Zoltán Szente – Fanni Mandák – Zsuzsanna Fejes (eds.)

CHALLENGES AND PITFALLS IN THE RECENT HUNGARIAN CONSTITUTIONAL DEVELOPMENT

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Discussing the New Fundamental Law of Hungary

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INTRODUCTION

In the transition period to democracy at the turn of the 1980s and the 1990s, Hungary was the only post-communist country in Central and Eastern Europe (CEE) which did not adopt a new constitution in place of the old communist-style basic law. Despite this, the constitution of 1949 was entirely revised in 1989 acknowledging the basic values and principles of the modern constitutionalism like human dignity, separation of powers, or rule of law. The new constitutional democracy developed on this basis, and existed for more than 20 years. Nevertheless, the idea of a new constitution has never been abandoned, even if the ideological division between the political parties and the political fragmentation did not provide the possibility of constitution-making for a long time.

After a conservative government gained a two-thirds, that is a constitution-making parliamentary majority in 2010, it was possible to adopt singlehandedly a new Fundamental Law in 2011. Since then, this constitution has attracted widespread attention and criticism in Europe. European institutions, human rights organisations, and even foreign government officials of some EU states have expressed their concerns not only about the new constitutional rules but also the recent development and the situation of the rule of law.

The new Hungarian constitution became a prominent topic of the present-day European constitutional and political discourse. One of the most interesting collection of studies in this topic was published in Italy, in which leading Italian constitutional scholars and CEE specialists discussed the Fundamental Law.* This interest encouraged us to organise an Italian-Hungarian discourse on the new constitution. An important part of the research project was a seminar on the Hungarian Fundamental Law held on 8 October 2014 in Rome, in the Palazzo Falconieri, the headquarters of Collegium Hungaricum. This conference provided an excellent opportunity for the participating Italian professors – Angela Di Gregorio (Milan), Carlo Fusaro (Florence), Cesare Pinelli (Rome), Giuseppe Franco Ferrari (Milan), Nicola Lupo (Rome) – and the Hungarian scholars – representing three universities and a research institute in Budapest – to exchange their ideas and opinions and to have a lively discussion. The applied method throughout this project was that some prominent Hungarian scholars addressed the most important issues of the new constitution, and the invited Italian professors reacted to their views from an inherently different position.

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* La nuova Legge fondamentale ungherese. Diritto Pubblico Comparato ed Europeo 2012/3. Ed. Giuseppe Franco Ferrari

Although we tried to preserve the discursive structure of this dialogue, this book is not a collection of the conference papers, but it contains the studies of the participants with references and bibliographies.

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Budapest–Rome, December 2014

Zoltán Szente
Fanni Mandák
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Editors

Constitutional Values and Constitutional Identity in the New Fundamental Law

Balázs Fekete

The National Avowal: More than a Conventional Preamble to a Constitution...

INTRODUCTION

The preambles to constitutions have never received extensive scholarly attention as compared to other objects of study. The scholarship focusing on constitutional law has largely regarded preambles as either brief introductory texts with some uncertain normative power or solemn introductions shedding light on the important points and claims of political communities (Ginsburg, Foti and Rockmore; Koubi). During scholarly discussions of the case law of various constitutional courts the normativity* of preambles comes up as a scholarly problem (see: Orgad; Popławska). That is, the study of preambles is certainly not a "*terra incognita*", but it has had only a secondary relevance for experts of constitutional law thus far.

However, – and this is the main thesis of this paper – preambles can reveal much more than anticipated on constitutionalism as such and the legal culture of a given country if they are studied with the proper methods. In other words, besides conventional methods of constitutional law (e.g. dogmatic text analysis or case-law method), novel approaches of legal theory may also refine our understanding of these brief attachments to constitutions. This paper illustrates this thesis by providing an in-depth analysis of the Preamble (The National Avowal) to the new Hungarian Constitution. Hopefully, as a secondary claim, this discussion may also contribute to the general understanding of preambles.

Two distinct worlds: the preamble of the "Constitution of 1989" vs. the National Avowal

Although the Hungarian constitution-maker had not enacted a new constitution in 1989, it substantially changed the content of the former Socialist constitution – Act No. XX of 1949 –in order to create a proper constitutional framework for the transition to the new multi-party democracy. That being said, essential legal mechanisms and institutions had newly been introduced, inter alia, rules for general and

* Normativity can be approached from various conceptual points. This paper applies the concept of normativity in a „factual" sense: basically, here, normativity means the capacity of a legal rule to make people obey to that rule, that is, it is the ability of norm to influence people's behavior toward the aim of this norm. Obviously, the normativity of a rule can be dependent of various internal and external factors, from the legal technique to certain social preconditions. For more on normativity (see: Berta and Pavlakos).

local elections; mechanisms for division of powers among various institutions; guarantees for the independence of the judiciary; the establishment of a constitutional court and so on. In sum, the new text of the former constitution was an excellent starting point for the new Hungarian parliamentary republic.*

It is striking, especially if one considers the historical relevance of the new democratic constitution, that its preamble was only one sentence focusing on the transitory nature of the entire constitution. That is, it simply declared that the new constitution had been created and enacted "in order to facilitate the peaceful political transition to a constitutional state".† Only the major features of the new socio-political setting was mentioned (multi-party system, parliamentary democracy and social market economy); neither value declarations, nor historical references were incorporated into the text – as was regularly the case in most of the constitutional preambles of other East-Central European post-Socialist countries.‡ It can be argued that this preamble attached to the "Constitution of 1989" neglected both the historical moment and the obvious post-transitory trends in East-Central Europe when phrasing an introduction to the new constitution. Therefore, due to its relatively neutral and value-free wording, it could not acquire a symbolic status and meaning in the following years during which the socio-political framework of the new democracy was established in intense and fierce internal debates.

In 2010, the overwhelming victory of the right-wing and populist party, FIDESZ Hungarian Civil Alliance, opened up the possibility for the enactment of a new constitution. Following less than one year of preparatory work, the Parliament enacted the new constitution, which it named the Fundamental Law, on April 18 2011 (for a general discussion of the post-2010 political and constitutional developments see: Kiss; Smuk). The new Fundamental Law (for a descriptive introduction see: Csink, Schanda and Varga) has been under a strong criticism since its inception; both constitutional law experts and the European institutions – mostly the Venice Commission of the Council of Europe – have questioned its overall spirit and certain specific provision.§

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* For a comprehensive overview, including the text of the renewed constitution and those of the most important new acts guaranteeing the basic mechanisms of democracy see: (Lamm) (with special regard to Géza Kilényi's introduction 5–34.).

† "In order to facilitate a peaceful political transition to a constitutional state, establish a multi-party system, parliamentary democracy and a social market economy, the Parliament of the Republic of Hungary hereby establishes the following text as the Constitution of the Republic of Hungary, until the country's new Constitution is adopted."

‡ From the former-Socialist countries in East-Central Europe the Czech Republic, the Republic of Estonia, the Republic of Poland, the Republic of Lithuania, the Slovak Republic, and the Republic of Slovenia enacted new constitutions with longer and thoughtful preambles.

§ See for instance: *Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary*, Opinion No. 614/2011, CDL-AD(2011)001; *Opinion on the New Constitution of Hungary*, Opinion No. 621/2011, CDL-AD(2011)016; *Opinion on the Fourth Amendment to the Fundamental Law*, Opinion No.

One of the major novelties of the Fundamental Law is the new preamble entitled the National Avowal. The National Avowal cannot intelligibly be compared to the former preamble, since it differs in both qualitative and quantitative terms. It is much longer; it contains numerous value declarations and historical references; its style is passionate, lofty and theatrical; and it has no transitory nature but rather it strives for a perennial status – that is, it aims to become an essential reference point of the new regime's political identity. Basically, the new preamble is a longer text emphasizing those historical, axiological, sociological and political points that were relevant in the eyes of the constitution-maker in 2011. In sum, the National Avowal is a completely new development in Hungarian constitutional thinking; therefore an in-depth and interdisciplinary analysis is indispensable for a comprehensive understanding of its nature.

Thus, this paper aims to contribute to the better understanding of the new Hungarian preamble through three novel approaches to legal philosophy. The speech act theory, theory of narratives, and law and emotions scholarship will be applied. These approaches converge at one point: they imply that law is more than a set of legal provisions; it is a component of a much broader – for instance social, political or cultural – reality. Therefore, this paper will also presuppose that a preamble is not only a provision of constitutional law strictly embedded in the "legal system" of constitutionalism, but also a text in a literal sense, being rooted in and attached to a much broader historico-political context. Therefore, the National Avowal will be discussed as a text in the following analysis, since this approach may reveal certain insights that remain hidden if conventional constitutional law methods are applied.

SPEECH ACT THEORY APPLIED: ARGUMENTS AGAINST THE NORMATIVITY OF THE NATIONAL AVOWAL

The normativity of preambles has always been an evergreen question (see: Orgad). The first claim of this paper is that the question of normativity cannot convincingly be handled only by analyzing the relevant case-law of constitutional courts – although this approach is more than tempting due to its simplicity and conventionality. Since preambles give written utterance to the will of the constitution-maker, the application of certain insights from the philosophy of language would seem to be especially helpful. Chief amongst them is speech act theory* and its consequences.†

720/2013, CDL-AD(2013)012. As a summary of scholarly critiques see the studies on various fields of Hungarian constitutional law (see: Tóth).

* Austin defines speech-acts in his seminal work: "(these utterances) A. do not 'describe' or 'report' or constate anything at all, are not 'true or false'; and B. the uttering of the sentence is, or is a part of, the doing of action, which again would not normally be described as saying something." One of his famous example is "I name this ship the Queen Elizabeth (…)" (Austin 5).

† On the applicability of speech-act theory with regard to written texts (see for instance: Skinner).

Speech act theory can be linked to the phenomenon of normativity in law. Besides other factors – for instance the moral embeddedness of a given provision, the state capacity to enforce law, or the economic rationality behind regulations etc. – effecting normativity of legal rules in general, the linguistic nature of a norm also has some impact when it is at least partially composed of speech acts. This approach seems to be even more suitable when such a provision like the National Avowal has to be analyzed, since this preamble has less direct legal relevance as compared to its literal layers.

As for normativity, the case of the National Avowal seems to be surprisingly simple at the first sight. The Fundamental Law even contains an article that deals with the normativity of the preamble. Art. R para 3, as a general rule of interpretation, sets forth that

> "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution."

Thus, the National Avowal is one of those three points – besides the *telos* of constitution (teleogical interpretation), and the achievements of the so-called "historical constitution" (quasi-historical interpretation) – that have to be followed when interpreting a provision of the constitution. The National Avowal as a compulsory tool of interpretation in itself acquires normative power in cases when a contextual interpretation is needed.

In sum, the problem of normativity of the National Avowal seems to be settled by this provision. This strong link between the normative provisions of the constitution and the preamble may be surprising since it has no antecedents in the previous practice of the Constitutional Court, thus it may be argued that this approach is rather distant from the Hungarian constitutionalism; however it is not senseless at all. This solution guarantees that such an interpretation of constitution that may go contrary its "spirit" as specified in the National Avowal cannot prevail. Essentially, the constitution-maker closed a considerable option for creative and activist interpretation by the future constitutional judges trying to overstep the actual constitutional setting.

However – contrary to the earlier normative speculations based on Art. R para 3 – some insights of speech act theory suggest a much more refined understanding. Although Art. R para 3 declares that the National Avowal has to be applied as a tool of interpretation, the simple fact that this text is full of speech acts* makes this problem more complex.

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* For example: „We promise to preserve (…)"; „We commit to promoting and safeguarding (…)"; „We respect (…); „We do not recognise (…)"; „We agree (…)".

Contemporary philosophy of language agrees that an utterance has three different – but also interrelated to a certain extent – characteristics: (i.) locutionary, (ii.) illocutionary and (iii.) perlocutionary dimensions.* For our discussion we have to focus on the illocutionary force in general, since – as it was mentioned above – it has a certain explanation value with respect to the problem of normativity. Basically, the illocutionary force of an utterance indicates to what extent it is able to produce some conventional effects with regard to the acts of people (Austin 108). The stronger the illocutionary force of an utterance, the better its capability to influence and alter reality.

It is argued in contemporary discourse – on the basis of the works of Austin and Searle – that the illocutionary force of an utterance is dependent on seven major factors.† That is, although a speech act always has a general illocutionary force – meaning that an utterance is capable of bringing about certain conventional consequences in human action, for instance, when someone says 'I promise', others will rely on this promise – many other external components shape its scope in a given situation. Obviously, these seven components designed for real utterances are not equally relevant in the case a written speech acts with special regard to "legal texts". Because legal provisions are products of a bureaucratic procedure that cannot be compared to the inherent diversity of real life; and their phrasing and style is much less sophisticated than a living language their linguistic nature is rather limited. Therefore, these components should be simplified to the peculiarities of written constitutional texts including constitutional preambles. By this simplification, one may argue that the illocutionary force of a speech act in a legal text is largely dependent on three major factors. These are as follows.

(i.) The first point that should be assessed is the question how a speech act is linked to the general logical and linguistic framework of law. Does it contain such concepts that may have direct legal relevance? If so, the illocutionary force of a speech act in a legal text may be strong or stronger (propositional content conditions).

(ii.) The second point to study is the historical context of the speech act. One may, with relevance, raise the question of in what kind of historical situation does the question of normativity come up. The historical context of a legal text may also influence the illocutionary force the speech acts embedded in it (preparatory conditions I.).

* For a broader discussion of these terms (see: Austin. 94–107).

† See for more (Green). These seven factors are: 1. Illocutionary point; 2. Degree of strength of the illocutionary point; 3. Mode of achievement; 4. Propositional content conditions; 5. Preparatory conditions; 6. Sincerity conditions; 7. Degree of strength of sincerity conditions.

(iii.) Lastly, one should also take into account the framework of the national legal culture. The question of how a given national legal culture approaches the normativity of preambles has an undeniable importance. If a national legal culture accepts the normativity of preambles in general (Orgad 726–731), it may enhance the illocutionary force of speech acts in a preamble (preparatory conditions II.).

A complex assessment of these three factors may help us in answering the question of whether a preamble – if it is also composed of speech acts – has a certain normative power. In other words, these three points may contribute to the assessment whether the National Avowal has normative power in fact.

In the case of the National Avowal, the third component has to be discussed first. The attitude of Hungarian judges is extremely text-positivist with respect to interpretation (Jakab and Hollán). They are generally reluctant to apply methods – for instance the teleological approach or analogy – that may lead to an innovative interpretation.* Moreover, it is not too likely that this text-positivist approach will be changing in the short term, since the post-transitory Hungarian legal culture also shows a strong commitment to the primacy of legal texts in interpretation. For instance, the Constitutional Court only relied on the former preamble in exceptional cases, and even then, the Court never used it as a starting point for a creative or activist interpretation (Vörös 23–25). Therefore, one can argue that this third condition is certainly not met.

The national legal culture has a strong text-positivist character, and the preamble to the constitution is certainly not regarded as a conventional helping hand when interpreting ambiguous provisions.

As for the second point, one seems to be unable to formulate such a solid conclusion as was the case with respect to the legal culture. The post-2011 political setting of constitutional law seems to be a situation where the constitution-maker (still in power following 2014) has had a clear and obvious intention to establish a new way of constitutional thinking, which is intended to be qualitatively different from that of the previous twenty-five years. Therefore, having introduced the new constitution, an activist approach in its interpretation would likely be unwelcome by the political sphere since it may harm political coherence of the new constitutional setting. Thus, this period seems to be unfavorable toward judicial activism. In addition, because of new rules for the selection of Constitutional Court judges (Fundamental Law, Art. 24. para 8; Act No. CLI of 2011 on the Constitutional Court

* Having studied extensively the patterns of Hungarian courts Ződi argues that "(…) there is no such as the »spirit of the rule what counts, and not the wording«. Hungarian law is textual, text-based, and text bound. The importance of precedents is growing in number, and if this is a sign of convergence, than there is a convergence. But the textual tradition of the civilian law is very strong, and the sophisticated ways of precedent handling, and reasoning is simply not present in Hungarian law." For more see: (Ződi).

Art. 6-9) – making it possible to elect them by a two-thirds majority in the Parliament, that is, without any interference of the opposition – only those may become constitutional judges that share the basic convictions of the government party. Thus, it may be supposed that the new constitutional judges will also be reluctant to adopt an activist approach. But, in general, it cannot be excluded that a creative and activist interpretation may appear in some cases. In sum, one cannot determine if criterion two of illocutionary force will or will not be met in the coming years.

Most of the terms included in the National Avowal openly contravene the first component linking legal illocution with "the legal nature" of concepts. Needless to say, because of the political mission of the text, this preamble is full of terms that were mostly borrowed from the vocabulary of either historical thinking* or political philosophy.† Therefore, they have no explicit legal reading or interpretation; that is, they cannot be relied on in a legal argumentation.

Perhaps one exception to be pointed out is those parts of the text that explain the manifold tasks of government and administration.‡ Here, the reader can find certain terms that are not absolutely unknown in legal vocabulary. However, there is no guarantee that these terms will be referred in constitutional interpretation just because they are part of the National Avowal. It is much more likely that the main tasks of government and administration will be discussed on the basis of specific provisions of the constitution or other acts.

