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The Fundamental Law Within the Network of Multi-Level European Constitutionalism

[1]Introduction

The first time we investigated the Fundamental Law (hereinafter referred to as FL) in terms of the values of the European Union was shortly after its adoption and before its entry into force (Chronowski 45-98). In 2014, after three years have passed, it is worth recalling the conclusion drawn in 2011: "on the basis of the original text of the FL itself, it can be stated that the new provisions are neither at all points in line with the normative values and fundamental rights standard of the EU, nor do they collide with them. One only needs to point out that there are some provisions in the FL which can have potential interpretations that might collide with certain Union norms in given circumstances. However, ultimately, the direction of interpretation of these problematic provisions depends on the Parliament, the Constitutional Court and the courts of law."

Parliament has modified the Fundamental Law five times (not considering the transitional provisions of unique status and history) since 2011, and has, *inter alia*, cemented the model of limited constitutional judicial review, attempted to break constitutional continuity, to restrict the exercise of the right to vote and freedom of expression and perpetuated the practice of overruling the decisions of the Constitutional Court.

The Constitutional Court has tried, sometimes with greater, sometimes with less determination, to protect the Fundamental Law, with a varying degree of success. European bodies have followed this process with great interest: the Venice Commission of the Council of Europe kept providing its opinions on the significant amendments to the Fundamental Law and on the cardinal laws and the European Parliament adopted several resolutions as well. The sharpest criticism was raised by the Fourth Amendment to the Fundamental Law, with which *lex specialis* rules (e. g. Art. U) were introduced in contrast to the fundamental principles of the rule of law, democracy and the protection of fundamental rights; regulations (e.g. student contracts, acknowledgement of churches, concept of family) evading or bypassing Constitutional Court rulings were enacted, substantially reducing the space for constitutional protection; a specific review, and a new interpretation, limit was raised in the way of constitutional judicial review (excluding substantial review of

1 This study was prepared with support from the János Bolyai research scholarship of the HAS.

the amendments to the Fundamental Law, repealing Constitutional Court decisions adopted before the Fundamental Law); and open infringement of EU law (limitation of election campaigns, possibility of special taxation as an indirect result of court rulings) was also risked. The European Commission initiated several infringement procedures as well, on the basis of which the Court of Justice of the European Union (hereinafter referred to as CJEU) issued two judgements: one on the subject of radical lowering of the retirement age of judges and another on the subject of bringing to an end the term served by the Data Protection Supervisor. Hungary had infringed EU law in both cases (Case No. C-286/12; Case No. C-286/12).

The European Court of Human Rights (hereinafter referred to as ECtHR) also received Hungarian cases which had arisen from the elimination of the previous constitutionalism and from the arrangements based on the new Fundamental Law – such as the recognition of churches, dismissal from employment without reasoning, lifetime imprisonment without compulsory review, premature termination of the mandate of the President of the Supreme Court, and ban of the parliamentary right of expression.[2] The State of Hungary had infringed the European Convention on Human Rights (hereinafter referred to as ECHR) in every case.

There is no room here to provide a comprehensive analysis of all of the issues arisen and debated at European forums.[3] Our task in this study is to examine with reference to certain European constitutional values how much did the Constitutional Court of Hungary endeavour to enforce European standards in the course of interpreting the Fundamental Law and how much did it try to contribute in the European Network of (Constitutional) Courts.[4]

The reason for this approach is that no European constitutional system may be regarded as isolated within the multilevel constitutional area. Constituents of this area, the European judicial forums, may provide a legally binding decision on the harmony between the system based on the Fundamental Law and the values and standards of European constitutionalism, but the opinion of a body holding great

2 *Magyar Keresztény Mennonita Egyház and others v. Hungary*, Judgement of 8 April 2014; *K.M.C. v. Hungary*, Judgement of 10 July 2012; *László Magyar v. Hungary*, Judgement of 20 May 2014, no. 73593/10; *Baka v. Hungary*, Judgement of 27 May 2014, No. 20261/12., *Karácsony and others v. Hungary*, Judgement of 16 September 2014, No. 42461/13.

3 See for example Vörös; Zeller; Vincze: Wrestling with Constitutionalism: the supermajority and the Hungarian Constitutional Court.

4 Voßkuhle characterises the system of European courts and constitutional courts as follows: "The European constitutional courts are parts of a system that provides room for coordination: they constitute, as it is called in German, a 'Verbund', a network, the cooperating network of European constitutional courts. There is not any supreme guardian of fundamental rights in Europe. The whole European construction of human rights is not based on a single foundation stone, but on columns: and these columns are the European constitutional courts. As for their functions, the European Court of Human Rights and the Court of Justice of the European Union may be regarded today, in my opinion, as the 'European constitutional court'." Voßkuhle 69.

professional authority, such as the Venice Commission, may also govern and influence their decisions.

