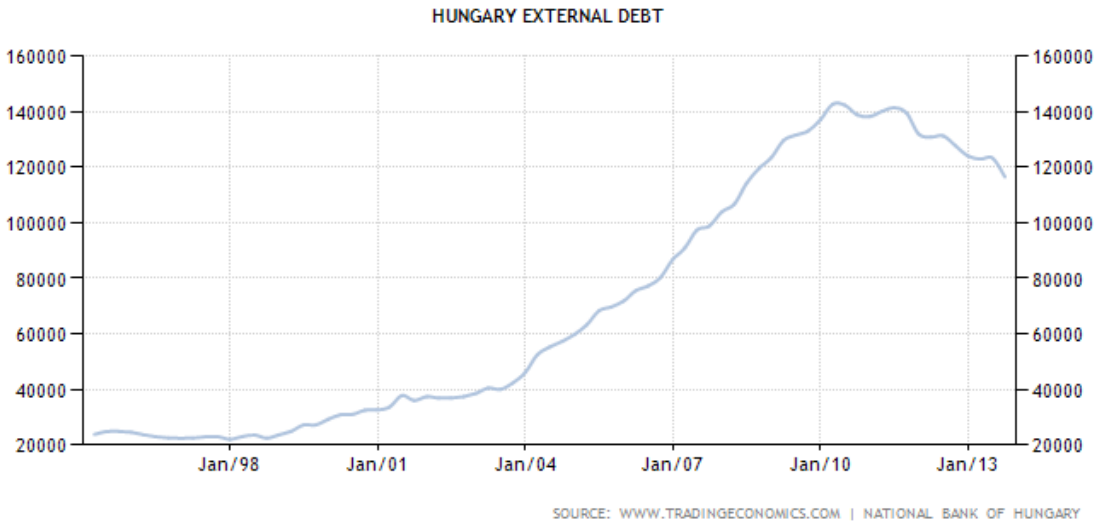


Figure 3


HUNGARY EXTERNAL DEBT
160000
140000
120000
100000
80000
60000
40000
20000
Jan/98
Jan/01
Jan/04
Jan/07
Jan/10
Jan/13
SOURCE: WWW.TRADINGECONOMICS.COM | NATIONAL BANK OF HUNGARY