All in all, the application of speech act theory – especially the components of illocutionary force – to the problem of National Avowal's normativity suggests that one can easily find various arguments against the normativity of the National Avowal. In light of these findings, Art. R para 3 requiring the application of the preamble as a compulsory tool of interpretation should be approached with both some caution and reservation. The main counter-argument to normativity of National Avowal that really weakens Art. R para 3 is the nature of the Hungarian legal culture. As indicated above, Hungarian legal culture is extremely text-positivist. Therefore, it is very reluctant to rely on vague and broad terms having no clear legal relevance during interpretation: the National Avowal is full of these terms.

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* For example: "the role of Christianity in preserving nationhood", "various religious traditions"; "the diversity of European unity"; "the Holy Crown"; "1956 Revolution".

† For example: "nation"; "Hungarian political community"; "freedom"; "new democracy and constitutional order".

‡ "We hold that the common goal of citizens and the State is to achieve the highest possible measure of well-being, safety, order, justice and liberty.
We hold that democracy is only possible where the State serves its citizens and administers their affairs in an equitable manner, without prejudice or abuse."

CREATING A NEW CONSTITUTIONAL NARRATIVE: THE FALL OF THE "INVISIBLE CONSTITUTION"?

The role of preambles to constitutions is not only to influence the understanding of some constitutional provisions toward certain policy choices preferred by the constitution-maker. They also have a much broader social role. Since the seminal work of Cover (*Nomos and Narrative*) no one can seriously doubt that constitutions are also considerable contributions to those narratives by which a political community understands both itself and the outside world. That is, the text of a constitution – and especially the preamble – may have a strong impact in shaping public thinking on the fundamental questions of a political community. In addition, the narratives are very important when defining the meaning of certain constitutional law provisions before the courts. In the words of Cover:

> "Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse – to be supplied with history and destiny, beginning and end, explanation and purpose" (Cover 4-5).

In other words, narratives shape our understanding of legal provisions; perhaps, pure legal meaning does not exist at all, and legal provisions become publicly comprehensible with help of narratives. Moreover, narratives have partially been created, reinforced or discredited simultaneously by the acts of the legislator and constitution-maker. Thus, law and narratives mutually animate each other, thereby creating a normative world (*nomos*) and giving practical meaning to the technical rules.

This paper argues here that the National Avowal should be regarded as a symbol of the establishment of a new constitutional narrative trying to compete with the existing dominant one. Basically, its final aim is to alter, or at least refine, the popular understanding of constitutionalism against the preferences of the rightist and populist constitution-maker. From the very beginning of the political transition process in 1989, an influential narrative had emerged around the "Constitution of 1989". The main actor in this formation was the newly established Constitutional Court with special regard to its first president: László Sólyom, the prestigious civilist and expert on constitutional law. The Constitutional Court made sincere serious efforts in order to create a new "epic" – in the Coverian sense – through its seminal decisions from the very beginning of the transitory years.* In general, the main decisions of the first nine years stressed the overwhelming importance of

* See for example: 23/1990 (X. 31.) AB határozat (annulling death penalty on the basis of the value of human life and human dignity); 43/1995 (VI. 30) AB határozat (annulling some parts of the act on economic stability (Act

human dignity and also emphasized the requirement of rule of law with special emphasis given to the formal requirements of legal procedures. Broadly speaking, this narrative – named as the "invisible constitution" many times (Sólyom 117–119) – had (i.) a universalistic and ahistorical nature and had been centered around (ii.) the idea of human dignity and freedom; (iii.) human rights; and (iv.) the concept of rule of law with special regard to legal certainty.* Its ahistorical features gained special relevance if one took into account the tradition of the historical constitution being popular prior to WW I in the Hungarian legal culture (for an in-depth discussion see: Péter). The idea of an "invisible constitution" and the narrative animating it has had a broad and strong influence over both legal scholarship and legal education during the last twenty-five years.

The main personalities of the new FIDESZ government have never denied or hidden their objections to "liberal constitutionalism", that is, to the "epic" of the "invisible constitution". For instance, Tibor Navracsics, Minister of Justice and Public Administration at that time, has explicitly argued for the establishment of "a new political and institutional culture" to replace the previous one.† Hence comprehensive political support has swiftly emerged to back a new national constitutional vison and narrative. The National Avowal contains all the main components of this new narrative and it can be regarded as the flagship of this new line of thinking. This prominent place is guaranteed by its particular place in the Hungarian legal culture, as the preamble to the new Constitution. Having studied the National Avowal one may easily summarize the core elements of this national constitutional narrative: (i.) it is focused on the idea of the cultural nation and national solidarity;‡ (ii) it creates a non-neutral understanding of the national history;§ (iii) it is also familiar to the concept of the so-called "historical constitution"¶ – whatsoever this term may mean –; and (iv) it also has a historical scope focused on national history.**

Thus, the coming years will be about the competition of these two narratives. One of them has strong roots within the legal profession, especially in the legal education and academia, while the other is supported by the official governmental constitutional spirit. Since there is no historical distance, but we all have been part of

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No. XLVIII of 1995) introducing serious restrictions in the field of maternity and family allowances in order to improve the budgetary balance).

* For a representative summary of this narrative see: (Halmai-Tóth).

† See: fn.hir24.hu/itthon/2012/08/18/navracsics-solyom-rosszul-latja/.

‡ „We commit to promoting and safeguarding our heritage, our unique language, Hungarian culture (…)"; „(…) a sense of responsibility for every Hungarian (…)"

§ „We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid."

¶ „(…)we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation."

** „Our Fundamental Law shall be the basis of our legal order; it shall be an alliance among Hungarians of the past, present and future."

these developments, it is not possible to formulate any conclusion on the future outcome of this competition yet. However one essential question seems to be quite clear: is the will of the government enough in itself for creating and maintaining a new narrative even contrary to the well-established narrative of the legal profession and academia as such? Legal history suggests that the support of both legal profession and society are also indispensable for setting up a new constitutional narrative (Cover 31–32).

"LAW AND EMOTIONS" APPLIED: THE WEIGHT OF HISTORICAL FRUSTRATIONS

Having studied the National Avowal from the aspect of speech acts and narratives, there is still one important approach remaining. Although the relationship between law and emotions is an issue for continuous and stormy discussion, it can hardly be denied that preambles imply a sentimental reading in most cases. Contemporary law and emotions scholarship (Bandes, Maroney, Abrams and Keren, Bandes and Blumenthal) teaches us that emotions remain relevant for understanding law in general. A legal provision may affect the emotions of the people – just think of controversies raised by the gay marriage acts in North America and Western Europe. Emotions may also be the subject of legal regulation: certain sections of criminal law or hate-speech provisions may provide proper examples. Finally, emotions can even be the driving force behind legislation, as the stories of environmental protection acts illustrate.

Additionally, as this body of scholarship has already pointed out, law as a general societal phenomenon can have an important role in managing collective emotions (Sajó 2011). As an insightful illustration, Sajó argued, when discussing the role of constitutional sentiments in the emergence of modern constitutionalism, that some of its major points (e.g. division of powers, due process, and protection of human rights) are also about the sophisticated management of collective fears from a tyrannical power (Sajó 1999, 1-47). This "management function" is even more apparent in the case of preambles, since by moving a public sentiment or public sentiments into the world of constitutionalism preambles provide public emotions with a special status. That is, preambles to constitutions pick up certain public sentiments from the societal world and move them to sphere of constitutionalism. And, this movement may have positive repercussions on these public sentiments, since it may contribute to the taming and neutralizing of the harshness of these sentiments. The sphere of constitutionalism seems to be rather neutral and predictable due to its internal logic, as compared to the busy, harsh and fast-changing world of public thinking. Thus, the "constitutionalization" of a public sentiment through a preamble may be an important contribution to rationalizing discourses and debates boosted by public sentiments.

A sentimental reading of the National Avowal suggests that historical frustrations had a considerable role in its phrasing. Some parts explicitly refer to these sentiments, such as, for example, the following paragraph:

> "We hold that after the decades of the twentieth century which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal."

In addition, other historical references to the 20th century* also have this emotional dimension; all of them go back to the still widely-shared public conviction that the 20th century was blatantly unjust to Hungarians. Just to mention the main among many such moments: Hungary lost two-third of its territory following the Trianon Peace Treaty in 1920; it was occupied by German troops in March 1944 and, therefore, it fought in alliance with Germany until the end of World War II; and the establishment of a purely Stalinist regime started in 1949 and the revolution of 1956 fell due to the Soviet invasion.

The inclusion of these components, having an unambiguous emotional relevance, into the preamble may contribute to the taming and neutralizing of the frustration rooted in modern history. On the one hand, it has a clear message: the constitution-maker recognizes this frustration and sees its importance in the recent past of the Hungarian nation. On the other, this recognition in the introduction of the constitution may also open the possibility of a more rational, not strictly emotional discussion, since it provides some kind of very abstract and symbolical reward. In sum, it may make a contribution to neutralizing these strong public sentiment in the longer run.

Obviously, whether or not a preamble is the proper place for this emotion management is another question to be discussed. It can be argued that the appearance of collective frustrations in the National Avowal strengthens Bibó's insight into the general deformation of Central European political cultures (for more: Bibó A kelet-európai 212–227). Normally, the management of historical collective experiences and frustrations should never be a task of constitutionalism and constitutional law; it is certainly not a coincidence that most of the preambles of Western constitutions are almost free of any emotional references.† However, because of the underdeveloped civil culture, the improper functioning of public discourse and the overwhelming influence of the political sphere in East-Central Europe, these problems can only be handled with the help of a strong political impetus. And, this strong political

* For ex.: „We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship."

† The Spanish and the Portuguese preamble to the constitution are manifest exceptions. It can be due to the fact that they were created following the fall of authoritarian regimes.

"participation" in the public life of a society can create such unconventional documents as the National Avowal.

CONCLUSION

The main thesis of this paper – that preambles can reveal a lot about the national legal culture – is certainly supported by the findings. The various conceptual approaches employed pointed out, among many other things, that (i.) the normativity of the National Avowal is rather questionable, although the constitution-maker had a clear intention to provide it with strong authority; (ii.) the National Avowal symbolizes the birth a of a new constitutional narrative centered around the nation and national history; and lastly (iii.) one of the aims of the National Avowal is to provide a helping hand in managing historical frustration through moving them into the sphere of constitutionalism.

That is, the National Avowal is intended to be much more for the Hungarian legal culture than a conventional preamble for a Western country.* It has certain functions that are completely different from the ordinary tasks of a legal provision. Basically, besides its original function to provide a value-oriented introduction to the constitution, it is also strongly linked to public thinking. Namely, it is a political tool to influence the public discourse on those questions – such as the role of 20th century in the Hungarian history, the role of the nation in the contemporary world, and judging the crimes committed by the authoritarian regimes – that have been vehemently and fiercely debated since 1989.

In sum, the National Avowal is a perfect symbol of the fact that Hungarian public and its political thinking are still in a transitory phase from the first events of the October of 1989. Moreover, it also symbolizes that politics has an overdeveloped and artificial role in the Hungarian society – a deformation that had already been pointed out Bibó many decades earlier (Bibó *Eltorzult*). All in all, one may argue that the Hungarian public thinking is still struggling with controversies of the 20th century past and the National Avowal moves many of them to the sphere of constitutionalism. The coming years will decide whether it is either a successful means contributing to the socio-political consolidation or just another chapter in the continuous war of symbols generated and boosted by various wings of the Hungarian political and intellectual elite.

* Cf. Horkay Hörcher argues that the National Avowal is strongly linked to 19th century romantic-nationalist poetry playing a crucial role in creating the modern Hungarian national identity. See: (Horkay Hörcher)

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Zsuzsanna Fejes

Constitutional Identity, the Historical Constitution Clause in the Hungarian Fundamental Law, and its Effects on Constitutional Interpretation*

INTRODUCTION

In our country the advance political, economic and moral crisis prior to the constitutional years 2010-11 had been an important constitutional moment, which led to an opportune and unavoidable change at the same time. The Hungarian constitutional power decided to adopt a fundamental law, which was able to create a common constitutional identity and to express a national belonging.

According to the "National Avowal" entitled Preamble – Fundamental Law, passed by Parliament on 18th April 2011 – "WE THE MEMBERS OF THE HUNGARIAN NATION (…) We honour the achievements of our historical constitution and (we honour) the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. We do not recognise the suspension of our historical constitution due to foreign occupations."

Regarding Art. R para 3 "[t]he provisions of the Fundamental Law shall be interpreted in accordance with their purposes, with the National Avowal contained therein, and with the achievements of our historical constitution."

The new Fundamental Law rich in national values meant a new challenge for the domestic scientific community. Not only classical political science, but also constitutional law and theory must struggle with the interpretation of the new declarations about national values in the Fundamental Law. During the examination of the constitutional identity I shall explain the components of national identity, the relationship between the individual and the community, the practical and theoretical demand of national independence, and the content and possibilities for the interpretation of the achievements of the historical Constitution.

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Problems recurring during the examination of the text of the Fundamental Law in a catalogue values, are our sovereignty in the international law and the conceptual system of the European Union (Smuk 446).

In my study I examine whether the Fundamental Law itself could offer suitable and sufficient means for the citizens of Hungary to embrace the ideas therein as their own, and I will discuss how the values and principles stated in the Fundamental Law can maintain our participation in the European integration. There will be a detailed analysis of the historical constitution as part of the constitutional identity, and then I will examine the new Fundamental Law's relationship to the historical constitution, and furthermore how the characteristics of the historical constitution assist in the interpretation of the Fundamental Law, and what bases gives the Fundamental Law to its self-interpretation. In this context, I review the existing jurisprudence of the Constitutional Court with respect to those parts of the historical constitution, which shall be taken into consideration during the interpretation without reference to the Fundamental Law, i.e. during the Constitutional Court's interpretation of what should be considered as the historical constitution's achievements.

THE NATIONAL AND CONSTITUTIONAL ELEMENTS OF IDENTITY IN THE FUNDAMENTAL LAW

The modern notion of a community's real political and legal order is connected to the development of constitutionalism.

The two most important features of the development of constitutionalism are the followings: On the one hand the government's legitimacy, its justification being based on the consent of the people, on the consent of the governed ones. On the other hand the political power is legalized, which means that there cannot exist any public authority, which is not based on the Constitution and the constitutional rule of law. This kind of legitimacy and legalization may only be possible, if the Constitution is a supreme law, superior to the other laws. The identification with the national community is based on an organic, cultural identity sense (Paczolay) which is amplified emotionally as well.

The individuals' national identity is related to the nation as an interactive, reflective relationship to the supreme community. In addition, the national identity is always attached to a political community and is composed of the following elements: a common historical territory, common myths and historical recollection, common mass culture, common rights and obligations, common economy with possible territorial mobility of the individuals (Smith 14). The togetherness of any society may be determined by the views, represented by its members, based on common knowledge, belief or creed. The togetherness here perceived means those members

of society who share similar values as the others or identify with similar symbols. In other words, a community is held together by its members with a common identity (Hurrelmann 345).

The identity of a constitution is not an abstract thing, which is waiting to be discovered, but is evolving by experience, rather developing through a kind of dialogue, and appears through a mixture of many nations' expressed past aspirations and opinions, and the determination of those who want to transcend the past in some ways (Jacobsohn 5).

Three things are expected from the modern constitutions. One of them is to have converging community symbols. The Constitution is not only a legal document, but also a symbol which expresses the togetherness of the political community, the country and the nation. The debate on the Preamble may be explained only by taking into consideration this last point, and therefore the Preamble will be an instrument which helps most of the citizens to have an emotional identification (Jakab 10).

The Fundamental Law also defines the content of the national identity by visualizing large number of national values. The question is, compared to the value neutrality of the previous Constitution, whether the Fundamental Law is able to assert such a catalogue of values, which will be shared by the entire political community (Horkay Hörcher 288).

The elements of constitutional identity appear primarily in the Preamble of the Fundamental Law, under the text called National Avowal. The legal nature of preambles is peculiar as their legal power is reduced, and on their own they impose no obligation on anyone but may assist during the interpretation of the Fundamental Law (Jakab 16). However, due to their highlighted position at the beginning of the document, they have symbolic significance, considered as a kind of introduction, which expresses a whole country's desire for revelation of constitutional identity. In the Hungarian constitutional tradition Preambles have always had a significant role in history; at fateful times of history the legitimating function of the Preamble is more appreciated.* The Preamble to the Fundamental Law is such a solemn statement that shows the historical continuity of the Hungarian sovereign state, the development of the one thousand-year-old state (Máthé, par. 3).

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* The Golden Bull of 1222, the Act No. I of 1920, which included the temporary regulations of the restoration of the constitutionality and the rules of the exercise of public power; Act No. I of the 1964 act that gave to the whole Hungarian history a possible narrative and to the legislative body shared fundamental values as an avowal of faith. Act No. XX of 1949 broke the previous historical narrative, and its main point was to suit the Soviet Constitution of 1936, the purpose of which was the commitment of the Soviet Union to establish the new principles of the social structure, in propagandistic terms.

The first sentence preceding the National Avowal, though part of the Fundamental Law, is the first line of the Hungarian national anthem. It determines that Christianity has a role in the continuity of the nation, since the foundation of the state by St. Stephen, and this is supported by historical facts as Christianity has helped during the nation's persistence and pursuit of independence. Thus Christianity shall be considered as part of the historical narrative, which is a contribution of universal value, notwithstanding that the reference to its nation retaining role generated great debates, combined also with fact that the text of the Fundamental Law states at the same time that "We value our country's different religious traditions", also acknowledging the role of other religions.