THE FUNDAMENTAL LAW AND THE REQUIREMENTS OF EUROPEAN CONSTITUTIONALISM

Declarations of intent of the Constitutional Court within the framework of relevant interpretation

It is without any doubt that the Fundamental Law expresses a commitment towards the international community and international law (Art. Q) and contains the so-called Europe Clause (Art. E) providing the basis for cooperation with the EU. Having regard to these provisions – and also confirming Art. B para 1 and Art. I –, the international treaties in force still oblige Hungary to maintain the rule of law, democracy, and to respect, protect and enforce fundamental rights. Consistency between international law and Hungarian law must be secured, and Hungary must participate in the creation of European unity under the rules of, *inter alia*, the treaties on which the European Union was founded and the ECHR. The relationship between domestic law and EU law has not changed, and the Constitutional Court has emphasised its commitment to the European constitutional evolution, sometimes in a demonstrative manner only, sometimes in a way affecting the case in hand as well. Even when it was searching for standards in its Decision No. 61/2011. (VII. 13.) for the review of the unconstitutional amendment, but did not find any, the Constitutional Court provided nevertheless in *obiter dicta* two important and forward-looking thoughts, even before the entry into force of the Fundamental Law. One of them suggested a potential standard for review, the other one promised a level of protection of fundamental rights. The first one did not have much luck and brought harmful consequences for the Constitutional Court, and remains undefined, without having concretised itself in practice. The second one has, however, seen itself expanded, and has played a role in specific cases as well.

International and European Union constraints: Do they have uncertain boundaries?

The first quotation: "The standards, fundamental principles and fundamental values of ius cogens provide altogether a standard that must be met by every subsequent constitutional amendment and any Constitution. A larger part of these principles and values has been incorporated into the Constitution and into the case-law of the Constitutional Court or has become part of different branches of the law (e.g. prohibition of retroactive effect in terms of criminal law, the nullum crimen sine lege principle, the nulla poena sine lege principle or the principle of exercise of

rights of good faith, the principle of fair trial, and others in other branches of law). The principles that incorporate guarantees of ius cogens appear in the form of values in different branches of the law and in other legislation as well." [Decision of the Constitutional Court No. 61/2011. (II.13.)]. This part seems to suggest that the Constitutional Court would in general, but not in specific cases, attribute in principle a certain level of "supra-constitutional authority" to the international ius cogens standards, i. e. would consider them as holding an interpretative priority in the course of constitutional judicial review (Blutman 1-11). This view is, however, not so convincing: the only positive possible interpretation of the case law as regards the (potential) appeal to ius cogens may be its incorporation into domestic law, i. e. its transformation from supra-constitutional into intra-constitutional.

The above mentioned standards appear again, although in a much more covered and even more blurred form, in the Decision on the Transitional Provisions to the Fundamental Law (TPFL), as adopted about a year after the entry into force of the Fundamental Law. The Constitutional Court announced in its Decision No. 45/2012. (XII. 29.) that it has the power to review the TPFL, to the extent that it had become a regulation substituting the Fundamental Law and disrupting the unity and structure thereof and taking away the scope of competence of the Constitutional Court. The Court provided a faint reference in this decision to the possibility of eventual substantial review of future amendments to the Fundamental Law in comparison with international standards. "Constitutional legality has not only procedural, formal and public law validity requirements, but also substantial ones. The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *ius cogens,* which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic States under the rule of law" [Decision of the Constitutional Court No. 45/2012. (II. 29.)]. International standards are transformed here into a requirement for a democratic state governed by rule of law, and are internalised, without precise reference to their source, origin or scope.

Parliament exercising its power to amend the constitution found this indirect reference however more than enough – the Fourth Amendment closed the way to substantial review of future amendments. Upon the motion of the Commissioner of Fundamental Rights, the Constitutional Court undertook to review this amendment, but no invalidity was found by Decision No. 12/2013. (V. 24.). In order to get out of an embarrassing situation, or so that the previous search for international standards did not appear to have been in vain or as a kind of pre-empting the expected international criticism, the following admonishment was given *obiter dicta* in the closing remarks:

"The Constitutional Court emphasises that the limitations implied by the interrelated system of fundamental rights, and implied in Art. E and Q of the Fundamental Law and applicable to the prevailing legislative and constitution making powers as well, limitations which result from the obligations of Member State of the EU and from ensuring the harmony between international law and Hungarian law in order to fulfill the obligations of Hungary under international law as well as from acceptance of the rules generally acknowledged by international law may not be ignored either in these acts [i. e. the ones specifying the Fourth Amendment to the Fundamental Law] or any other. (...) [Besides safeguarding the coherence of the Fundamental Law, the Constitutional Court], in the course of assessing the given constitutional issue, acting according to the applicable rules, shall also consider the obligations undertaken by Hungary in international treaties and those accompanying its EU membership, and the rules generally acknowledged by international law and the fundamental principles and values therein. All these rules, especially after considering the fact that their values are also being enshrined in the Fundamental Law, form such a single system (system of values) which may not be ignored either in the constitutional or the legislative process or in the course of a constitutionality review by the Constitutional Court" (Decision oft he Constitutional Court No. 12/2013. (II. 24 paras [46] and [48]).

The encoded message is more specific than the previous one: inherent constraints are implied by the European Union membership and international obligations, i.e. from Art. E and Q, for the constitution making and legislative power. In light of the foregoing it is, nevertheless, highly improbable that the Constitutional Court would confront the constitution makers with such constraints.

Equivalences and the lack of conflicts

In its Decision No. 61/2011. (VII. 13.), as a direct continuation of the thoughts firstly quoted, the Court adjusts the domestic level of constitutional protection of fundamental rights to the international level, not on a hierarchical basis, but as a consequence of the pacta sunt servanda principle:

"In case of certain fundamental rights, the Constitution defines the substance of the fundamental right in the same way as it is in some international treaty (for example the Covenant of Civil and Political Rights and the European Convention of Human Rights). In these cases, the level of protection of fundamental rights provided by the Constitutional Court may in no instance be lower than the level of international protection of rights (typically elaborated by the Strasbourg Court of Human Rights). As a result of the pacta sunt servanda principle [Art. 7 para 1 of the Constitution, Art. Q paras 2-3 of the Fundamental Law], the Constitutional Court is required to follow the Strasbourg jurisprudence and the level of protection

of fundamental rights defined therein, even if it did not necessarily arise from its own previous case-law." [Constitutional Court Decision No. 61/2011. (VII. 13.)].

Later the Court broadens the international determination of the level of protection of fundamental rights with the stipulations of EU law, moreover, it considers the above quoted conclusion as being "even more true" for the law of the European Union, having regard to Art. E paras 2-3 of the Fundamental Law (compared to the rules of the Constitution, however, it did not elaborate in detail the meaning of the new Art. E para 3. [Decision of the Constitutional Court No. 32/2012. (VII. 4.)]. Therefore, without any particular dogmatic argument or foundation, Decision No. 32/2012. (VII.4.) on student contracts did indeed refer to the jurisprudence of the CJEU and mentioned the necessity to consider fundamental freedoms of the EU, but did not investigate in depth the connection between the ban on free movement of workers and EU citizenship. With these decisions, the Constitutional Court simply confirmed the basic requirement for the equivalence of the internal protection of fundamental rights.

In the decision on the concept of family, which had a big effect (because it resulted in an amendment to the Fundamental Law), the Court confirmed the practice preceding the Fundamental Law that the case-law of the ECtHR is the starting point for interpreting the ECHR: "It holds, in line with its practice so far, the jurisprudence of the Court empowered by the states parties to the Convention to provide authentic (authoritative) interpretation of the Convention for interpreting and clarifying the content of the relevant provisions of the Convention. This interpretation is done on the basis of those *dicta* ("case-law", in a figurative sense) of the Court when the Court interprets the Convention itself, and certain expressions used, when it points out what is compatible with the requirements of the Convention and what is not" (Decision oft he Constitutional Court No. 43/2012. (XII. 20.) referring back to Decision No. 166/2011. (XII. 20.). It is important to underline that to take as the basis of interpretation does not mean the recognition of the ECtHR decisions as binding or having automatic interpretative priority[5] concerning the text of the Fundamental Law.

As logically expected the Court adjusts its position to that of the Council when interpreting other conventions concluded in the framework of the Council of Europe: "The interpretation by the Constitutional Court as regards the content of international treaties should of course be consistent with the official interpretation by the Council of Europe as regards these treaties." [Decision of the Constitutional Court No. 41/2012. (XII.6.)].[6]

5 For the concepts of interpretative, applicative and abrogative priorities and primacies see Blutman.
6 Interpretation by the Constitutional Court of the conventions of the Council of Europe on the protection of minorities became necessary in this case.

The Court acknowledged in Decision No. 4/2013. (II.21.), in the case of the "red star", that the ECtHR decision establishing an infringement of the convention by Hungary may eliminate the *res iudicata*.[7] Moreover, under the effect of the Strasbourg jurisprudence, but not expressly because of a specific decision, the Constitutional Court may depart from its own previous case-law. The Court confirmed at the same time that the Strasbourg ruling itself does not overwrite the jurisprudence of the Constitutional Court, and laid down the requirement for reverse equivalence, i.e. the fact that the protection system of the ECHR is only a minimum standard which may not erode any higher level protection at Member State level. With this declaration the Hungarian body did not say anything new, as this is clearly stated in Art. 53 of the Convention, in the clause on non-reversal.[8] According to the Constitutional Court therefore,

> "The ruling of the ECtHR is of declarative nature, i.e. it does not mean direct alteration of the points of law, its jurisprudence may however provide assistance in the interpretation of constitutional fundamental rights, as set out in the Fundamental Law and in international conventions, and in the determination of their content and extent. The meaning of rights ensured by the European Convention of Human Rights (hereinafter referred to as "the Convention") is embodied in the decisions adopted by the ECtHR in specific cases facilitating a uniform perception of the interpretation of human rights. The Convention and the jurisprudence of the ECtHR may not lead to the limitation of the protection of fundamental rights under the Fundamental Law or to setting a lower level of protection. The Strasbourg jurisprudence and the Convention set the minimum level for protection of fundamental rights that must be ensured by every state party thereto, the international law may however develop a different and higher system of requirements for the protection of human rights" [Decision of the Constitutional Court No. 4/2013. (II.21.)].

In the case of the "red star" the position was, however, the opposite: the Constitutional Court adjusted the national level of protection of the freedom of expression to the level of Strasbourg.

Decision No. 36/2013. (XII.5.) declaring the transfer of cases to be (*ex post facto*) unconstitutional and in conflict with the Convention goes even further and expressly acknowledges that interpretative primacy may be attributed to the decisions of the

7 "Considering all that, the Constitutional Court established that the ruling of the ECtHR in the case *Vajnai v Hungary*, which ruling contains conclusions as regards Art. 269/B of the Criminal Code (...), is such a new condition and aspect significant in terms of law, that makes the repeat of the constitutional review necessary." (Decision of the Constitutional Court No. 4/2013. (II.21.) para [20]).
8 Art. 53 of the ECHR: Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other convention to which it is a party.