National holidays are symbols with special significance, and they represent the historical narrative with due emphasis in the Fundamental Law. Among the national identity factors common culture and cultural traditions occupy a prominent position. Although these are notions of the culture nation, the modern nation-state integrates them into the political community by raising them to a normative rank. In the national traditions and international relations the coat of arms, the flag, and the national anthem are a general system of symbols, creating at the same time an emotional attachment to it (Smuk 452–459).

The concept of nation in the Fundamental Law

The Preamble to the Fundamental Law begins with a self-definition – "We the members of the Hungarian nation" – is a reference to the source of the constituent power, which is the people, exercising this power through representative democracy. However, at the end of the Preamble, the term "We, the citizens of Hungary", is used. The last sentence of the Fundamental Law is: "We, Members of Parliament elected on 25 April 2010, being aware of our responsibility before God and man, and availing ourselves of our power to adopt a constitution, have hereby determined the first unified Fundamental Law of Hungary as above." Regarding this we may conclude that there is a strong relation between the nation and the Fundamental Law, but ultimately not the nation is the organ/actor, which accepts the Fundamental Law, but the representatives of the national Assembly, elected on April 25, 2010 (Trócsányi 56–57).

In the Fundamental Law, compared to the previous Constitution, the concept national appears in new correlations too, and the term nation may have more possible meanings, considering that the term Hungarian nation may be understood as a political and also a cultural term at the same time.

During an examination of the text of the Fundamental Law, each of the widespread definitions of nation may be found in turn. According to Kukorelli "it shall be seen

that the Fundamental Law has courageously moved to the direction of political or national state, not denying the – sometimes mixed with the favoured by Pan-Slavism and also live in Hungarian political thinking – term of culture-nation" (Kukorelli 8-9).

The term nation first appears in the context of the subject of constitutionalism as according to the first sentence of the avowal of nation faith, members of the Hungarian nation are manifested. The political community created by the Fundamental Law in this regard has gone beyond the country's border, although it connects the membership of the community to a legally clear condition, to citizenship. Systematically, this may be interpreted as the state having created the political community which is connected to the national community's cultural sense concerned, through the responsibility clause. The National Avowal states as a fact that the Hungarian nation was torn into parts in the 20th century. The promise to preserve the intellectual and spiritual unity covers the aims of preserving the Hungarian culture and identity living beyond the state's political borders. In the re-drafted clause of responsibility the support has been clearly declared of the survival and development of Hungarian communities living beyond Hungary's borders, of their aspirations for maintaining their Hungarian identity, of the enforcement of their individual and community rights, of the creation of community self-government, of their prosperity on their homeland, as well as the cooperation with each other and Hungary (Smuk 447-453).

The "national" avowal may be regarded as a summary of such political beliefs, which may be used in a national context, that is, what the nation state in their political avowal (Horkay Hörcher 289). The National Avowal is a national political creed as well, in which the national cooperation and responsibility for the community play a significant role. In this regard the Fundamental Law distances itself from the liberal constitutional thinking, which shifts the focus on fundamental rights of the individuals instead of the communities. However, the responsibility for the community impacts on the individuals as well, according to "Foundations", "everyone shall be responsible for their own sake, and shall be bound to contribute to the performance of state and community tasks according to their abilities and possibilities". In a world influenced by the globalizing and supranational organizations, the cooperation among the members of the nation and the common responsibility may help a country to face the challenges of the 21st century (Trócsányi 58).

National sovereignty in the Fundamental Law

The Constitution as the embodying notion of the national sovereignty is always bound to a particular state. Hungary's position in the international relations, its independence described by the sovereignty, is a central category in the analysis of

our national values.* The actors of the political system-change in 1989–90 had the key idea to make the country become part of Europe again. Europeanism was one of the dominant political ideologies, which also expected the West to recognise the dignity of our position among European nations.

This need is lately formed in the National Avowal, which is referring to the value content of the state foundation, emphasising that the nation was struggling for centuries not just for its independence and survival, but also for the protection of Europe. The Hungarian nation is enriching Europe as a community of values at the same time. The European-clause of the Fundamental Law engages Hungary to the European integration. Maintaining the other parts of our sovereignty shows, that the constitutional power believes in the concept of Europe – which recognises the autonomy of the Member States (Smuk 461).

Hungary was the first country in the region which approved a new constitution upon its accession to the European Union. A state's national identity is an inseparable part of the fundamental political and constitutional system, which means the basic state functions (e.g. the maintenance of public order and the protection of national security).† The term of common constitutional traditions of the Member States refers to the European Union taking into account this part of constitutional identity of the Member States in connection with the protection of fundamental rights. Thus there is a harmony between EU law and the common constitutional traditions of the Member States.‡

The national identity is therefore a limit to the Union, protecting the independently exercised sovereignty of Member States, which however may prevail legally only in a narrow sense. The substantive requirements of enforcement are the following:

1) elementary state functions or elements of the institutions or measures of the Member States inseparable from the form of Member States' political and constitutional government may not be challenged by EU law, or

2) the EU may not take any action which trespasses on, or is disadvantageous for, the enforcement of these institutions or measures in the Member State. Certain provisions of the national constitutions may be limits of EU law (Case No. C-208/09, and No. C-391/09, points 86-87; Trócsányi 79). When the Member States consigned to EU bodies a part of their competences arising from their sovereignty or the right to exercise those, they did not waive from their rule of state, sovereignty and the

* Fundamental Law, Art. Q.

† *The Treaty on European Union*, Article 4.2.

‡ *The Treaty on European Union*, Article 6.3.

essence of their independence, the freedom to determine the foundations of the character of their rule of law. Member States have retained their right to free action over those basic principles of their constitution, which are essential for maintaining statehood, and constitutional identity. The State acceding to the integration reserves its sovereignty without any special declaration since this is a cornerstone of the Member States' constitutions (and EU law). This follows from the sovereignty and the fact that the EU legal order is a cooperation of sovereign states (Decision of the Constitutional Court No. 143/2010. (VII. 14.).

The historical narrative in the Fundamental Law

Historical narrative is an acceptable and prevalent element of Preamble of Constitutions. Its main function is to create a community with the help of the content and style defined by different national peculiarities. The National Avowal as Preamble, besides universal values, lists the common historical merits and achievements of the nation in a pronounced degree (Smuk 451). Such as the memory of King Saint Stephen, the reference to the historical constitution and to the Holy Crown, the role played in protecting Europe, the commemoration of ancestors fighting for national independence. The continuous existence of Hungarian statehood is exceptional, thus the new Fundamental Law had to be attentive to the derived heritage arising from the more than one thousand years continuing existence of the Hungarian state. Heritage deriving from the one thousand-year-old Hungarian state is a necessary part of our national existence, which had to be expressed in the Fundamental Law as well.

Reference to the historical constitution may be viewed as a symbolic "exhibition of heritage" and memorial, an element of the Catalogue supporting the consciousness of the community. It expresses a conscious value-selection, but regarding this, the lack of further normative handrails makes its use in law enforcement use ponderous, as well as the integration into the Constitutional Court's system of argument. Obviously the real question is whether these meanings are useful in identity-forming historical knowledge or they become the inevitable basis of today's dogmatic and inescapable elements of the interpretation, development and application of substantive law at the same time (Rixer, pars. 1-4)

In Hungary there was a lack of ***tradition*** of codified constitution. The specificity of Hungarian history was the historical Constitution. Cardinal laws of the previous historical Constitution existed as ordinary laws in the legislation and application of law (Kovács 90–97). Rixer summed up the conceptual elements of the concept of unwritten constitution used by most of the authors, saying that it consists of multiple norms (written and unwritten) which come about timely separated, at least partially independently from each other and are constituted by sources of law

of various levels, and their existence is typical for the so-called evolution of constitution with compromise, thus ensuring the continuous development of the constitutional order. The unwritten nature of the Constitution however does not mean of course petrifaction; the historical constitution is also changing (Rixer, pars 1-4).

Barna Mezey has formulated the above as follows: "Unlike the European written codified Constitutions the Hungarian state structure was not codified into a unified code, constitution. This (also) meant that the public law preserved numerous institutions and principles during its one thousand year continuous development." (Mezey 207)

The historical constitution is constantly evolving, expanding with new legal institutions since the individual is expecting more and more from the community, and the whole community from the state power. Through the centuries long organic development it is becoming more conforming to the interests of society and citizens are increasingly identifying with it. The voluntary law-abiding conduct becomes more and more natural. The historical past, strengthens the citizens' nation consciousness (Horváth 47).

Understanding the meanings arising from the special historical context of the Constitution is identity-forming; however, it is impossible to change that constitutional spirit and historical heritage attached to the country, it is only possible to intend to understand it. Hungary, in recognizing the importance of independent national and constitutional identity, although firstly distanced itself from the constitutional heritage of the period of 1949–1989 at the time of the regime change, between 1989–2010, however, did not manage to name its constitutional heritage (identity) and to display it in the country's constitution (Trócsányi 37). And even if the regime change in 1989–90 per se did not revive the feeling attached to the Constitution as an upper Act, the idea of constitutionalism has still become a part of law, political culture and public life over the years (Paczolay).

The Decision of the Constitutional Court No. 45/2012. (XII. 29.) destroyed some of the transitional provisions of the Fundamental Law, and pointed out as a matter of principle: "The Constitutional power closed a more than sixty-year old period in Hungary by the adoption of the Fundamental Law. At the beginning of this period in 1949, the socialist constitution broke and suspended our historical constitution. The system and regime change in 1989 – in the view of the idea of the rule of law – formed the democratic state system with the amendment of the then actual constitution and stated that the amendment of the constitution was a transitional period, and the aim of the regime change was to adopt a new constitution."

"The continued existence of Hungarian statehood – through the centuries to the present – is an exceptional, and the only formula in this part of Europe. Therefore

the development of the public and legal state framework and those constitutional institutions which supported this continuity by the means of law are worth special attention" (Kovács 105). The new Fundamental Law proclaiming the legal continuity conceptually opens the possibility of the attribution of substantive legal meanings to certain elements of the historical constitution.

Holy Crown in the Fundamental Law

One of the central institutions of the historical constitution for centuries was the Holy Crown, with the Holy Crown doctrine, which vested in a specific unit the principles of the exercise of public power.

The Holy Crown is a means of the order of separation of powers in the history of Hungarian public law. The crown is a symbol which expressed the kings' legitimacy and the legitimacy of the Hungarian state from the 15th century; it represented the nobility until 1848, then the people granted fundamental freedoms. As a specific public symbol the Holy Crown expresses the Hungarian population organized as a nation, and thus all the elements of state life obtain legitimation and justification through it. According to the doctrine sovereignty is vested in the Holy Crown, and the so-called rights of the king were the rights of the Crown. In this approach, therefore, the main power was not vested in the king or in the people, but in the community of citizens united in the Holy Crown (Mezey 208).

The Holy Crown doctrine is that public law concept, in which the Holy Crown as a legal entity is the single holder and donor of the power, the king may exercise his power by (Rixer, pars. 1–4). The King and the nation together constitute the Holy Crown which is the mystical personification of Hungarian statehood and the constitutional symbol of the kingdom. The Historical constitution is that type of constitution, which allowed the Holy Crown doctrine to fill the Hungarian public life until the mid-20th century. The Holy Crown doctrine is an important and integral part of the Hungarian historical constitution, but not its exclusive content.

In Hungary within the historical constitution the essential feature of Holy Crown doctrine that has prevailed is the principle of national independence, ultimately continuous sovereignty (Csink, and Fröhlich 124–126). The Holy Crown doctrine has become a value of historical science. The crown is an expression of the legal continuity of the one thousand-year-old Hungarian state, and carrier of European value, as well as of historical events (Máthé, par. 3). It would be difficult to deny the symbolical nature of the Holy Crown, as since the system and regime change it has become part of our national coat of arms (Smuk 454).

However, the historical constitution carries a wider and different significance in respect of the idea of the Holy Crown. According to Zoltán Szente the unwritten constitution embodied in the Holy Crown doctrine, as a system of customs and laws based on each other, is dogmatically not compatible with a written constitution – with the European constitutional tradition, which has several remaining issues in the new constitution as well. However, the references to the achievements of the historical constitution and the Holy Crown have been incorporated into the new Fundamental Law not only as a state symbol, but as a principle of interpretation, thus one cannot get around the question of what constitutional meaning may be attributed to them. Szente refers to the appendix on 9/2011. (III. 9) Standing Orders of National Assembly, namely "Information on the constitution preparatory ad hoc committee's activities in support of the Members of Parliament's constitutional work", which highlights its symbolic role, that is the constitutional function of the Holy Crown should not be seen in its original role, but only be mentioned as a state symbol. According to Szente the National Avowal is also about the achievements of the unwritten constitution and of the respect of the Holy Crown, which reinforces the interpretation that they are just symbols, with no attributable individual normative content (Szente 8–9).

THE LEGALLY BINDING POWER OF THE NATIONAL AVOWAL AND THE ACHIEVEMENTS OF THE HISTORICAL CONSTITUTION

The legally binding power of the National Avowal

Now comes the question whether the National Avowal called Preamble is part of the law, may be considered as source of law, or is just a prelude (Csink 5). In connection with this issue, the Sulyok–Trócsányi co-authors outline three possibilities: it has no legal significance only rhetorical, "honor" significance; or certain legal obligations may be derived from it; or as an interim measure the Preamble may be used as a guide for interpretation. According to the view adopted by the Hungarian dogmaticists this latter option prevails, the Preamble may not be applied as a separate legislative provision, but as a mandatory guideline for interpreting the law (Sulyok and Trócsányi 90–91).

The Fundamental Law states in Art. R para 3, making it mandatory, that the "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, with the National Avowal contained therein, and with the achievements of our historical constitution."

According to Szente using it as a canon of interpretation means that to the provisions of the Fundamental Law shall be attributed such objective, which complies with the relevant provisions and the achievements of the constitution (including

the doctrine of the Holy Crown). Since the provisions of the Fundamental Law are the highest norm of law in Hungary, the requirements denoted in general terms ("the respect of the achievements of the historical constitution") may be considered as an auxiliary to the principle of interpretation, if need be, solely with refinement and clarification (Szente 9).

Raising the National Avowal to a mandatory interpretation rule Chronowski, Drinóczi and Kocsis suggest that only in its name Preamble is the National Avowal, regarding its content it is more of a political statement, with the fundamental failure of rejection of the republican constitution (Chronowski, Drinóczi and Kocsis 11–12).

According to Trócsányi, certain decisions of the Hungarian Constitutional Court between 1990 and 2010 rather referred to the Preamble as a declaration (60). According to the Constitutional Court Decision No. 32/1991. (VI. 6): "The Preamble of the Constitution - which is not eligible to directly determine a constitutional right - conceives goals in connection with the constitutional legislation, thus unconstitutionality of laws may not be concluded directly from it."[4.1.] The decision 4/1998 (X.14.) in connection with the determination of the "socialist" attribute in the Preamble of the Act on Legislative Procedure as being against the constitution referred to the Preamble of the Constitution to interpret the term rule of law." (Constitutional Court Decision No. 1055/B/1990 AB)

However, the constitutional Court did not want to interpret the National Avowal after 2010, but referred to the content of the National Avowal to corroborate its decisions. Thus, for example in Constitutional Court decision No. 6/2013. (III.1.) it is referred, that „the importance of religion and churches in Hungarian history is also appreciated by the National Avowal in the Fundamental Law" [122] and "it is declared that from the beginning of the new democracy and constitutional order of our homeland (since 1990, compare with National Avowal) religions are granted a valid, accentuated autonomy, in our cardinal laws (Act No. CCVI of 2011) the stipulated relevant regulations establish a strong link with the achievements of the historical constitution"[141].

Another example for the interpretation based on the National Avowal is the Reasoning of the Decision of the Constitutional Court No. 21/2013. (VII. 19.), wherein it was held in connection with a constitutional complaint regarding to publicity of data of public interest that "…to secure the transparency and the purity in public life clause (…) – taking into consideration the content of National Avowal – are applicable not only regarding to the public funds and national assets, but also the data related to the performance of public duties in generally is" [33]. According to the National Avowal "[W]e hold that democracy exists only where the State serves it citizens and administers their affairs in an equitable manner and without abuse

or partiality." Therefore the entire functioning of a democratic state for all of its citizens, in general is linked to the fundamental legal requirements of transparency and purity in public life and the conduct of public affairs in a fair, impartial manner without abuse. In addition to ensure the freedom of expression or through it, the protection of the fundamental right to the knowledge and dissemination of public information ultimately led a need to enforce this requirement [34].

Constitutional Court held in No. 27/2013. (X.9.) Constitutional Court's decision – acting *ex officio* – according to the Art. II and Art. XVI para 4 of the Fundamental Law – and interpreting these in accordance with the National Avowal– states constitutional obligations in respect of parent maintenance. According to this decision "[F]rom the National Avowal follows the obligation of taking responsibility for the descendants ('bearing responsibility for our descendants'). According to Art. XVI para 4 of the Fundamental Law the obligation of parent maintenance as also a fundamental duty – according to the Constitutional Court – is only compatible with the – hereby quoted – principles contained in National Avowal, if the maintenance obligation on the descendants do not impose disproportionate and beyond their capacity burdens of performance" [22]-[23].

In the Reasoning of the Decision of the Constitutional Court No. 21/2014. (VII. 15.) on a constitutional complaint in connection with the right to conduct a fair and impartial procedure and the right to remedy, the Constitutional Court referred to the following part of the National Avowal "[W]e hold that democracy exists only where the State serves its citizens and administers their affairs in an equitable manner and without abuse or partiality". The requirement of a democratic rule of law is formed through the reference thereto, "to ensure a fair process for its citizens where the bodies shall be acting impartially and within a reasonable time" [56].

The achievements of the historical constitution

The normative interpretation of the historical constitution may not be avoided, since during the interpretation of the Fundamental Law the Constitutional Court will (also) be bound to look at its "achievements".

The historical constitution is flexible, because it evolves through the interpretation of the Constitution rather than through legislation. For the codified constitution the written, positive law is primarily, while the historical constitution is rooted in the constitutional conventions. The written constitution includes higher - moral and natural law - principles in positive legal rules, but in order to avoid becoming a tool of state tyranny or not just to remain a piece of paper, a solid system of principles and values is also necessary to back the written constitution, which may be formed by the judicial interpretation of the Constitution. One advantage of the

historical constitution is that in the common law, the precedents fill the gaps of the written law. Filling the gaps is also possible through judicial interpretations, thus the incompletion of the written constitutions may be avoidable (Paczolay 35).
The practice of Constitutional Court decisions referring to the rights and legal institutions implied in the Fundamental Law has become an inevitable part of the Hungarian constitutional culture. Some declare that this may be what is called the "invisible" constitution, which is an achievement of the democratic Constitution, and which as such may be of help during the interpretation of the Fundamental Law provisions, if there is a legal continuity between the Constitution and the Fundamental Law. This concept is a product of a legal theory, and did not evolve through common law as an unwritten constitution in general. Nevertheless, according to co-authors Csink and Fröhlich still the invisible Constitution concept corresponds to the historical constitution term used in the Art. R para 3 of the Fundamental Law (Csink and Fröhlich 132-133).

The Invisible Constitution term may be related to László Sólyom yerm as the Constitutional Court's President. Sólyom first declared the following in the concurring opinion in the decision declaring the unconstitutionality of death penalty [Decision of the Constitutional Court No. 23/1990. (X.31.)]. "In this context, the starting point is the whole Constitution. The Constitutional Court must continue its effort to explain the Constitution and the theoretical base of the rights included in it and to form a coherent system with its decisions in order to provide a reliable standard of constitutionality – an 'invisible Constitution' – beyond the Constitution, which is often amended nowadays by current political interests; and because of this the 'invisible Constitution' probably will not conflict with the new Constitution to be established or with future Constitutions. The Constitutional Court enjoys freedom in this process as long as it remains within the framework of the concept of constitutionality."

In the Hungarian legal literature, the meaning of the term invisible constitution has already been made clear, it means a content of the Constitution which has been concretized through the activity of the Constitutional Court and shall also serve as a framework for its future work. Thus the invisible character clearly refers to those generally accepted ethical and moral fundamental principles that may serve as reasons and principles for any constitution. Assuming that the public consensus on the catalogue of these principles is not exposed to significant changes, I definitely think that the identification of the invisible constitution with the historical constitution is possible. Even if today the invisible constitution is fundamentally a dogmatic, theoretical legal concept, in contrast with the primarily historical content of the historical constitution. This assertion is not contradicted by the fact that in our legal science – surprisingly – the content of the invisible constitution is more specifically elaborated than the content of historical constitution (Rixer, pars. 1-4).

It is a question whether the achievements of the historical constitution may serve as a help at the interpretation of a fundamentally different logical system to the codified constitution (Csink, and Fröhlich 124).

However Rixer considers problematic the Art. R para 3, because the specific extension of the historical method of interpretation attempts to transpose those facts, principles and values into the current legislation derived from established historical circumstances that existed in the previous constitutional regulations of similar relationships of the (long) past. Such interpretation may become very problematic when the other "legally accurate" method of interpretation "is put away" (Pokol 94) or when these principles and values, called for help, are not sufficiently clarified (Rixer, pars. 1-4).

Béla Pokol, the Constitutional Court judge in his concurring reasoning in the Decision of the Constitutional Court No. 28/2013 (X. 9.) for the interpretation of Art. R para 3 argues that "three guidelines help the judges of the Constitutional Court in this paragraph in the interpretation of the certain provisions of the Fundamental Law: the purpose of certain provisions, the declarations and instructions of the National Avowal and interpretation in accordance with the achievements of the historical constitution.

a) It must be assumed that the interpretation for the purposes of certain provisions may not be built on a theoretical speculation in connection to what the constitutional power"s intention was about that provision, but only on the normative cues of the Fundamental Law's provision itself, or those given in the justification here presented. (…) In absence of this the examined provision has no indicated purpose, and in this case this directive (guideline) may not be used, but the other two directives may help in the interpretation.

b) Contrary to the intent the National Avowal may be used as a guideline for interpretation multiple times, since in this document 26 declarations and directions and value-revelations have been stated, a coherent and nuanced criteria system, and the interpretation of certain provisions from which bunches of interpretation in different directions can be attempted depending on what kind of correspondence may be brought to the surface in each case (…) the specific requirements for the interpretation of certain provisions of the Fundamental Law, however, only in case of a mass emergence of cases can be expanded by the Constitutional Court with an extensive work of interpretation, and yet the scope of them cannot be envisaged.

c) 'The achievements of the historical Constitution' as an interpretation guideline is still completely undeveloped in the practice of the Constitutional Court, rather discussions just emerged about this. In order to avoid that any provisions of the

> Hungarian regulations of last centuries could be introduced as 'achievements of the historical Constitution' – and thus legitimise the currently supposed intent – it is worth pointing out the existence of the historical constitution before the written legal age, which thus belongs to the essence of the restrained common law and with this its entering into force or its lack of repeal" [42-45].

Over the past two years, the Constitutional Court referred to those achievements of the historical constitution, the integral interpretation of which was possible under the circumstances. Thus the Constitutional Court may refer to the cornerpoints of the development of the Hungarian constitution and the history of public law, attesting to the Hungarian legal tradition's origins and development, which may strengthen the argument of the Constitutional Court's decisions, but by itself cannot legitimize the decisions (Csink and Fröhlich 131).

In the Decision of the Constitutional Court No. 33/2012. (VII. 17.), which has declared unconstitutional provisions of the judges' compulsory retirement at the age of retirement the Constitutional Court judges took upon themselves the tasks of legal interpretation related to the historical constitution achievements and established the framework for interpretation as well (Csink 8-18). The significance of the decision is that it was the first time of detailing to what extent the achievements of the historical constitution can be used in the interpretation of the Fundamental Law during the constitutional review of a certain regulation. In this case the Constitutional Court creatively grasped the opportunity for calling on the achievements of the historical Constitution, raising laws from our history of law, and formulating their affect on the civil development of law. A special emphasis has been given to the decision that Rapporteur judge of the case should be Péter Paczolay, the President of the Constitutional Court.

The Constitutional Court – referring to Art. R para 3 of the Constitution – stated: "This rule does not emphasize the historical constitution itself, but the significance of its achievements. What belongs to the achievements of the historical constitution, the acquis under the Constitution, must be determined by the Constitutional Court. (…) To the minimum of the consolidated interpretation of the Hungarian historical constitution belongs the acceptance of the fact that the civil changes construing regulations in the nineteenth century are part of the historical constitution. These laws have created - after not insignificant antecedents - the solid foundation of the legal institution on which the modern rule of law is founded. Thus, when the Fundamental Law opens as a door to our public law's historical dimension, and draws attention to that historical institution's antecedents, all this without today's public relations and our legal culture in general would be rootless. The responsibility of the Constitutional Court in this new situation is extraordinary, we may say historical: at the analysis of concrete casework, there shall be raised into its critical horizon the relevant sources of legal institution history."

In the specific case, the two "main historical sources" were pinpointed by the Court: the Act No. IV of 1869 and the Act No. IX of 1871. These laws included those most important elements which guaranteed the independence of the judiciary: at the personal side the rules of appointment and dismissal, the motion displacement, relocation, and promotion; organizationally, the norms of the separation of competence. According to the decision in these provisions "it seemed (…) that a legislative humility was shown in front of judicial office holders, as holders of an independent 'state' position since 1869. This legislative attitude is certainly assessed as an achievement of our historical constitution." The Constitutional Court also held that "the principle of judicial independence, together with its elements, is an achievement without any doubt, thus the principle of judicial independence and the therefrom arising principle of irremovability is not only a written rule of the Constitution, but also part of the achievements of the historical Constitution. These achievements are a principle of interpretation according to the principle of Fundamental Law binding on everyone, and which has to be applied during the exploration of other possible contents of the rules of the Fundamental Law. The Constitutional Court [Decision No. 21/2010. (II. 25.) and Decision No. 1/2008. (I.11.)] considered already the requirement of irremovability as part of the judicial independence." [80]-[81].

On this basis, Smuk considers it as a reasonable method that the person who applies the law shall explore not only the content of the simply repealed regulations' provisions, but their essential tendency looking into the direction of development into the modern rule of law and *quasi ratio decidendi*, use the historical constitution as a tool of interpretation. In this way the achievements of the historical constitution are simply the achievements of the Hungarian constitutional history, the positive results are marked, and with this there will be no problem regarding the application of the Constitutional Court's practice between 1990-2011 as well (Smuk 455).

To the independence of judges as the achievement of the historical Constitution also referred the concurring reasoning of Péter Szalay Constitutional Court judge in the Decision of the Constitutional Court No. 4/2014. (I.30.), which provides that "the Art. R para 3 of the Fundamental Law does not outline the whole unit of the historical constitution, but emphasizes taking the achievements of the historical constitution into account. Which regulations or parts of a regulation are part of the historical constitution shall be examined and decided by the Constitutional Court case by case. (…) The principle of judicial independence is a fundamental pillar of the rule of law, which is guaranteed by most of the civilized, developed jurisdictions observing the rule of law, expressly in ordinary laws or constitutions. It is consistent with the fact that the judicial independence is declared and placed under protection by several international conflict-of-laws rules. (…) on the basis of these rules must indeed be considered as achievements of the historical constitution those regulations which have introduced and regulated in our country the legal concept

of judicial independence. Such a rule was the Act IV of 1869 on the exercise of judicial power, which ratified at first time in Hungary the detailed content and guarantees of judicial independence. (…) The Act No. IV of 1869 established the judicial independence including the courts' institutional independence and the judges' personal independence, and all frameworks of independence, which were effective assurances of the prevailing of the expectations arising from the legal institution and established the separation of competences, the guaranteed budget of the judicial system, the method of the election of the judges and the termination of office, the conflict of interest rules, the freedom of the judges in their decision making, and the present case revealed particularly significant economic, and existential freedom." [71]-[78]

Thus, according to the Constitutional Court judge's concurring reasoning it would be required – in order to strengthen the argument – to refer to the historical constitution's above described achievements as directly connected with the present case.

During 2013 and 2014 several other Constitutional Court decisions also referred to the achievements of the historical constitution, as a mandatory tool of constitutional interpretation stipulated in Art. R) para 3 of the Fundamental Law. The same has happened in connection to the Decisionas of the Constitutional Court No. 25/2013. (X.4.),* No. 31/2013. (X. 28.),† No. 33/2013. (XI. 22.),‡ No. 34/2013. (XI. 22.),§ No. 37/2013. (XII. 5.),¶ No. 13/2014. (IV. 18.),** and in No. 16/2014. (V. 2.)†† as well.

SUMMARY

The Fundamental Law, stepping back from the postmodern era to the modern era, uses the historical narrative and notion system of the formation of nation-states. In this sense, the new Fundamental Law is not a "historical" document, but it is living in history (Smuk 462). The new Hungarian Fundamental Law feeds from the spirit, soul and morality of the nation, thus it is not only the epitome of a solid

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* In connection with principle of neutrality in the criminal procedure. Reasoning [24]

† In connection with election procedure complaint filed against the Kúria, the Constitutional Court interpretation of the right secured by the Fundamental Law. Reasoning [24]

‡ The history and significance of the charge principle's constitutional context. Reasoning [13-15]

§ Interpretation of the principle of an independent and impartial tribunal established by law and the generally recognized principles and in respect for international legal commitments to international law. Reasoning [23]

¶ Regarding the requirement of the legal certainty, in connection with such a broad interpretation of the prohibition of retroactive legislation. Reasoning [29]

** The free argument on public affairs, and to ensure freedom of expression in criticism of public figures and criticized authorities. Reasoning [22]

†† Regarding the interpretation of the meaning of the rule of law clause, inherent retroactive legislation. Reasoning [24]

tradition, but also a shaper and developer of the future through a consistent way of thinking.

Real social legitimacy of a constitution may be judged only by progress of time, and the mutual trust may determine the everyday prevalence of Fundamental Law. "The legal sense of legitimacy is a geared than statutory law. Social acceptance of the constitution ultimately depends on how much and in what sense the law itself is accepted (prevails in the given society). (…) The law is a social phenomenon. The prevailing social relations of power are standing behind it. These two facts give the legality and legitimacy of the law" (Szentpéteri 44).

The provisions of the new Fundamental Law may be interpreted by taking the National Avowal into consideration, however in order to render this interpretation more accurate and make it better defined, ideally the meaning of the term "historical constitution" should be explained by means of a rather exhaustive catalogue of value. A further problem is that for today's lawyers and the legislative body the "practical historical constitution" is the Act No. XX of 1949, possibly supplemented by the Act No. I of 1946. They mostly draw up those values which are also reflected in the new Fundamental Law, opposed to the several today unacceptable conditions, consideration, text-level provisions and everyday practice of the earlier „archaic" historical constitutions (Rixer, pars. 1-4).

To sum up, under the current constitutional jurisprudence it is presumed that the historical constitution may get a bigger role as declarative, general reference, but, may only be used as a guideline for interpretation; constitutional issues may not be decided solely on the basis of the historical constitution in the future either.

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Giuseppe Franco Ferrari

The controversial definition of Hungarian identity: from the Preamble to the role of the new Constitutional Court

THE PREAMBLE AND THE HUNGARIAN IDENTITY

The Preamble is probably one of the most interesting features of the Hungarian Fundamental Law, both in terms of possible counterparts in comparative law and in light of the peculiar domestic transition to the new constitutional order.

Preambles are rare nowadays. They used to be common at the end of the 18th century and in the first half of the 19th, when the public opinion was in need of a detailed notice of the circumstances of adoption of a constitutional text. Sometimes the media often could not adequately illustrate the political context of the constitutional process, or there was a special need of justifying some special institutional events, like in the American situation, where the breaking down of the unity of the common law world needed a detailed explanation.* In recent times, the power of the media is so developed that we have had the chance to watch revolutions, the overturning of political regimes and even the physical execution of bloody dictators live on TV.† There is actually less need of preambles in 21st century constitutional law, unless special exigencies impose otherwise (Frosini 19).

In the Hungarian case, it is *prima facie* evident that the authors of the new text intended not only to describe the foundations of the constitutional history of their fatherland, but also to introduce a coherent set of values, including a certain amount of peremptory density in it, in order to bind future constitutional interpretation.‡ One can then wonder about the ideological bias of the "founding fathers". The preference for an ideal type of citizen and for a model of nation is apparent: Papp's interpretation is that the preferred blueprint is one of a patriot, a Christian (Catholic or belonging to a recognized Christian minority), a married heterosexual

* According to Beck the Framers were very conscious of the pivotal role played by the Preamble in defining American constitutional identity (217).

† From this point of view the case of Tunisia is probably one of the most intriguing: the transition to democracy was minutely covered by the web with a view to allow people to participate in the process. Nevertheless, the Tunisian Framers did include a Preamble in the text of the Constitution to synthesize the reasons of the overthrow of the precedent regime as well as to consecrate civil society's role in democratic Tunisia (Nicosia 124-127).

‡ Although it must be stressed that it is likewise uncommon to use Preambles in constitutional interpretation (see Orgad 714).

naturally fertile person, middleclass, employed, non-homeless and of Hungarian descent or having been living in Hungary for a long time.

It is hard to deny that there is little room for interpretation. In other contexts, for instance in the Italian *Statuto albertino* of 1848, the preamble formed matter for discussion up till well inside the beginning of the 20th century, between those who believed it had only a descriptive and historical nature and those who preferred to consider it a rich source of legal binding content. Apparently this is not the case in Hungary. It is clear that, if the Constitution has to be taken seriously, the idea is to introduce obligations on future interpretation, imposing on the Constitutional court parameters and criteria strictly adherent to a precise bunch of values and principles. In other words, by including a well-defined axiological platform, the authors of the constitutional revision were clearly both adopting a rigid concept of citizenship and securing constitutional interpretation.

The same conclusion can eventually be drawn from the inclusion of duties in the constitutional texture (see Articles 30 and 31). Very few charters nowadays include duties. One of the few is the Italian one, at Art. 2. Apparently there is no relationship between Mazzini's thought, the likely ideological foundation of such a provision, and possible Hungarian roots of the new norms. The explicit mention of duties must have been considered an instrument of consolidation of the interpretation of the core content of the rights and of their reciprocal balancing. At the same time, it could also be used as a way to reinforce citizens' fidelity to a definite national identity. The frequent deferral to cardinal laws* of the task of defining content and limits of the rights apparently supports such a construction, because it seems to prefer legislative choices to rigid constitutional definitions, which leave little room for non-superprimary integration or specification.