ECtHR in certain situations. "If the national legislation has the same content as the law in the Convention or in any of its Additional Protocols or serves the fulfilment of the obligation to ensure this right, then Art. Q of the Fundamental Law implies that the Constitutional Court should refrain from interpreting the particular legislation (or legislative provision) in a way that would inevitably result in the infringement of obligations undertaken under international law and in repeated condemnation of Hungary in front of the Court" (para [28]). The other significant result of the decision is that the Constitutional Court confirmed the following as derived from the Fundamental Law: no reference may be made to the Fundamental Law in order to become exempt from the obligations undertaken under international law. The constitution makers, according to the interpretation of the Court, acknowledge their duty to respect this fundamental rule of international law (paras [46]-[47]).[9] This argument may be called as the requirement for conflict-free coexistence, an argument which the Constitutional Court may use as a corollary to this decision in order to prevent eventual conflicts between the international law and the Hungarian Fundamental Law.

Decision No. 6/2014. (II.26.) is the last step worth mentioning in the process of adjustment to the European standard of fundamental rights. The Court granted priority direct enforcement (applicability) to the ECtHR decision establishing that a 98 percent special tax infringes the Convention,[10](paras [22] and [24]) resulting

9 "The Constitutional Court reminds that the fourth amendment to the Fundamental Law, regardless of the fact that Art. Q of the Fundamental Law has already ascertained the fundamental rules of the relationship between Hungarian Law and international law taking the text of Art. 7 para 1 of the Constitution as basis, but with the conscious readjustment thereof, devoted a separate point in the closing provisions again for the importance of the continuity of and respecting the obligations under international law. Therefore, by virtue of the Closing and miscellaneous provisions of the Fundamental Law: '8. The entry into force of the Fundamental Law shall not affect the legal force of legal regulations adopted, normative acts governing public organisations, and other legal instruments of state control issued, specific decisions taken and international legal commitments undertaken before its entry into force.' The Constitutional Court established that the constitution making power expressed in this point its attachment to one of the fundamental rules of international law which had been declared by the Permanent Court of International Justice when it did not accept that Germany would become exempt from its obligations under the Peace of Versailles on the basis of its internal legal act (declaration of neutrality). (CPJI: A Wimbledon steamship case, 17 August 1923. Série A n° 1., pp 29-30). The Permanent Court of International Justice stated in the case of Polish citizens of Danzig, and so setting the standards even higher, that 'no state may refer to its own constitution against another state in order to become exempt from its obligations under international law or treaties in force'. (CPJI: Advisory Opinion to the case on Treatment of Polish Nationals in the Danzig Territory; 4 February 1932, Série A/B n° 44, pp 24). These decisions have been of determinative nature since their issue: they provide the basis for conflict-free coexistence of international law and national constitutions, and are already reflected in the Fundamental Law." (paras [46]-[47]).

10 "The Chamber of the Strasbourg European Court of Human Rights established in its Decision No. 41838/11. (R. Sz. v Hungary) of 2 July 2013 (para. 62), Decision No. 66529/11. (N. K. M. v Hungary) of 14 May 2013 (Para. 76) and Decision No. 49570/11. (Gáll v Hungary) of 25 June 2013 (Para. 75) that the tax rate of 98 percent under the law for lawful severance pays is in conflict with Art. I (property protection) of the Additional Protocol I" (...) "The Constitutional Court did not see any reason in this case to depart from the content that was attributed by the decisions of the Court through interpretation to Art. I of the Additional Protocol I in connection with the extent of the special tax. The Constitutional Court therefore establishes that Art. 10 of the Act is in conflict with Art. I (protection of property) of Additional Protocol I." (Decision of the Constitutional Court No. 6/2014. (II. 26.). paras [22] and [24]).

in a certain level of supra-constitutionality regarding the specific limitation of review in the Fundamental Law.[11] The stakes were, however, not very high because the 98 percent tax rate was not in force any more (it has been modified to 75 percent), and the Constitutional Court ordered therefore a prohibition of application in cases where the previous tax rate should be applied.[12] The Court took the opportunity however to "save" another element of the practice preceding the Fundamental Law for "the period following the Fourth Amendment". It reinforced the position that any infringement of international obligations does not only violate the requirement of harmony between Hungarian and international law (Art. Q para 2) but also the principle of rule of law (Art. B para 1).[13]

Judicial independence, fair trial, and the rule of law

Assurance of the effective enforcement of EU law is significant in terms of EU membership, therefore the integration organisation generally pays special attention to the functioning of the guarantees of justice at Member State level. It is a remarkable coincidence, evidenced by the content of motions and by the practice of their acceptance, that the Constitutional Court has dealt relatively a lot with the requirement of judicial independence and fair trial since the entry into force of the Fundamental Law.

The radical lowering of the retirement age of judges in 2012 was the subject of the constitutional appeal leading to the declaration of the first unconstitutionality [Decision of the Constitutional Court No. 33/2012. (VII.17.)]. The main argument of the Court in this matter was the irremovability implied by the principle of judicial independence, which means that the retirement age may only be lowered gradually, with a necessary transition period. The decision was dominated by internal argumentation on the basis of domestic constitutional law, and only one of the relevant recommendations of the Council of Europe[14] appeared to provide suitable support, although it was known that the CJEU was also dealing with the case as

11 The Constitutional Court made it clear that the review limitation does not cover investigation of conflict with international treaties: "The rule limiting the competences under Art. 37 para 4 of the Fundamental Law is not applicable, either as regards the aspects of investigation or the establishment of legal consequence, to the investigation of conflict between legislation and international treaties" [Decision of the Constitutional Court No. 6/2014. (II. 26.)].