From another perspective, it could be argued that the Constitution apparently aims at a full equivalence of rights of citizens and rights of man. Art. 1 para 1, in fact, introductorily imposes that fundamental man's rights, defined inviolable and inalienable, be respected and defended by the State as a primary obligation. At first sight, such a formulation could mean that fundamentality as a category should be founded only in international law, since the rights of citizenship seem to be absorbed by or flattered into human rights. Such a conclusion is reliable, even though para 2 paves the way to the recognition of fundamental rights to be enjoyed by individuals and community as part of an open list, because the systematic use of the term "person" as titular of rights† formally leave Hungarian citizens only with the social rights included in Art. 19, with the possible exception of the right to housing, attributed to "any person".

* E.g. at Articles 7, 8, 9, 29.

† Such as in articles from 3 to 13 and again in articles 15, 20, 21, 23 (see Ferrari 52).

Summing up, it is true that the Hungarian Constitution tries to identify a model of citizen whose personal features are mostly conservative and that the choice of values to incorporate in the National Avowal has been operated selectively. Indeed, while most contemporary Constitutions usually mention principles such as liberty, equality, local autonomy, democracy and, more recently, proportionality, with human dignity on top, the Hungarian selection of values is more ideologically oriented. Defining always implies inclusion, most of all when political rights are at stake. Yet, in the process of conforming the core values of the constitutional structure, the approach is definitely less value-neutral than usually.

However, there are reasonable expectations that this axiological orientation can be compensated by other forces rooted in the Constitution itself. First of all, the trend of the rights to be labeled as human rather than citizens' manifests a strong preference of the Charter for the monistic opening of the legal system of sources towards international law. The prevailing of international parameters in the construction and balancing of rights could help both ordinary judges and the Constitutional Court to avoid loopholes and lift the standards of protections.

THE PIVOTAL ROLE OF THE NEW CONSTITUTIONAL COURT IN DEFINING THE HUNGARIAN CONSTITUTIONAL IDENTITY

If the most valuable contribution to the definition of the Hungarian constitutional identity will probably come from the Constitutional Court, the tormented history of its creation will not make such a task easy for judges.

As Téglási seems to maintain, it is actually rare that a Constitutional Court in the very same composition keeps on serving after the transition from a constitutional system to a completely new one. The other case that can serve as an example is the South African one, whose constitutional process in the passage from apartheid to democracy is unanimously described as unique (Orrú 689). Similarly the Belgian *Cour d'arbitrage* not only followed, but specifically caused both the transformation of the constitutional system towards the federalist model and its own conversion into a true constitutional court (Ferioli 293). The Italian experience is somewhat comparable, though less "total": in 2001 the almost complete substitution for Title V of Part II, concerning local and regional authorities, has put the Constitutional Court in the place of saving the most part of its case law or alternatively to inaugurate new trends: it decided to stick to the tradition and to apply almost all the old concepts to the second generation regionalism.

In the Hungarian context, the most typifying factor is the fourth Amendment to the Fundamental Law, which declares all rulings adopted prior to the Constitution itself repealed or annulled, without prejudice to the legal effects produced. Such a

provision represents a quite unusual cleavage formally interposed between judicial eras. Téglási's choice of periodization is almost obliged:

a) the case law before the Decision of the Constitutional Court No. 22/2012 (V. 11.), stating guidelines about the use of precedents;

b) the Fourth Amendment, obliging the Court to more restrictive criteria but implicitly saving all cases decided after the new Constitution;

c) the Decision of the Constitutional Court No. 13/2013 (VI. 17.) and the preservation of former arguments, legal principles and constitutional correlations, notwithstanding the automatic abrogative effect imposed by the Amendment. Furthermore, the classification of later constitutional cases according to the automatic compliance to old dicta independently of the textual identity of the wording of the successive constitutional texts or, to the contrary, to the distinguishing of literal formulations or even to the irrelevance of possible textual differences, is also intriguing especially when considered in a comparative perspective.

Other important conclusions, which somehow derive from the crucial role that will most likely be played by the Constitutional Court, are predictions that deserve to be verified in the next few years. In particular, the interpretation of the scope of human dignity, which could be read simply as a prohibition of inhuman or degrading treatment rather than a paramount value or a general personality right, need to be tested in constitutional case law.* Analogously the eventuality of a growing importance of the European Convention of Human Rights as an instrument of constitutional interpretation in the field of rights will depend on the application of the tempered openness to international law enshrined in Art. Q, sec. 3 of the Fundamental Law.†

Indeed it is in this realm that the concurring forces shaping the axiological content of the Fundamental Law deploy their effects. Based on what happened in other cases of democratic transitions,‡ notwithstanding the conservative attitude of the choice of values of the National Avowal, the international human rights law can be widely used as a compensatory measure, preventing a too restrictive interpretation of principles and rights on a merely domestic basis.

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* From this point of view the most interesting case of possible contrast between principles of domestic law, as interpreted according to the axiological matrix provided by the Fundamental Law, and the ECHR will be the issue of the right to life as interpreted in the case of abortion (Ferrari, 21).

† Stating that: "Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations".

‡ This was generally the case with post 90s constitutionalism (Ferrari 1-122, Ferrari 259).

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Notes on the Chapter of "Freedom and Responsibility"

András L. Pap

Who are "we, the people"? Biases and preferences in the Hungarian Fundamental Law

INTRODUCTION

The following essay provides a critical overview of the biases and preferences within the phrasing of the Hungarian Fundamental Law. It is a short, primarily textual analysis, which unfolds possible interpretations and normative definitions for how the constitution envisages (ideal) members of the political community. The starting point for the analysis is Herbert Küpper's essay entitled *Between collectivism and liberal individualism: the normative basis underlying the idea of the person enshrined in the new Hungarian Fundamental Law*. In his article Küpper points out that* "the constitution is not just a law but simultaneously also a value system (8). What underlies the values in a constitution is the idea of the person it espouses, that is the constitution's take on the individual and her place in society." In my view, however, the implications can be more far-reaching still: in some instances constitutions include normative definitions. In the following, thus, I will try to detect what concepts the new Hungarian constitution operates with, when "We, the members of the Hungarian nation" who, under the preamble, the National Avowal (*Nemzeti Hitvallás*),† establish a constitution which, in addition to serving as the 'basis of our legal order […,] shall [also] be an alliance among Hungarians of the past, present and future. It is a living framework which expresses the nation's will and the form in which we want to live.'" ‡

Küpper argues that the constitution-maker can choose between three models (or, naturally, some combination thereof):

> "At the center of the individualist model is the individual endowed with liberty and free will. If there is a conflict between the individual's freedoms and her obligations

* The essay was published in the volume entitled "Viva vox iuris civilis: Tanulmányok Sólyom László tiszteletére 70. születésnapja alkalmából" [Viva vox iuris civilis: Studies in the honor of László Sólyom on the occasion of his 70th birthday], edited by Zoltán Csehi, Balázs Schanda and Pál Sonnevend. It is is an abbreviated version of Küpper's article entitled "Zwischen Staatspaternalismus, Kollektivismus und liberalem Individualismus: Normative Grundlagen des Menschenbilds im neuen ungarischen Grundgesetz."

† For an official translation of the Fundamental Law see http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf

‡ Pursuant to Art. R para 3 in the constitution's chapter entitled Foundation, "[t]he provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution."

> towards the state or obligations stemming from social coexistence, then the former shall prevail. (…) Collectivism starts with the assumption that humans are social beings and hence emphasizes the (public) interests of society at large. (…) The fundamental tenet of state paternalism is that the state knows better than the individual what is best for her (…) The difference between a democratic and a paternalistic state is that a democratic state derives its definition of the public good from citizens' self-understanding, whereas the paternalistic state comes up with its own understanding of individual interest and public good, which it then foists upon citizens. The democratic state is an instrument in the hands of its citizens, while the paternalistic state is their guardian. To this day the latter idea of the state has prevailed in Central and Eastern European – including Hungarian – mentality ever since absolutism."(8)

Even with the caveat that this typology could become more comprehensive by including several other ideological bases for a constitution (for example by considering communitarianism), I will adopt Küpper's typology as a framework for the analysis below, and, in line with his conclusion, I will systematically review – and occasionally expand to some extent – all those technical arguments and observations advanced on the subject which contain points that are critical of the prevailing constitutional arrangement. Focusing on aspects that the prominent (chiefly Hungarian) academic authors find objectionable on constitutional or political theory grounds, or occasionally even from a practical standpoint, I will seek to delineate the contours of the constitution's idea of the person who is defined as the member of the political community. Reviewing the entire profile, that is a comprehensive reconstruction of the Fundamental Law's idea of the person, is beyond the scope of this piece, which is why the objective pursued here is limited to the aforementioned.

I find it important to stress that the current writing will not take a position on the question whether a constitution-maker should be allowed to or be expected to commit herself to any single constitutional identity and idea of the person, or in how far the expectation that a constitution be based on an inclusive, potentially value-neutral approach, which also draws on the experience of multiculturalism, can be realistically met or even legitimately advanced. While a collectivist commitment is not inherently problematic (it can be compatible with a fundamental rights perspective, for example), the desire to render its implied preferences explicit makes it necessary for me to indicate which specific clauses and formulations in the constitution relegate individual liberties to the background. Yet the issue of constitutional constructs inspired by a paternalistic approach is altogether different. Based on the prevailing constitutional theory paradigm, these can hardly be reconciled with the ideas of a modern constitutional democracy.

The opinions cited in the current analysis will show that the textual and value preferences in the constitution not only espouse and project a paternalistic concept of the state, but that at the same time they also explicitly and exclusively define membership in the political community (occasionally approving and affirming ju-

risprudence that had continuously prevailed before the Fundamental Law was actually adopted) in a way that not only rejects the inclusive and multi-cultural models of liberal democracies, but is also downright exclusive in some instances. Moreover, as analysts, domestic and international civil rights organizations, and international organizations have often pointed out,* on occasion the new Hungarian constitution also fails to live up to 21st century standards of human rights and constitutional democracy.

As noted above, for spatial limitations, I will not be able to examine here the question of whether one can legitimately expect the constitution-maker to hold certain specific values or, for that matter, to embrace strict value neutrality; nor will I explore what extent of social support can justify certain levels of exclusion of some social groups from the preferred, potentially explicitly defined, political community. Nevertheless, critics of the Fundamental Law may rightly point out that there was no persuasive and in depth social or political debate surrounding these preferences (thus for example the governing parties did not discuss their plans for a new constitution – or even the fact that they even sought to draw up a new constitution – in the election campaign of 2010, and hence their election victory did not include a mandate to adopt one). Furthermore, despite the process euphemistically labeled as "national consultation,"† the constitutional text cannot be regarded as resting on a broad social consensus – even if the re-election of the governing party alliance in the 2014 national parliamentary election might be considered a subsequent political legitimation of the Fundamental Law (*Alaptörvény*).

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* See for example Report 25 June 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)); CDL-AD(2012)001-e Opinion on Act No. CLXII of 2011 on the Legal Status and Remuneration of Judges and Act No. CLXI of 2011 on the Organization and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012); CDL-AD(2012)009-e Opinion on Act No. CLI of 2011 on the Constitutional Court of Hungary adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012); CDL-AD(2012)020-e Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion; CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012); CDL-AD(2012)004-e Opinion on Act No. CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012) or the CDL-AD(2012)012 English 21/06/2012 - Public Joint Opinion on the Act on the Elections of Members of Parliament of Hungary adopted by the Council for Democratic Elections at its 41st meeting (Venice, 14 June 2012) and the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012). Also see: Hungarian Helsinki Committee, The Eötvös Károly Institute and the Hungarian Civil Liberties Union: Newest amendment to the Fundamental Law of Hungary seriously undermines rule of law

† Under the so-called National Consultation, the government mailed a questionnaire regarding the proposed contents of the Fundamental Law to the entire adult population of Hungary in March 2011. A total of 11.3 percent, or 916,941, of the 8.09 million recipients completed and returned the 12 questions in the survey See: http://static.fidesz.hu/download/156/A_Nemzeti_Konzultacios_Testulet_kerdoivenek_eredmenyei_2156.pdf A self-addressed, stamped envelope was provided so that citizens could easily send back their glorious thoughts on twelve questions. See: http://hungarianspectrum.wordpress.com/2011/03/02/national-consultation-questions-on-the-constitution/ The Venice Commission held that the consultation process before adopting the new constitution was inadequate and unsatisfactory. See European Commission for Democracy Through Law Opinion on the New Constitution of Hungary, adopted by at its 87th Plenary Session, Venice, 17-18 June 2011.

Let us discuss in turn each of the constitution's exclusionary preferences considered most significant by critics of the Fundamental Law.

THE FUNDAMENTAL LAW SUGGESTS THAT THE MEMBERS OF THE POLITICAL COMMUNITY, I.E. HUNGARIANS, ARE ALL, WITHOUT FAIL, PATRIOTIC

The Fundamental Law's preamble, the so-called National Avowal, which was proclaimed not in the name of the MPs who adopted the constitution but in the name of the "members of the Hungarian nation," in other words all Hungarians, sets out certain characteristics that Hungarians necessarily possess.* Thus for example

> "[w]e are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago. We are proud of our forebears who fought for the survival, freedom and independence of our country. We are proud of the outstanding intellectual achievements of the Hungarian people. We are proud that our people has over the centuries defended Europe in a series of struggles and enriched Europe's common values with its talent and diligence. We recognize the role of Christianity in preserving nationhood. We value the various religious traditions of our country. (…)We believe that our national culture is a rich contribution to the diversity of European unity. (…) We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist (sic!) and the communist dictatorship. (…) We hold that after the decades of the twentieth century which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal. We trust in a jointly-shaped future and the commitment of younger generations. We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength. We, the citizens of Hungary, are ready to found the order of our country upon the common endeavors of the nation."

A strict reading of the text would suggest that in terms of their membership in the political community, the status of those Hungarian citizens who disagree with these statements, or at least some portion of them, or who agree, but happen to be proud of or believe in other things, is thereby questioned.

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* In my view such an interpretation of the text is not rendered impossible by the fact that the next to last line in the Fundamental Law reads as follows: „We, the Members of the National Assembly elected on 25 April 2010, being aware of our responsibility before God and man and in exercise of our constitutional power, hereby adopt this to be the first unified Fundamental Law of Hungary." Neither does the concluding line of the Preamble, which states that „[w]e, the citizens of Hungary, are ready to found the order of our country upon the common endeavours of the nation."

THE FUNDAMENTAL LAW SUGGESTS THAT THE POLITICAL COMMUNITY CONSISTS OF CHRISTIANS WHO ARE FOLLOWERS OF TRADITIONAL, AND STATE-APPROVED CHRISTIAN DENOMINATIONS

Not only was the Fundamental Law adopted by MPs who are "aware of their responsibility before God,"* but, according to the National Avowal, "we, the members of the Hungarian nation, (…) recognize the role of Christianity in preserving nationhood. (…)We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love." *The text does not presume an exclusive religious identity, but it does reserve a pre-eminent role for religion, specifically for Christianity. This preference is made explicit by Art. 4 of Chapter VII, entitled Freedom and Responsibility, which states that "[t]*he State and religious communities may cooperate to achieve community goals. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfillment of tasks that serve to achieve community goals." Under para (5) "The common rules relating to religious communities, as well as the conditions of cooperation, the established churches and the detailed rules relating to established churches shall be laid down in a cardinal Act."

In the opinion of the authors of one of the first comprehensive expert opinion on the Fundamental Law, the new constitution "characterizes the nation referred to as the subject of the constitution as a Christian community, narrowing even further the range of people who can recognize themselves as belonging to it (Fleck et al. 63). 'We recognize the role of Christianity in preserving nationhood', it declares, not as a statement of historical fact, but also with respect to the present. And it expects everyone who wishes to identify with the constitution to also identify with its opening entreaty: 'God bless the Hungarians!'"(Fleck et al. 7–8). The Fundamental Law also distinguishes between Christian churches, expressing a preference for certain (selected and mostly traditional) denominations that are recognized by the state.

Balázs Majtényi (91-92) writes as follows about the provisions that were explicitly included in the constitution to override, and overrule by constitutionalization the opinions of international organizations† and the Hungarian Constitutional Court: "The first clause of the new constitution's Art. VII para 2 authorizes the National Assembly [*Országgyűlés* the Hungarian parliament] to recognize as registered churches those organizations engaged in religious activities which are willing

* See the next to last line in the Fundamental Law.

† Opinion on Act No. CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD (2012)004.

to co-operate with the state for the purposes of realizing public objectives. The underlying distinction between [officially recognized] churches and other organizations engaging in religious activities may be used as a basis for discriminative practices, a fear that is all the more well-founded since the Fundamental Law associates the ethnic national community with Christianity.… (…) An application of this constitutional clause may simultaneously mark the end of the free establishment of churches." [Decision of the Constitutional Court No. 6/2013. (III. 1.)].

The abovementioned opinion by Fleck et al. argues that the Fundamental Law calls for a lifestyle model that the members of the community are required to comply with as part of the obligation they owe to the community; this model is based on Christian-conservative normative preferences (Fleck et al. 66-68). Specifically, the authors argue that

> "the preamble, while giving preference to the thousand-year-old Christian tradition, states that 'we value the various religious traditions of our county.' The choice of words displays its idea of what model of tolerance ought to prevail, namely one in which the various worldviews do not have equal status, although following them is not impeded by prohibition and persecution. It is however significant that the tolerance thus declared only extends to the various 'religious traditions' but does not apply to more recently established branches of religion or those that are new to Hungary, or to non-religious convictions of conscience. This means that the Fundamental Law does not simply approve of the worldview, religion, practices and cultural heritage of a portion of the country's citizens, but also states a position regarding the question of which worldview and perception of life is true and correct, thereby according lower status to the rival doctrines and cultural practices. In other words, the Fundamental Law does not merely recognize the historical role of Christianity in the creation of the state, but also makes a commitment to its moral and political principles. Consequently it breaks with the solution applied in the 1989 Constitution, which remained neutral among the competing doctrinal approaches. (…) The Fundamental Law's model of 'separate, but cooperating' churches appropriates Hungarian constitutional court practice, under which the rules on public education, social- and health-care and taxation may give preference to the 'historical churches' over other churches, and the churches may be given an advantage over other institutions (associations, foundations). The incorporation of this approach into the Fundamental Law makes it far more difficult for this constitutional-court practice – which does not comply with the principle of equality – to change" (Fleck et al. 24-25).

Pursuant to the *amicus brief* drafted for the Venice Commission, the Fundamental Law authorizes the National Assembly to award the status of an officially registered church based on political considerations rather than with a view towards promoting the objective of the freedom of religion as a fundamental right (Bánkuti et al. 6-8; 12). That is because in "realizing public objectives," parliament is under no

obligation to work with social partners selected on the basis of constitutional criteria or human rights considerations. "In this respect the state cooperation condition is most problematic from a human rights perspective because the state's willingness to cooperate with a religious organization is not simply a solely discretionary criterion, but also openly invites the state to prefer certain religious organizations or communities above others on the basis of its own views of the helpfulness of specific churches to state goals. This criterion requires the state to abandon its neutral stance towards religious communities. This requirement clearly runs counter to the state's duty of neutrality and impartiality as required under Art. 9, a duty that has been consistently upheld in the well-established case-law of the ECtHR."(Bánkuti et al. 22)

The fact that between 2001 and 2010 census data showed a substantial decline in the number of persons who claim belong to the major Christian denominations is a significant addendum in evaluating the constitutional construction adopted by the legislator. Over that decade the number of persons who self-identified as Catholic dropped from 5.5 million to 3.9 million, while the number of those who belong to the Reformed and Lutheran churches also fell, from 1.6 to 1.15 million and 304,000 to 214,000, respectively. The number of those who did not indicate any affiliation with any organized religious community simultaneously rose to 2.7 million in 2010, up from a level of 1.1 million in 2001.* According to an earlier research, the number of those who regularly exercise their religion (at least once a month) dropped by around a third between 1998 and 2008, and now amounts to roughly 13% of the total population (Keller 144).

MEMBERS OF THE POLITICAL COMMUNITY PREFERRED BY THE FUNDAMENTAL LAW ARE MARRIED HETEROSEXUALS WHO LIVE SEXUALLY MONOGAMOUSLY AND ARE NATURALLY FERTILE

The National Avowal states: "We hold that the family and the nation constitute the principal framework of our coexistence." Art. L goes on to say: "(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage and/or the relationship between parents and children." Kriszta Kovács argues that the absence of equality as an expressly endorsed value from the preamble† clearly reveals the essence of the new outlook (186).‡ Pursuant to the authors of one of the first comprehensive opinions on the Fundamental Law,

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* See http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_10_2011.pdf.

† Art. XV para 3 makes provisions concerning the equal rights of women and men, but a declaration to serve as a basis for reducing the widely documented gender pay gap, the integration of a constitutional clause involving the common principle of "equal pay for equal work" never found its way into the text.

‡ Cited by Majtényi, Balázs, who discusses the issue in more detail.

> "[t]he Fundamental Law's conception of marriage – which, incidentally, follows the definition serving as the basis for the Decision of the Constitutional Court No. 154/2009 (XII. 17.) on the constitutionality of registered domestic partnerships – corresponds roughly to the Catholic natural-law interpretation of marriage, which regards [… fidelity] procreation and the unbreakable sanctity of the relationship between spouses as the most important elements of marriage. This constitutional regulation, founded on natural law principles, protects those of the people's interests that not everyone attributes to themselves, and with which they do not necessarily wish to identify themselves and, thus, it breaches their autonomy. When defining marriage and evaluating the role of the family a modern, living constitution – especially a new Fundamental Law – should accommodate the changes to society that increase the range of choices available to the individual. This should have required the Fundamental Law to regulate the institution of marriage and family together with the fundamental rights guaranteeing the self-determination of the individual and the principle of equality. (…)With the constitutional ban on same-sex marriage the constitution-maker has ruled out the future ability of the Hungarian legislature, following the worldwide tendency, to make the institution of marriage available to same-sex couples. In keeping with this, Art. XV of the Fundamental Law does not mention discrimination based on sexual orientation and gender identity in its list of prohibited forms of discrimination. This means that the Hungarian constitution-maker does not prohibit the state from supporting or negatively discriminating against a way of life—based on sexual orientation alone" (Kovács 17-18).

Though it is true that the open-ended prohibition of discrimination enshrined in Art. XV para 2 does not rule out official action against discrimination based on sexual orientation, neither does it involve an unequivocal commitment thereto.

On the whole, the Arató, Halmai and Kis opinion argues that

> "[a]n analysis of the content of these duties reveals that the Fundamental Law is outdated… [t]he 1989 Constitution was based on the equal recognition of individual and communal forms of life and a plurality of views regarding the good life. The Fundamental Law breaks with this tradition by including moral duties among the fundamental rights. It thereby selects those forms of the good life which it regards as morally valuable and worthy of constitutional protection. The Fundamental Law excludes the following components of the liberal constitutional conception: equal recognition of the plurality (freedom) of forms of life, the neutrality of (and tolerance by) the state and respect for personal autonomy. By defining one man and one woman as the subjects of marriage (…) the Fundamental Law creates a long-term constitutional obstacle to individual demands for extending the plurality of forms of partnership. Although, by doing so, it adopts the legal position of the Hungarian Constitutional Court, this measure will clearly hamper an eventual revision of existing legal interpretations" (Arató, Halmai and Kis 15).

The *amicus brief* drawn up for the Venice Commission also points out that the amendment of Art. L (1) was adopted in response to the Decision of the Constitutional Court No. 43/2012. (XII. 20.), in which the Court ruled that "family life" is a historically changing and evolving concept; one that is a matter of factual rather than legal assessment; and that same-sex couples are entitled to the same right of respect for their family life as heterosexual couples. Going against the decision of the Constitutional Court and the system of expectations set out in Art. 8 of the European Convention on Human Rights, the National Assembly incorporated a concept of family into the Fourth Amendment of the Fundamental Law that the Constitutional Court had deemed unacceptably narrow. Art. L does not merely establish that only a relationship between a man and a woman may qualify as a marriage, but also states that "[f]amily ties shall be based on marriage and/or the relationship between parents and children." Though this formulation recognizes parent-child relations that have emerged outside of marriages, it does not extend to the mutual relationship between parents who are not married to one another (Bánkuti et al 6-8).

> "This notion of family also infiltrates other fields of law, such as media and education. According to Act No. CXC of 2011 on public education, it is the task of the teacher to 'make students familiar with and respect family values.'* Media services and mass media defines – among others – the aim of public broadcast to 'respect the institution of marriage and family values'. Read together with the Fundamental Law's exclusionary definition of family, these provisions might result in limiting freedom of expression with regard to LGBT people in the media, as well as encouraging ignorant and often discriminatory views on same-sex and other not marriage-based relationships in school curricula"(Bánkuti et al. 12).

According to the Arató, Halmai and Kis commentary, the same Christian idea appears in the passage codifying the protection of the fetus:

> "Apart from the Irish constitution of 1937, there is no other European constitution that protects embryonic and fetal life from the moment of conception. The Fundamental Law does not state explicitly that the embryo and fetus has a right to life, but it supports this interpretation by incorporating the phrase 'embryonic and fetal life shall be subject to protection from the moment of conception' into the same sentence as the statement that 'every human being shall have the right to life'. In this way it prompts both the legislature, ordinary and Constitutional Court judges' interpretation of the law to restrict women's right to self-determination. Uncertainties also arise with regard to the artificial reproduction procedures that have been widely permitted by the medical act of 1997. By necessity, the in-vitro fertilisation methods permitted by law entail the death of numerous embryos, either inside or

* 27 Act No. CLXXXV of 2010 on media services and mass communication

> outside of the womb. In view of the fact that the Fundamental Law does not differentiate between in-utero and in-vitro embryos (…) It gives rise to considerable legal uncertainty if a country – like Hungary to this very day –, which promotes various means of treating infertility, including in-vitro fertilisation and implantation and, which also permits research on embryos, prescribes in its Fundamental Law the constitutional protection of embryonic and foetal life from the moment of conception. This requirement could bring into question the constitutionality of artificial reproduction procedures and the compatibility of the new constitutional provision with international treaties ratified by the Republic of Hungary, including the Oviedo Convention on Human Rights and Biomedicine, approved by the Council of Europe. All of these provisions breach the autonomy of individuals who do not accept the normative life models defined on the basis of the Fundamental Law's ideological values – as the preamble words it: 'the form in which we want to live' – and they are capable of ostracising them from the political community."(Arató, Halmai and Kis 18-19)

In the context where it is mentioned, the term fidelity as used in the text may be construed as applying to marriage or (this is the considerably less unambiguous interpretation) to patriotic loyalty (Küpper 10).*

Art. XVI para 4, which posits that "[a]dult children shall be obliged to take care of their parents if they are in need," yields the restriction of any freedoms derived from notions of citizens' private life that may diverge from traditional understandings of the concept, which the relevant academic literature refers to as "intimate citizenship."† The obligation in question may also apply to parents who abuse or molest their children, who have been convicted of such crimes in a legally binding decision, or have had restraining orders issued against them to protect their children from them.

MEMBERS OF THE POLITICAL COMMUNITY PREFERRED BY THE FUNDAMENTAL LAW ARE MIDDLE CLASS, EMPLOYED AND NOT HOMELESS

Herbert Küpper shows that the Fundamental Law basically paints a contradictory image of individual autonomy (8-9). For one, Art. O of the Foundations states that "[e]veryone shall be responsible for him- or herself," which suggests that the indi-

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* Herbert Küpper's interesting assessment differs on this question, as he suggest that Art. L para 1 of the Foundations, which construes the "family as the basis of the nation's survival," protects the family only as part of the function it plays in the survival of the nation, and does not accord it any autonomous value or commitments. (Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage and/or the relationship between parents and children.)

† See for example Plummer, Kenneth: Intimate citizenship: private decisions and public dialogues.

vidual is not subject to state or social guardianship. This is reinforced by Art. V: "Everyone shall have the right to repel any unlawful attack against his or her person or property, or one that poses a direct threat to the same, as provided for by an Act." While this authorizes the wealthy to take even the most drastic measures against the extremely marginalized underclass, it might at the same time also undermine Art. C para 3, which proclaims the state's legal monopoly on violence: "The State shall have the right to use coercion in order to enforce the Fundamental Law and legal regulations."

Küpper argues that the chapter on fundamental rights also suggests something similar trough its title "Freedom and Responsibility." "The individual's situation is expressed not only through the notion of freedom, but also through responsibility, since a person can only be free if she shoulders and is ready to shoulder the concomitant responsibilities"(Küpper 8).

It is established already before, in Art. O, that "[e]veryone shall be obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities." And Art. XIII of the chapter on Freedom and Responsibility states that "(1) … Property shall entail social responsibility," while Art. XXX para 1 mandates that "[e]veryone shall contribute to covering common needs according to his or her capabilities and to his or her participation in the economy."

This is not objectionable per se, but on the whole it betrays a decidedly collectivist idea of liberties, something that was also unequivocally reinforced by the preamble, which (following the Universal Declaration of Human Rights) states that "[w]e hold that individual freedom can only be complete in cooperation with others." Where this becomes reality interesting, however, is in Art. XIX para 3 of the chapter on Freedom and Responsibility: "The nature and extent of social measures may be determined in an Act in accordance with the usefulness to the community of the beneficiary's activity", read in conjunction with the National Avowal's thesis stating that (…) the strength of community and the honour of each man are based on labour, an achievement of the human mind." Küpper argues that this work ethic displays "some extent of doubt concerning human dignity (…) Such formulations are reminiscent of the 20th century's totalitarian left- and right-wing ideologies, which suggest that the 'value' of humans is not inherent but must be earned by the individual - generally by his/her work"(Küpper 9).*

* Küpper also points out numerous other paternalistic elements. One example is the Foundation's Art. G para 2 ("Hungary shall protect its citizens.") in which, viewed from the perspective that the idea of the person offers, "the individual is not (…) the subject but the object of the protection offered by the state. Another paternalistic element is clause 2 of Art. I para 1, which states that '[t]he inviolable and inalienable fundamental rights of MAN (sic!) be respected. It shall be the primary obligation of the State to protect these rights'. Art. 8 para 1 of the previous Constitution, in contrast, said the following: '(1) The Republic of Hungary recognizes inviolable and inalienable fundamental human rights. The respect and protection [sic! in this order!] of these rights is a primary obligation of the State.' The respect in question is meant to express the liberal perspective, since it implies that the state withdraws to give citizens the freedom to fully develop their liberties. Protecting rights, by contrast, implies that the state becomes active, that it acts, with the concomitant risk that instead of the individual the state will determine when and to what extent individual rights will apply." The author also construes

The possibility of criminalizing homelessness (which has been the subject of forceful criticism by several domestic and international human rights organizations)* is a characteristic example of the value system espoused by the constitution. Though the National Avowal proclaims that we Hungarians "hold that we have a general duty to help the vulnerable and the poor," Art. XXII para 3 states that "[i]n order to protect public order, public security, public health and cultural values, an Act or a local government decree may, with respect to a specific part of public space, provide that staying in public space as a habitual dwelling shall be illegal."

Balázs Majtényi writes the following about this:

> "Strikingly, the Fundamental Law authorizes the parliamentary majority to sanction homeless persons as part [sic!] of the provisions on the right to adequate housing. (…) In the human rights conventions …restrictions with reference to public order, public safety and public health are indeed not unknown in the context of certain fundamental rights. Yet it is rather unusual to invoke cultural values as the basis for the restriction of rights. Viewed from the perspective of the previous fundamental rights-based approach, the individual's right to dignity was certainly not subject to restriction on this basis. Hence Art. XXII runs counter to the notion underlying the protection of fundamental rights, and it violates certain internationally protected human rights expressly mentioned in binding international conventions. Thus the legislator argues that the rights of those (homeless persons) who do not lead a lifestyle in accordance with the values (which the constitution-maker had designated as 'cultural values') that have been declared as guiding values for the imagined ethnic national community may be restricted" (Majtényi 93).

Art. XVII para 1 of the Fundamental Law as a turn towards paternalism: «Employees and employers shall cooperate with each other with a view to safeguarding jobs and the sustainability of the national economy, as well as other community goals." In Küpper's reading "employees and employers can only assert their interests in the pursuit of objectives enshrined in the Fundamental Law, and other 'community goals' that are defined by the government as part of its economic policy objectives. In the case of a government that is active in terms of economic policy, there remains little latitude for dialogue, the autonomy of market economy and economic players in the realm of labor relations is done for. [T]his is strongly reminiscent of the Kádár era's economic regime." (Majtényi 10–11).

* See for example www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13206&LangID=Eor Main concerns regarding the Fourth Amendment to the Fundamental Law of Hungary, http://tasz.hu/files/tasz/imce/appendix_1_main_concerns_regarding_the_4th_amendment_to_the_fundamental_law_of_hungary.pdf.

THE FUNDAMENTAL LAW RELIES ON AN ETHNICALLY-BASED CONCEPT OF NATION, AND AMONG THE MINORITIES THAT LIVE IN HUNGARY IT PREFERS THOSE GENUINE NATIONALITIES "THAT HAVE BEEN LIVING WITH US" FOR A LONG TIME

According to Herbert Küpper the "Fundamental Law derives the concepts it uses from the ethno-nationalist perspective that emerged in 19th century Eastern Europe – which stands in contrast to the concepts of the democratic nation and the cultural nation"(Küpper 9). Küpper's assessment is primarily based on the National Avowal's declaration that the "(…) family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love." This is also reinforced by para 1 of the Foundation's Art. L, which defines the "family as the basis of the survival of the nation" ("Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation"). Moreover, he writes, the "end of the preamble* attributes an own 'will' to the nation since it suggests that the 'contract' is binding for all Hungarians – regardless of whether they wish to be party to it or not. The 'will' of the nation is superordinated to the freedom of the individuals who constitute the nation" (Küpper 9).

Küpper also sees the manifestation of the national as a central value in the Foundation Art. P para 1†(Küpper 10).