12 The enforcement/applicative priority of ECtHR decision would have become abrogative primacy only if there had been standards that could have been repealed. (The Court did not investigate of course whether the new tax rate of 75 percent complies with the ECHR.)

13 Decision of the Constitutional Court No. 6/2014. (II. 26.) para [30], with reference to Decision of the Constitutional Court No. 7/2005. (III.31.).

14 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities. Quoted by Decision of the Constitutional Court No. 33/2012. (VII. 17.).

initiated by the European Commission (Recommendation No. CM/Rec(2010)12). The Constitutional Court did however avoid involving the issue of age discrimination in the review, seeking assistance in the law of the EU to interpret the amendments of the Fundamental Law in the TPFL, or seeking direct contact to the Luxembourg court through initiating a preliminary ruling procedure. The impropriety of the policy of burying one's head in the sand, and the insufficiency of the *pro futuro* nullification were further highlighted by the decision of the CJEU (Case No. C-286/12 judgement of 6 November 2012.) a few months later.[15]

The premature termination of the appointment of the President and Vice President of the Supreme Court was also related to the intended transformation of the judicial organisation. Whereas the mandate of the President of the Supreme Court was terminated by the TPFL,[16] only the Vice President could lodge a constitutional appeal, as his term was terminated pursuant to the Act on the organisation and administration of courts. The Constitutional Court found, with the narrow majority of 8 to 7, that the transformation of the organisation of the courts and the significant modification of the scope of responsibilities of the *Kúria*, its president and its vice president, provide sufficient constitutional justification for the shortening of their mandates, and abstained from reviewing the relevant Strasbourg jurisprudence [Decision of the Constitutional Court No. 3076/2013. (III.27.)]. But according to the dissenting opinion of some judges of the Constitutional Court, there was harm caused to the rule of law and violation of the petitioners' right to a remedy. By contrast, the ECtHR stated after hearing the complaint of the President of the Supreme Court that the State of Hungary had infringed his right to fair trial, because it had not allowed any judicial review in the case; moreover, the right of the President of the Supreme Court to free expression had also been infringed, whereas his removal may had been related to his criticism of the transformation of the organisation of courts, which had not only been his right, but, as a court leader, his duty as well.[17]

In the case on transferring cases the Constitutional Court held the right to an appointed judge and the prohibition of being removed from an appointed judge to be basic requirements for a fair trial, and concluded that the appointment of the members of the proceeding court at the sole discretion of the president of the National Office for the Judiciary does infringe these rights, and that the legal regulation does not meet the so-called objective test of an impartial judiciary

5 Vincze, Attila calls attention on the same: Vincze: Der EuGH als Hüter der ungarischen Verfassung – Anmerkung zum Urteil des EuGH v. 6.11.2012, Rs. C-286/12 (Kommission/Ungarn).

6 Presently in Point 14(2) of the Closing and miscellaneous provisions of the Fundamental Law: The mandate of the President of the Supreme Court and of the President and members of the National Council of Justice shall terminate upon the entry into force of the Fundamental Law.

7 *Baka v. Hungary*, Judgement of 27 May 2014, no. 20261/12, § 79, 100, 103.

[Decision of the Constitutional Court No. 36/2013. (XII.5.)].[18] The Court heroically declared the rules to be not in force any more, but still having an effect on the cases of the petitioners causing them to be unconstitutional and in conflict with international treaties, and provided subjective protection of fundamental rights as befits the function of a constitutional appeal. The Court's reasoning provided extensive references to the relevant jurisprudence of the ECtHR, and it also took into consideration the relevant, and sharply critical, positions of the Venice Commission.

The majority of the decisions rejecting the petitions for appeal dealt with fundamental procedural rights. With reference to the scope of the requirements for fair trial enshrined in Art. XXVIII of the Fundamental Law, the Court considered the jurisprudence of the ECtHR on the right to a reasoned judicial decision (Decision of the Constitutional Court No. 7/2013. (III. 1.) paras [30]-[32]). Interpreting the right of protection, the Constitutional Court used the "understanding" of the ECtHR as well; additionally, it referred in support of its argument to the resolution of the Council of the EU on full enforcement and uniform application of fundamental procedural rights and to the draft directive of the Commission outlining alternatives for regulating the issues of the right to employ legal counsel in criminal prosecution, which is obviously quite interesting (Decision of the Constitutional Court No. 8/2013. (III.1.) para [50]); Recommendation of the European Commission COM(2011) 326 final; 2011/0154 (COD)). It did not delay recalling the Observation No. CCPR/C/ HUN/CO/5 of the United Nations Human Rights Committee of 16 November 2010 issued to Hungary (Decision of the Constitutional Court No. 8/2013. (III. 1.) para [49]).[19] Such international, "meta-legal" reference of EU origin is rather of a symbolic significance and is aimed at showing the awareness of the Constitutional Court. The Court stated in cases connected to the principle of impartiality, in harmony with the interpretation of the ECtHR, that it is necessary to enforce that strict standard by virtue of which the ruling court may not cease to appear impartial beyond impartial consideration of the cases. The ECtHR acknowledges two aspects of impartiality: impartiality in terms of subjectivity and impartiality in terms of objectivity. The subjective side of impartiality defines the need that no member of a court may be prejudiced or biased in a particular case. By contrast, the objective side of impartiality concerns whether any real doubt may arise regarding the impartiality of the judge beyond his behaviour in the course of the particular case (Decision oft he Constitutional Court No. 25/2013. (X.4.) paras [27]-[28]; [38]; 34/2013. (XI. 22 paras [32]-[38]).