In addition to those whose identity as "Hungarians" is ethno-culturally established, the Fundamental Law also has provisions regarding nationalities. In the National Avowal, "we Hungarians" "proclaim that the nationalities living with us form part of the Hungarian political community and are constituent parts of the State." According to Art. XXIX of the chapter on Freedom and Responsibility:

> "(1) Nationalities living in Hungary shall be constituent parts of the State. Every Hungarian citizen belonging to a nationality shall have the right to freely express and preserve his or her identity. Nationalities living in Hungary shall have the right to use their mother tongue, to use names in their own languages individually and collectively, to nurture their own cultures, and to receive education in their mother tongues.

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* "Our Fundamental Law shall be the basis of our legal order, it shall be an alliance among Hungarians of the past, present and future. It is a living framework which expresses the nation's will and the form in which we want to live."

† "Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."

(2) Nationalities living in Hungary shall have the right to establish their self-government at both local and national level.

(3) The detailed rules relating to the rights of nationalities living in Hungary, the nationalities, the requirements for recognition as a nationality, and the rules for the election of the self-governments of nationalities at local and national level shall be laid down in a cardinal Act. A cardinal Act may provide that recognition as a nationality shall be subject to a certain length of time of presence and to the initiative of a certain number of persons declaring to be members of the nationality concerned."

It is worth dwelling a little on this point. Under ethnic minorities international law – which primarily looks at the issue from an interstate perspective – refers to groups that lack a nation-state. Rights protections extended on the basis of ethnic identity involve protection from discrimination, verbal violence (hate speech) or physical violence aimed at individuals based on classifications undertaken without consideration of the affected person's identification, using attributes determined by the outside world (biological features or external racial markers).*

The legislator failed to further define the archaic and substantially hazy conception of "nationality" even in the new minority law. This provides an interesting contrast between the new minority law and the previously effective regulations. It is not clear what the legislator's problem with the previous definition of "national and ethnic minority" was. (Act No. LXXVII of 1993 on the Rights of National and Ethnic Minorities operated with a dual group concept.) Presumably the constitution-maker neither dispute that "nationalities" are likely to constitute a numerical minority within society, nor that they suffer from certain disadvantages (which the minority law is designed to redress by setting forth minority rights). Furthermore, there are key distinctions between "national" and "ethnic" minorities, and a "nationality" cannot be regarded as a greater set comprising both; the most accurate description would be that it is synonymous with national minority. It is no coincidence that the terminology used in international documents also employs this distinction, and that the original draft of the Fundamental Law talked of „nationalities and ethnic groups."

Under Law No. CLXXIX of 2011 on the Rights of Minorities "Art. 1 … ethnic groups resident in Hungary for at least one century are minorities which are in a numerical minority amongst the population of the State, are distinguished from the rest of the population by their own language, culture and traditions and manifest a sense

* For more see Papp, Andras L.: Overruling Murphy's law on the free choice of identity and the racial-ethnic-national terminology-triad: Notes on how the legal and political conceptualization of minority communities and membership boundaries is induced by the groups' claims.

of collective affiliation that is aimed at the preservation of these and at the expression and protection of the interests of their historically established communities." Copying the earlier 1993 law, Appendix No. 1 of the Act enumerates the 13 recognized groups (Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romania, Ruthenian, Serbian, Slovak, Slovene and Ukrainian, while Art. 148 specifies the procedures for other minorities to be recognised: " (3) If a minority other than those listed in Appendix No. 1 wishes to verify that they meet the relevant conditions, minimum one thousand electors forming part of that minority may initiate that the minority be declared an ethnic group native to Hungary. (…) The procedure shall be governed by the provisions of the Act relating to the initiation of national referenda (…) In the course of its procedure, the National Election Committee shall seek the position of the President of the Hungarian Academy of Sciences with respect to the existence of the statutory conditions."

Based on the old-new regulation, therefore, in order for someone to submit a request – together with the required thousand endorsing signatures – for the National Assembly to expand the list of the thirteen minorities recognized by law, it is practically a requirement the minority group to already exist under the law at the time when it becomes recognized. In addition to requiring the Hungarian Academy of Sciences (MTA) to provide an expert's opinion, the National Assembly reviews compliance with the conditions set out by the law (that is whether the minority is real), and, having ascertained that these conditions have been met, recognizes the group as a new nationality (minority). There is also a potential contradiction here since parliament (and individual MPs) are free in making their decisions, and thus (similarly to the recognition of churches by parliament) even if the legal requirements are met there is no guarantee that the legal amendment that is necessary for the recognition of a minority will enjoy the support of the required two-thirds supermajority. In effect, therefore, there is a danger that the number of minorities will be frozen or that new minorities will be recognized on a politically selective basis. (Incidentally, it is questionably whether several of the groups recognized in 1993 met the requirements set out in the law.) The history of popular initiatives, all of which failed to succeed, and sometimes involved bogus groups, like the ancient Huns, provide perfect illustrations of the contradictory character of the regulations.*

Another important issue is the set of criteria to determine who belongs to a minority. The prevailing laws – and the Fundamental Law as well – are silent on any criteria that would define membership in a minority group. We see only a feeble attempt to define these in the context of a small segment of the privileges that mi-

* On this issue see for example Papp, András László: Identitás és reprezentáció: az etnikai hovatartozás meghatározásától a politikai képviseletig; Majtényi, Balázs, and Pap, András László: Végtelen történet: a kisebbségi hovatartozásról; Majtényi, Balázs, and Pap, András László: Sokasodó kisebbségek?; Halmai, Gábor: Pókhálóból font híd–Nemzeti kisebbség–identitás–zsidóság. Also see Pap, Andras L.: Overruling Murphy's law on the free choice of identity and the racial-ethnic-national terminology-triad: Notes on how the legal and political conceptualization of minority communities and membership boundaries is induced by the groups' claims

norities are entitled to, namely with regard to political representation. Here, however, the new legislation retained the nationality voter roll that existed already under the previous legal regime, and has been a source of continuous criticism for not having contained and form an eligibility criteria besides the individual's decision to sign up. On account of ethno-corruption practices in the election of a minority self-governments, a unique Hungarian institution established by the 1993 law and preserved by the new legislation, the question of how to regulate eligibility has been a repeatedly raised, sensitive issue. The 1993 regulation, which was essentially left unchanged by the new 2011 legal framework, was unable to prevent abuses of the privileges accorded to minorities; even though the persistence of such abuses can result in the hollowing out of these privileges. In its decision No. 45/2005, the Constitutional Court stated that it is constitutionally permissible for a law to require the declaration of minority affiliation, as long as it is justified by the necessity of protecting other constitutional rights or values, and it is realized with the smallest degree of restriction conceivable and the most suitable instrument to this end. Art. No. XXIX of the Fundamental Law's chapter on Freedom and Responsibility could actually have provided a sufficient framework for this, by stating that "[e]very Hungarian citizen belonging to a nationality shall have the right to freely express and preserve his or her identity." The language, departing from the previous concept,* which centered around the free (unlimited) choice of identity, hints at an objectively existing minority identity (which can be expressed and preserved).

On a last note, the preamble's provision that "the nationalities living with us form part of the Hungarian political community and are constituent parts of the State," which is also repeated in Art. XXIX of the constitution's chapter on "Freedom and Responsibility," is in need of interpretation and clarification. Though it is a restatement of the previous constitution's relevant provision (not a verbatim reiteration, but substantially the same),† despite several Constitutional Court decisions seeking to construe its meaning, it remains ambiguous [Decision of the Constitutional Court No. 1041/G/1999); Decision of the Constitutional Court No. 24/1994. (V. 6.)]. If minorities were constituent elements of the nation/the political nation, then that would make sense, but the semantic connotations of minorities or nationalities that are constituent parts of the state is rather confusing outside a Bosnian-style

* The preamble of the 1993 Hungarian minority rights act stated that "the right to national and ethnic identity is a universal human right," and the statement was reiterated in Art. 3 para 2: "[t]he right to national or ethnic identity is a fundamental human right, and is legally due to any individual or community." Art. 7 further declared that, "The admission and acknowledgement of the fact that one belongs to a national or ethnic minority is the exclusive and inalienable right of the individual".

† (1) The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State. (2) The Republic of Hungary shall provide for the protection of national and ethnic minorities and ensure their collective participation in public affairs, the fostering of their cultures, the use of their native languages, education in their native languages and the use of names in their native languages. (3) The laws of the Republic of Hungary shall ensure representation for the national and ethnic minorities living within the country. (4) National and ethnic minorities shall have the right to form local and national bodies for self-government. (5) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the rights of national and ethnic minorities.

ethnic federation. All in all it appears therefore that members of the Hungarian nation, who gave themselves a constitution, share public power with the nationalities who live here. Incidentally, pursuant to the interpretation outlined above, these nationalities are not subjects of the constitution (after all, the National Avowal is authored and framed by members of the Hungarian nation) - even if there may be, and in fact there are, members of parliament (even some governing party MPs) who are citizens of Hungary but may not be ethnically Hungarian, i.e. are members of one of the national minorities/nationalities.

THE FUNDAMENTAL LAW SUGGESTS THAT THE POLITICAL COMMUNITY IS ENTITLED TO UNCONDITIONAL RESPECT (AND THIS IS EXTENDED TO ALL ITS MEMBERS IN THIS CAPACITY)

Art. IX para 5 of the Fundamental Law's chapter on Freedom and Responsibility states that "[t]he right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates the community, invoking the violation of their human dignity, as provided for by an Act."

This is an utterly unusual provision, as under the standard constitutional doctrine, in Europe the concept of human dignity is generally intended to protect the individual rather than the community,* and certainly not the majority, and definitely not against the minority. According to Balázs Majtényi, "The parliamentary majority has the authority to curtail rights on the basis of this clause, and hence one possible interpretation of the cited provision is that it could serve as an efficient instrument for taking action against criticisms of the government. If for example one were to criticize the parliamentary majority which acts in the name of the ethnic nation, which in our case is the power authorized to give us a constitution and amend it, one could in light of this article be seen as violating the dignity of the Hungarian nation" (Majtényi 94).

The regulation is therefore problematic because the curtailing hate speech, and the protection of dignity on the basis of identity in general, becomes pertinent when it based on and applied to situations involving some sort of vulnerability – if there is a threat of potential or actual exclusion or marginalization. As things stand, however, it is unclear how being part of the ethnic/national majority or the Hungarian nation in today's Hungary could have implications that threaten individuals within this majority with a stigma and vulnerability that they should need special legal protections. When it comes to restricting the right of free expression, the arguments that carry the greatest weight are not those that seek to justify restrictions on hate

* See for example Mahlmann, Matthias: Human dignity and autonomy in modern constitutional orders

speech with regard to general notions of dignity, but rather those that would legitimate such measures on the basis of protecting minorities. That is they would offer additional protections for groups with a reduced ability to assert their own interests, who are, as a consequence of for example, some historical trauma, prevented from participating in the democratic discourse on a level that is commensurate with the majority's involvement therein. The prohibition of hate speech can therefore serve as a means of righting a historical wrong,* or as an instrument for protecting groups that cannot ignore the hate they encounter or lack the wherewithal to take effective action against it. In my view, these are the only contexts when such restrictive measures may be called for.

UNDER THE FUNDAMENTAL LAW MEMBERS OF THE POLITICAL COMMUNITY (MAY) AVOID PUBLIC SCRUTINY EVEN IF THEY ARE PUBLIC FIGURES – EXCEPT IF THEY WERE COMMUNISTS

According to Art. U para 4 of the Foundations, "[t]he holders of power under the communist dictatorship shall be obliged to tolerate statements of facts about their roles and acts related to the operation of the dictatorship, with the exception of deliberate statements that are untrue in essence; their personal data related to such roles and acts may be disclosed to the public."

The Fundamental Law, thus declares that those who previously exercised public power in the communist regime (and of the two totalitarian regimes in the 20th century, this provision only applies to the communist) are quasi public figures who, in the name of historical justice, are subject to less severe privacy protections. Yet the new constitution fails to apply similar provisions to other public figures. This is highly relevant, because judicial practice has been controversial concerning public scrutiny of public figures, including both holders of public office and people pervasively involved in public affairs or distributing or having access to public funds. Until very recently, specifically up to the point when the office of the independent Parliamentary Commissioner (Ombudsman) for Data Protection was abolished, by the Orbán government, (presumably because of the temporal proximity of the communist dictatorship) Hungary was among the countries with the highest levels of privacy protections. However over time, the practice of an over-zealous interpretation of privacy emerged, which practically led to the obstruction of transparency of public figures and an impediment of a thorough public discourse on politics and society -- an essential element of democratic societies. The possibility to monitor the activities of the authorities that exercise public power, and to render these transparent, is, thus often subordinated to the protection the privacy of public figures.

* Cf.: Uitz, Renata: Does the Past Restrain Judicial Review?

According to the Hungarian Supreme Court's jurisprudence, for example, mayors who utter racist statements during municipal assembly sessions or before the press are not subject to Act No. CXXV of 2003 on equal treatment and the promotion of equal opportunity (which bans discrimination and harassment) because even under these circumstances they can be considered not to be speaking in an official capacity, thus they may not necessarily qualify as public figures (Kfv. No. III.39.302/2010/8).* The Hungarian Civil Liberties Union (HCLU) once even had to sue the Constitutional Court for not disclosing the name of a petitioner, a Member of Parliament seeking the constitutional review of a provision of the Criminal Code on an official letterhead. The court, in line with the Constitutional Court (the ultimate guarantor of fundamental rights!) was of the opinion that cases initiated by Members of Parliament may amount to private data and can be exempt from disclosure. The case reached the Supreme Court, with the HCLU's requests denied at all instances.† Finally, the European Court of Human Rights ruled for the NGO (Application No. 37374/05).‡

Both the Supreme Court and the data protection commissioner held that privacy protections apply to police officers, even when on duty using force, say arresting citizens in public areas, and no pictures are allowed to be taken without their consent (Case Kfv. No. III.39.010/2012/7). An appellate court held that official communication between a former prime minister and other heads of governments and states should not be of public concern,§ and another court ruled that the budgetary appropriations of a nuclear plant need not be disclosed.¶

In a 2014 decision the Constitutional Court ruled that a provision of the newly adopted Civil Code that only allowed the broader criticism of public figures in the context of public affairs contingent on the presence of a "legitimate public interest," ran afoul of the freedom of speech and expression laid down in Art. IX of the Fundamental Law [Decision of the Constitutional Court No. 7/2014. (III. 7.)]. At the same time, most of the new judges who had been elected by the governing majority that had also adopted the Fundamental Law wrote dissenting opinions, which reflects the legislator's preferences in terms of reasoning and attitudes. Judge Dienes-Oehm, Egon writes for example that "[p]ursuant to clause eleven of the "National Avowal," "individual freedom can only be complete in cooperation with others."

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* Also see Pap, András László: A Legfelsőbb Bíróság ítélete az Egyenlő Bánásmód Hatóság határozatának hatályon kívül helyezéséről. Zaklatásnak minősülhet-e egy polgármester rasszista megnyilatkozása? Legf. Bír. kfv. II. 37 551/2010/5

† See http://tasz.hu/hu/informacioszabadsag/33 (in Hungarian).

‡ Hungarian Civil Liberties Union (Társaság a Szabadságjogokért) v. Hungary, (Application No. 37374/05), Judgement of 14 April 2009.

§ Index: Kende megint vesztett Németh Miklós ellen (Kende loses again against Miklós Németh). Index, September 28

¶ The appellate court overruled the judgment. See Energia Kontroll Program 2011; Nem lát el közfeladatot a Paksi Atomerőmű – a TASZ szerint abszurd az ítélet (The Paks nuclear plant does not provide a public service). *Hvg.hu,* 2011. február 8. http://hvg.hu/itthon/20110208_paksi_atomeromu

Comparing this requirement with the title of the chapter entitled Freedom and Responsibility, it is unequivocally apparent that the fundamental and substantial change in the Fundamental Law as compared to the previous constitution is that the constitution-maker sought to overrule previously established practice in terms of the extent to which individual liberties can[not]be limited. (…) [T]he exercise of any fundamental right also implies responsibility, and (…) an abusive exercise of (…) rights may violate the interests of the public." [Decision of the Constitutional Court No. 7/2014. (III. 7.) para 83].

Judge Barnabás Lenkovics further explains that "(…) there is an increasing social desire (…) for the public power to defend the rights of free speech and free expression against the influence and domination of the press and media powers (…) [T] here is a growing expectation vis-à-vis the law that it protect free speech and free expression from becoming deformed and morphing into libertinism, turning on itself. (…) the exercise of all fundamental rights and liberties implies responsibilities, and may only occur responsibly." [Decision of the Constitutional Court No. 7/2014. (III. 7.) para 103, 105].

CONCLUDING THOUGHTS

In conclusion, Herbert Küpper's words may be most suitable for summing up the above: "An analysis of the Fundamental Law reveals a mixed picture (…) [The constitution] places the individual in a considerably tighter collective bond as compared to Western European constitutions. Moreover, many perceive that the bond which receives the greatest emphasis, namely the nation, is not future-oriented but backward looking, drawing on the 19th century (…) All considered, the Fundamental Law does not stand firmly on the ground of individual freedom as most (Western) European Constitutions (including the Hungarian between 1990-2011) do. The [constitution's] idea of a person has not managed to move beyond the inherited illiberal, collectivist and state paternalist elements"(Küpper 11).