18 Upon normative appeal, with eight dissenting opinions.

19 According to the recommendation, it would be necessary to establish the conditions warranting effective legal aid for every person deprived of his freedom.

The picture would not be complete without mentioning the fact that the independence of judicial branch and the principle of rule of law suffered a severe defeat from the rather obscure argument about justice in the decision on the Nullity Act, in which the reasoning considered foreign solutions only, and European standards did not appear included in the reasoning [Decision of the Constitutional Court No. 24/2013. (X.4.)]. Reference to the principle of rule of law seems to become more and more relegated to the background in other constitutional judicial review cases as well. The Court protects the principle of rule of law to a very narrow extent only, as far as the lack of required preparation time and the prohibition of adverse retroactive effect are concerned, but still not as far as the course of constitutional appeal procedures is concerned.[20] Protection of acquired rights or protection of legitimate expectations (*Vertrauensschutz*) are completely disappearing.[21]

Democracy – right to vote and political participation

The principle of democracy is a central value in the legal order of the Council of Europe and of the European Union. It is an extremely complex principle, its conceptual items include pluralism, the majority principle combined with respect of minority rights and human dignity, and the principle of representation complemented with direct exercise of power, legitimacy of the political institutional system, fundamental rights, especially political participation rights, transparency of public authority, publicity and freedom of the civil sector. Democracy formally presumes at the same time that the people (such as the population, the constituent population, conscious political community) require a democratic functioning of power and an active participation in securing it. It is much more an issue of social need, practice and political culture than one of legal construction. To put it in another way, while the rule of law may be controlled with legal instruments and may ideally be judicially enforceable, democracy may be much less so. Due to the multitude of its components democracy may become deficient in several ways and may turn into post-democracy and then drift towards autocracy.
The Venice Commission emphasised in its comprehensive opinion assessing the Fundamental Law: "Elections (...) would lose their meaning if the legislative power would not be able to achieve changes in such important fields of legislation which should have been regulated with simple majority. If, as regards certain issues, not only fundamental principles but very specific and detailed rules are adopted in

20 Originally: 1140/D/2006 AB végzés, but at the time when the Constitution was in force, this did not mean any problem due to the actio popularis subsequent constitutional review.

21 See early retirement – Decision of the Constitutional Court No. 23/2013. (IX. 25.). Gambling monopoly – Decision of the Constitutional Court No. 26/2013. (X. 4.). It is to be mentioned that when investigating the rules limiting the operation of slot machines, the Constitutional Court considered the legislative efforts of the EU and the decisions of the CJEU supporting free discretion of national authorities and the exceptions of public interest from the freedom of service provision as regards organising gambling.

cardinal laws as well, then the principle of democracy itself shall become threatened as well."[22] In its position assessing the Fourth Amendment to the Fundamental Law, it recalled the following, while condemning the instrumental treatment of the constitution: "Democracy may not be reduced to the rule of majority; exercise of power of the majority is limited by the constitution and by law, primarily in order to protect minority interests."[23]

It is without any doubt that the right to vote and political participation rights are of outstanding significance in terms of democracy. Within the limits of possibilities open to it, namely depending on petitions and their acceptability, the Hungarian Constitutional Court dealt with these substantial elements of democracy in a number of its decisions.

In Decision No. 1/2013. (I.7.) the Court investigated the justification of voter registration, namely the necessity of limiting fundamental rights in such a manner, as a preliminary question to the proportionality of the regulation of registration upon request. For this, it scrutinised the relevant jurisprudence of the ECtHR, from which it concluded that setting the condition of active registration for exercising the right to vote may limit the right to vote extensively with no compelling reason,, and that such compelling reason cannot be found beyond the already established and functioning voting list [Decision of the Constitutional Court No. 1/2013. (I.7.)]. As a result of the nature of the procedure, a finding of conflict with international treaty, within a preliminary constitutional review, was not possible, but the Court used internal law arguments based on constitutional law in the light of the Strasbourg jurisprudence. The correctness of declaring the rules limiting media campaigns as unconstitutional was confirmed by international criticism and the official objections of the European Commission that followed the incorporation of these limitations into the Fundamental Law. (Perhaps these mutually supporting events led to the change of the limiting rule into a more presentable one by the fifth amendment to the Fundamental Law.)

In the case of the so called winner-compensation (or winner-premium), the Constitutional Court, in order to get out of a delicate situation, supported the thesis of freedom of the legislative power concerning the electoral system as much as possible, and called upon assistance from two of the decisions of the ECtHR.[24]

22 See Point 24 of Opinion No. 618/2011. of the Venice Commission.

23 See Point 136 of Opinion No. 720/2013. of the Venice Commission.

24 Decision of the Constitutional Court No. 3141/2014. (V. 9.): "The rules of the election system which effect the relative weight of votes as a result of the precisely non-predictable expression of will of the citizens, are not in connection with the equality in terms of procedure but with the so-called "effective equality". Such typical rules are requirements defining the order of acquiring mandates, which requirements themselves are "neutral", i.e. do not put groups of voters into a disadvantaged position. These result in advantages or disadvantages implied by the non-proportionality of the acquisition of mandates exclusively on the basis of the decision of the voters and as subsequently established. This is not an issue of the discriminatory

The Court contributes to the protection of the freedom of expression by changing its previous restrictive jurisprudence concerning the wearing of totalitarian symbols, having regard to the decision of the ECtHR in the Vajnai case [Decision of the Constitutional Court No. 4/2013. (II.21.)]. This step forward was followed by a step back: a new and restrictive interpretation of the freedom of expression appeared, already after the Fourth Amendment to the Fundamental Law, with the recognition of the denial of the sins committed by the totalitarian systems as constitutional [Decision of the Constitutional Court No. 16/2013. (VI.20.)]. The Constitutional Court also relied on the decisions of the ECtHR related to Holocaust denial and abuse of rights, although these decisions are only partly conclusive on comparison with the criminal facts of the Hungarian case, which should have been assessed in a more sophisticated way, in the light of the relevant EU law and Strasbourg jurisprudence, as held in the dissenting opinions. Criticism of public persons did however win: the Court maintained its former practice and tried to develop standards that may also be used in the application of law and that are necessary for achieving harmony between the criminal law assessment of public statements regarding the discussion of public affairs and the requirements implied by the freedom of expression as ensured in Art. 10 of the Convention and in the Fundamental Law [Decision of the Constitutional Court No. 7/2014. (III.7.); and No. 13/2014. (VI.18.)]. The Constitutional Court provided an implicit answer by this to one of the reservations of the Venice Commission to the Fourth Amendment to the Fundamental Law.[25]

CONCLUSIONS

Constitutional evolution and constitutional practice have drifted away in many fields from European standards during the three years that have passed since the adoption of the Fundamental Law.

The Constitutional Court however tries to curb the excesses of the constitution-amending power and the legislative power without exhausting the possibilities

nature of the rule any more but of the proportionality of the voting system. The jurisprudence of the Constitutional Court in this matter is in harmony with the jurisprudence of the European Court of Human Rights as related to the right to free vote enshrined in Art. 3 of the First Additional Protocol of the European Convention on Human Rights. "The Court has already established that Art. 3 of Protocol 1 ensures individual rights including the right to vote and the right to be voted for. No matter how important these rights are, they are not absolute. Whereas Art. 3 recognises them not mentioning and defining them *expressis verbis*, 'implicit limitations' are possible and the states parties to the convention have a wide margin of manoeuvre in this respect. They may stipulate conditions for the right to vote and to be voted for in their own internal legal order whereas this is not excluded in principle by Art. 3." (*ECtHR, Orujov v Azerbaijan* (4508/06), 26 July 2011, para (40).

25 See Point 141 of Opinion No 720/2013 of the Venice Commission: the wording of the provisions on the dignity of communities is too general and the separate protection of the "dignity of the Hungarian nation" creates the risk that freedom of expression in Hungary may be restricted in order to protect Hungarian institutions and officials in the future.

provided by the European standards. Questioning or even a complete rejection of the necessity to refer to the European and international standards and jurisprudence appear in minority opinions within the Court itself.[26] For the time being, the majority does not share this understanding and does rely on the jurisprudence of the ECtHR in its reasoning, at least as an interpretation tool. Because of the Strasbourg ruling finding an infringement of the Convention by Hungary, the Court was prepared to change its practice and to find unconstitutionality in the case of the communist red star. In the subject of the application of the, no longer in force, rules on special taxation, the Court granted applicative (almost abrogative) priority to the decisions of the ECtHR upon judicial initiation, ordered the general prohibition of their application, and thus it was able to ensure the protection of fundamental rights (namely property rights) against the Tax Act and the restrictive rule in Art. 37 para 4 of the Fundamental Law.

At the same time, there is no change of the fact that the Constitutional Court still selects precedents from the jurisprudence of the ECtHR and the CJEU (Szente 1591-1614, 1602) in order to support its arguments as befitting its own pre-conceptions; and that it bases its decisions more on internal arguments of constitutional law, i.e. it uses the option of interpretative primacy to a limited extent only when using international and EU law standards, and grants applicative priority to these standards only exceptionally.[27] The Court has not clarified its

26 Dissenting opinion of Dienes-Oehm, Egon Judge of the Constitutional Court, Decision of the Constitutional Court No. 36/2013. (XII. 5.): "Ad hoc decisions of the European Court of Human Rights established for the rectification of infringements to fundamental rights enshrined in the Convention and for ruling in individual cases only are not binding either for Hungarian legislation or for the Hungarian Constitutional Court. Following the jurisprudence of the Court is justified in several aspects, moreover it is a question meaning budgetary burden, in pure legal terms however it may not be of such gravity as to determine the decisions of the Constitutional Court and may not have more power than the own set of arguments and decisions, based on the Fundamental Law, of the Constitutional Court."

Concurring reasoning of Pokol, Béla Judge of the Constitutional Court, Decision of the Constitutional Court No. 3025/2014. (II. 17.): "The relevant decisions of the ECtHR may play a useful role in our draft decisions as information in the decision process of the Constitutional Court and *pro domo* for internal use; but my opinion is that they may not appear in the final decision, maximum as further arguments of the positions of individual Judges of the Constitutional Court in their concurring and dissenting opinions opposing it. Such a reference in the Decision of the Constitutional Court would mean that we attribute, beyond the Fundamental Law, a normative and for us binding power not only to the Convention but to the judicial practice interpreting it as well, and by this we acknowledge that the ECtHR may continue establishing international standards binding for the states parties to the Convention without their contribution." (...) "In their so-called Lisbon Ruling of 2009, the judges of the German Constitutional Court elaborated a theoretical construction enabling a country to act against the interpretation of any convention as delivered by the court of any multilateral international convention, with reference to the integrity of constitutional identity and further to prohibit a decision made with such understanding to be applied within the country. Although the German constitutional judges formulated this doctrine of constitutional judicial review against legal acts of the European Union affecting the Member States, its significant findings stand for every multilateral convention if the particular country waives its prerogative concerning its sovereignty therein and the court of the international organisation maintains a jurisprudence concerning the standards of the constitution of that country."

27 As it relatively rarely uses the option of establishing conflict with an international treaty, and in general the option of investigating *ex officio* the conflict with an international treaty.

position on the relationship between EU law and constitutional protection which had been controversially developed in the previous jurisprudence (Vincze 13-15), and does not seek formal contact, in the form of a request for preliminary ruling, with the CJEU, which would have been possible not only in the case of the retirement of judges but also in the review of the Hungarian regulation on the implementation of the European arrest warrant, In the latter case it could have inquired on the harmony of the rules with the Charter, contributing to the development in the protection of fundamental rights at EU level.[28]The Constitutional Court also didn't invoke the procedural bond between ordinary courts and the CJEU, the procedure of a preliminary ruling with constitutional emphasis on the interpretation of the right to a legitimate judge to establish if the EU legal conditions are met.[29] According to the permanent jurisprudence of the German Federal Constitutional Court, the CJEU may also be a "legitimate judge" by virtue of Sentence 2 of Art. 101 para 1 of the German Basic Law, namely if the German judge fails to request a preliminary ruling although the EU conditions are met, then reference may be made to the infringement of right to a legitimate judge within a constitutional appeal procedure.[30] According to the Hungarian Constitutional Court, this is not a constitutional issue but a technical legal issue falling within the scope of the judge of the proceedings.[31]

Although the Constitutional Court does not refuse but also does not endeavour to actively participate in the network of cooperative constitutionalism, nevertheless it might emphasize the importance of a Europe-friendly interpretation of the Fundamental Law in a political environment in which rejection of an otherwise

28 Decision of the Constitutional Court No. 3025/2014. (II. 17.). In this decision by the way, the Constitutional Court used ECtHR decisions when interpreting the right to freedom and personal security, but did so only on one occasion, indicating a reference to the CJEU decision. It appears from the dissenting opinion of Miklós Lévai that other decisions from the case-law of the CJEU may have been used for the argument and it would have been worth requesting the interpretation of the EU law for the sake of overall clarity.

29 Constitutional Court Order No. 3110/2014. (VI. 17.), reinforced by Constitutional Court Order No. 3165/2014. (VI. 23.). Petitioners argued in both cases that the court had not fulfilled the request to initiate a preliminary ruling in the base case and Art. XXVIII para 1 of the Fundamental Law had been therefore infringed.

30 BVerfGE 73, 339, 366 ff.; 75, 223, 233 ff.; 82, 159, 192 ff.; 126, 286, 315 ff., latest in 2010: 1 BvR 1631/08.

31 "The Constitutional Court, acting within its powers regulated by Art. 27 of the CCA, ensures the harmony between the judicial ruling and the Fundamental Law. Consequently, the Constitutional Court shall refrain from taking a position on technical legal issues or issues exclusively about interpreting the law that belong to the review powers of courts while investigating the unconstitutionality of the judicial ruling. {first see: Order No. 3003/2012 (VI. 21.), Reasoning [4]; (...)]}, {Order No. 3028/2014. (II. 17.), Reasoning [12]}. According to its jurisprudence, the Constitutional Court interprets the essence of the fundamental right to a fair trial in the enforcement of procedural rules of constitutional significance, wherefore it does not consider elements of court proceedings beyond that, especially the manner of deciding, with the application of legislation and exercising the discretional right of the court, in the particular legal disputes as a constitutional issue. In the present case, with the interpretation of applicable legislation and having regard to the issues of fact, the court, the legitimate judge under national law, i.e. a judge acting at a competent court and appointed pursuant to the order of distribution of cases defined in advance, of the proceedings had to decide whether it falls under the obligation to initiate a preliminary ruling or is exempt from it; wherefore the Constitutional Court does not have the competence to review that as provided by Art. 29 of the CCA." (Constitutional Court Order No. 3110/2014. (IV. 17.)

constructive European criticism, questioning of the decisions of Strasbourg and Luxembourg and a generally anti-EU rhetoric are typical. It appears that the political circumstances do not favour an extensive and activist constitutional judicature. Reciprocity is, however, the essence of cooperative constitutionalism and the Hungarian Constitutional Court has also received approval, for example, from the CJEU in the case of radical lowering of the retirement age of judges, and from the ECtHR in the case of recognition of churches.