The issue is not only that the Fundamental Law allows for curtailing the fundamental rights of certain groups of citizens, and potentially also for their social exclusion, but, going back to the introductory thoughts in the present essay, there is also no persuasive evidence to show that in codifying the new constitution the constitution-makers had indeed tried to discern and hew close to the genuine preferences of the members of the political community.

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András Téglási

The protection of fundamental rights in the jurisprudence of the Constitutional Court of Hungary after the new Fundamental Law entered into force in 2012

INTRODUCTION

In Hungary, a new constitution entered into force on 1st January 2012, which is currently referred to as "Fundamental Law"* compared to "constitution". It is quite a unique situation in the world, when a new constitution is adopted under an already existing constitutional court. In most of the countries today, where a constitutional court operates, the court's case law has been developing under the same constitution. In Hungary, the Constitutional Court (*Alkotmánybíróság*, henceforth abbreviated: CC) has been operating since 1990 and has been developing its case law for more than two decades, when it had to face a completely new constitution in the Fundamental Law†.

In this paper, we are searching the methods of how the CC handled the adoption of this new constitution and how the new constitution influenced the protection of basic human rights in the jurisprudence of the CC.

The basic question, to which we would like to find the answer, is whether the new Fundamental Law has brought about radical changes in the protection of fundamental rights‡ and freedoms in the light of the jurisprudence of the CC, compared to the former 1989 Constitution of Hungary.

Since the new Fundamental Law of Hungary has been enacted, even before and after it became effective§, Hungarian and international constitutional experts in

* This constitution was originally adopted in 1949, during the Soviet occupation of Hungary. In 1989 during the change of the political system the legislature approved a total amendment of the constitution, though formally (*de iure*) Hungary remained the only one among the former post-socialist countries that had not adopted a new constitution after the fall of Communism, since 2011. In spite of this, we refer to the Hungarian constitution since 1989 as a new one, because in the sense of its content, it became a "rule of law constitution".

† About the new Fundamental Law see the first commentary of the Fundamental Law of Hungary. (Csink, Schanda, and Varga Zs.)

‡ Under fundamental rights we understand those human rights protected by the constitution.

§ The Hungarian Parliament adopted Hungary's new Fundamental Law on April 18, 2011, and was signed in a ceremonial event by the President of Hungary on Easter Monday, 25 April 2011. The new Fundamental Law became effective on 1 January 2012.

legal literature (Dupré 143-69; Kovács, Kriszta 171-95) and even in the Venice Commission* have been worrying about the reduction in the level of the protection of fundamental rights in Hungary by simply looking at the different wording of the new Fundamental Law compared to the former Constitution.

In this paper, we are going to focus on the jurisprudence of the CC concerning the interpretation of fundamental rights and freedoms after the Fundamental Law became effective. In doing so, we will be discussing those factors that have influenced the interpretation of human rights by the CC next to the changes in the text of the constitutional provisions. One of these factors is the fourth amendment of the Fundamental Law, according to which CC rulings made prior to the effectiveness of the Fundamental Law were repealed.

There has been no consensus among the members of the CC on how to handle those CC decisions issued with respect to the former Constitution of Hungary, which has at times been mentioned as the so called „invisible constitution", referring to those constitutional norms that are „beyond" the plain text of the Constitution itself.† This question has arisen due to uncertainties over the situation in which a provision of the previous Constitution has been excluded from the Fundamental Law. Could this prior constitutional provision be still regarded as part of the constitutional system in force?

The other debate regarding the jurisdiction of the CC in the field of human rights is the following question: in what way shall the interpretation of a human right by the European Court of Human Rights (henceforth abbreviated: ECtHR) influence the interpretation of a basic fundamental right by the CC of Hungary. Therefore we are also going to discuss the dispute among the CC judges concerning the influence of the ECtHR with respect to the interpretation of fundamental rights under the Fundamental Law of Hungary.

THE LEGAL EFFECT OF CONSTITUTIONAL COURT DECISIONS ISSUED ON THE BASIS OF THE FORMER CONSTITUTION

One of the most important debates regarding the interpretation of fundamental rights and freedoms under the new Fundamental Law of Hungary was whether the CC can use its decisions issued with respect to the former Constitution for purposes of interpreting fundamental rights under the Fundamental Law.

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* Opinion on the new Constitution of Hungary. Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17–18 June 2011) CDL-AD(2011)016.

† See for the first time in the concurring opinion of judge László Sólyom to the Decision of the Constitutional Court No. 23/1990. (X. 31.); Arató 17-18; Sajó 253-267. Béla Pokol has criticized this method of reasoning (Pokol 170-71).

In the reasoning of CC decisions issued after the Fundamental Law became effective, basically 3 methods can be observed regarding interpretation of those fundamental rights and freedoms contained in the Fundamental Law:

1) The first way of interpreting fundamental rights and freedoms contained in the Fundamental Law is when the CC interprets those rights and freedoms on the basis of CC decisions issued with respect to the former Constitution by adopting and specifically citing that reasoning. In this regard, the treatment of former interpretations has been either:

   a) automatic: meaning that the CC automatically used its former interpretation of a certain fundamental right, without investigating the wording of the former and the new constitution's regulations*;

   b) adoption of a former CC decision according to the criteria set forth in the Decision of the Constitutional Court No. 22/2012. (V. 11.);

   c) adoption of a former CC decision according to the criteria set forth in the Decision of the Constitutional Court No. 13/2013. (VI. 17.).

In instances of adoption employing the criteria referenced in points b) and c), these can be subdivided into the formal fulfillment of the criteria† and the real fulfillment of the criteria on the merits‡.

2) The other method of interpreting fundamental rights and freedoms under the Fundamental Law is when the CC interprets those rights on the basis of new regulations contained in the Fundamental Law without using and citing its previous decisions.§ However, in arriving at certain CC decisions, the rationale is literally the same as in a previous decision while the CC failed to cite such earlier decision as the source for its subsequent reasoning.

After the new Fundamental Law became effective on 1st January 2012, the CC dealt with the issue of adopting a former decision for the first time in the Decision of the Constitutional Court No. 22/2012 (V. 11.). In this decision, the CC declared that „The Constitutional Court's duty is the protection of the Fundamental Law. The Constitutional Court can apply in the new cases the arguments connected to the questions of constitutional law judged upon in the past and contained in its decisions adopted before the Fundamental Law was put into force, provided that it is

* See e.g. Decision of the Constitutional Court No. 44/2012. (XII. 20.), Reasoning [13]–[15].

† See e.g. Decision of the Constitutional Court No. 3380/2012. (XII. 30.), Reasoning [12]–[13]; Decision of the Constitutional Court No. 36/2013. (XII. 5.), Reasoning [24].

‡ See e.g. Decision of the Constitutional Court No. 3/2013. (II. 14.), Reasoning [38].

§ About argumentation and interpretation in Constitutional Law see thoroughly: Szente.

possible on the basis of the concrete provisions – having the same or similar content as that of the previous Constitution – and of the rules of interpretation of the Fundamental Law".*

In 2013 the Hungarian Parliament adopted the Fourth Amendment of the Fundamental Law with two-thirds majority. One of the provisions of this amendment provides that "Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings".† There has been a big debate in the Hungarian literature about the real meaning of this regulation.‡

Right after this amendment, the CC reassessed the extent to which it could rely on formerly elaborated justifications and arguments in the course of interpreting the provisions of the Fundamental Law. According to the Decision of the Constitutional Court No. 13/2013. (VI. 17.), in the course of reviewing constitutional questions to be examined in new cases, the CC "may use the arguments, legal principles and constitutional correlations elaborated in its previous decisions if the application of such findings is not excluded on the basis of the identical contents of the relevant Article of the Fundamental Law and of the Constitution, the contextual identification with the whole of the Fundamental Law, the rules of interpretation of the Fundamental Law and by taking into account the concrete case, and it is considered necessary to incorporate such findings into the reasoning of the decision to be passed".§

It is clear that after adoption of the Fourth Amendment the CC developed stricter criteria for use of arguments, legal principles and constitutional correlations embodied in its previous decisions than in the Decision of the Constitutional Court No. 22/2012 (V. 11.).

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* Decision of the Constitutional Court No. 22/2012. (V. 11.), Reasoning [40].

† According to the translation of the official website of the Hungarian Constitution Court. See: http://www.mkab.hu/rules/fundamental-law. See point 5 of the Closing and Miscellaneous Provisions. The official website of the Hungarian Government uses almost the same translation. See: http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf

‡ Therefore, it is more difficult to even translate it into English. According to another translation in the Hungarian literature: "Decisions of the Constitutional Court delivered prior to the entering into force of the Fundamental Law become void. This provision does not concern the legal effects achieved by the preceding decisions." See: *Main concerns regarding the Fourth Amendment to the Fundamental Law of Hungary.* Eötvös Károly Policy Institute. 26 February 2013. http://tasz.hu/files/tasz/imce/appendix_1_main_concerns_regarding_the_4th_amendment_to_the_fundamental_law_of_hungary.pdf. For further details about this problem see: Opinion on the Fourth Amendment to the Fundamental Law of Hungary. Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013). CDL-AD(2013)012; Erdős 303-321.

§ Decision of the Constitutional Court No. 13/2013. (VI. 17.), Reasoning [32]. Reiterated e.g. by the Decision of the Constitutional Court No. 7/2014. (III. 7.), point 1.3. See this latter decision on the official website of the Hungarian CC: http://www.mkab.hu/letoltesek/en_0007_2014.pdf.

However, the legal status of the decisions issued after the effective date of the Fundamental Law but prior to the Fourth Amendment is still questionable. Formally, these decisions have not been repealed by the Fourth Amendment, but they obviously could not have satisfied the stricter criteria prescribed by Decision of the Constitutional Court No. 13/2013. (VI. 17.). For example, in the case of interpreting the freedom of enterprise, in 2012* the CC reiterated its corresponding legal arguments and principles contained in a 1993 decision.† After the Fourth Amendment became law, the same reasoning appeared in Decision of the Constitutional Court No. 26/2013. (X. 4.)‡ referring only to the 2012 Decision without any reference to the earlier 1993 Decision.

It can also be also observed that in many cases following adoption of the Fourth Amendment, the CC formally reiterates all the criteria of the Decision of the Constitutional Court No. 13/2013. (VI. 17.), but afterwards takes into account only the changes in the text of the constitution as presented in the Fundamental Law, without considering the other criteria, such as the contextual identification with the whole of the Fundamental Law, the rules of interpretation of the Fundamental Law and the necessity to incorporate such findings into the reasoning of the decision to be passed.§

In most of the cases, only one judge of the CC, Béla Pokol, paid attention to the fact that criteria for adoption of a previous constitutional holding or rationale, as set forth in previous CC decisions, was being ignored by the CC in its current decisions. He declared his concerns in most of his concurring and dissenting opinions. For example, in his concurring opinion to the Decision of the Constitutional Court No. 20/2013. (VII. 19.), Pokol wrote that „this decision, accepted by the majority of the members of the CC simply declares the preconditions of the reception of the previous CC decisions prescribed by the Decision of the Constitutional Court No. 13/2013. (VI. 17.), even without examining any of them in the present case." Therefore Pokol considers the reception of these arguments and legal principles to be invalid, and should not be used in the latter CC decisions.

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* Decision of the Constitutional Court No. 3062/2012. (VII. 26.).

† Decision of the Constitutional Court No. 54/1993. (X. 13.).

‡ Decision of the Constitutional Court No. 26/2013. (X. 4.), Reasoning [176]

§ See e.g. Decisions of the Constitutional Court No. 36/2013. (XII. 5.), Reasoning [24]; No. 3152/2013. (VII. 24.), Reasoning [30]; No. 3134/2013. (VII. 2.), Reasoning [10]; No. 21/2013. (VII. 19), Reasoning [37]-[38]; No. 34/2013. (XI. 22.), Reasoning [41].

ADOPTION AND REINFORCEMENT OF CASE LAW BASED ON THE PREVIOUS CONSTITUTION

Although the wording of fundamental rights and freedoms in the Fundamental Law and the previous Constitution in most cases seem to be different, the CC has confirmed its previous case law about most of the fundamental rights. In the following chapters we are going to discuss those factors that provided the legal basis for this reaffirmation.

The codification of the previous case law to the Fundamental Law

One of the reasons for the CC to reinforce its former decision was that it considered the textual differences to be the codification of its previous decision in the new Fundamental Law.

In case of the general provision for the restriction of fundamental rights and freedoms, the CC considered the new, extended rules of the Fundamental Law to be the codification of its previous case law, and therefore there is no necessity to reassess the previous principles. The prior Constitution only declared that "In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights".* In relation to this Article, the CC created the so-called test of necessity and proportionality in its case law.† The majority of the CC decisions considered that this test meet the demands of the requirement of "not restricting the basic meaning and contents of fundamental rights." In other words, if the restriction of a fundamental right is necessary and proportionate, this means that the restriction does not restrict the basic meaning and contents of fundamental rights. (Balogh 124, Gárdos-Orosz 124.) However, in the new Fundamental Law, these requirements has been established separately from each other. According to Art. I, para 3 of the Fundamental Law "[a] fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the

* Act XX of 1949 on The Constitution of the Republic of Hungary, Art. 8 para 2.

† „The State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, it is not enough for the constitutionality of restricting the fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the content of a right arbitrarily, without a forcing cause is unconstitutional, just like doing so by using a restriction of disproportionate weight compared to the purported objective." See for the first time: Decision of the Constitutional Court No. 30/1992. (V. 26.).

objective pursued, and respecting the essential content of such fundamental right." Despite this, the CC considered this Article to be the codification of its former case law and, therefore, found no reason to change its previous jurisprudence.*

The same reasoning appeared in case of freedom of expression.† In Decision of the Constitutional Court No. 7/2014. (III. 7.) the CC established that the Fundamental Law reinforced the interpretation developed in the Constitutional Court's practice despite the fact that the rule, according to which „the right to freedom of speech may not be exercised with the aim of violating the human dignity of others," could not be found in the previous Constitution nor in the original text of the Fundamental law but, rather, has only been incorporated with the Fourth Amendment to the Fundamental Law.‡ The Decision of the Constitutional Court No. 7/2014. (III. 7.) declared that „In the present case the former arguments related to the interpretation of freedom of speech remain applicable despite of the fact that there are further differences between the text of Art. IX of the Fundamental Law and the text of the previous Constitution in the field of the freedom of speech and the difference found in Art. IX para 4 deals, in particular, with personality protection. According to the provision incorporated by the fourth amendment of the Fundamental Law, the right to freedom of speech may not be exercised with the aim of violating the human dignity of others. However, from the very beginning, it has been the cornerstone of the Constitutional Court's interpretation of the freedom of speech that the human dignity of others can restrict the freedom of speech. Based on the general rules of restricting fundamental rights, the relevant constitutional question was – and still it is – in which cases the rules protecting human dignity qualify as necessary and proportionate limitations over the freedom of speech [Art. I para 3 of the Fundamental Law]. The right to the protection of human dignity is only unrestrictable as the legal determinant of human status while as a general personality right and the resulting partial rights can be restricted".§

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* Decision of the Constitutional Court No. 26/2013. (X. 4.), Reasoning [162]

† At the time of the elaboration and the consolidation of the Constitutional Court's practice, Art. 61 para. 1 of the Constitution provided that, in the Republic of Hungary, everyone has the right to freely express his opinion and, furthermore, to have access to and distribute information of public interest, and paragraph (2) provided that the Republic of Hungary recognizes and respects the freedom of the press. The constitution-forming power amended – from 7 July 2010 – Art. 61 of the Constitution by refining the text of the first two paragraphs and by adding a new (3) paragraph: "For the purpose of forming a democratic public opinion, everyone has the right to receive adequate information about public affairs." Thus the constitution-amending power did not affect the previously interpreted content of the freedom of speech and the freedom of the press; indeed, it provided a constitutional ground for the twofold justification of these rights – as elaborated in the Constitutional Court's practice – and incorporated into the Constitution the aspects of forming a democratic public opinion. According to the Decision of the Constitutional Court No. 7/2014. (III. 7.), the contents of the text of the Fundamental Law taking force on 1 January 2012 is identical with the text of the Constitution after the above amendment. According to Art. IX para 1, everyone shall have the right to freedom of speech and according to para 2, Hungary shall recognize and protect the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion.

‡ See Art. IX para 4.

§ http://www.mkab.hu/letoltesek/en_0007_2014.pdf 7.

The question is still open for us as to why, if the constitution-forming power had wanted to maintain the previous CC case law, was it necessary to amend the Fundamental Law.

The new law might result in an interpretation that human dignity has a narrower scope than before. According to such an interpretation, the right to human dignity shall be restricted to only a prohibition against inhuman or degrading treatment, as its original content, and shall preclude this right from being interpreted as „a general personality right". According to judge Béla Pokol, a „general personality right" cannot be found either in the Hungarian Constitution or in the Fundamental Law. Despite this, the CC tended toward enriching the content or scope of this right and, this way, completed the catalogue of fundamental rights through creation of an independent right (Arnold 382). According to Pokol, the CC in this fashion has been extending the scope of its constitutional review to fields which otherwise could be freely modified by a simple majority of the parliament thereby resulting in the arbitrary restriction of freedom of the democratic legislature (Pokol 163).

In our opinion, with this amendment, the constitution-forming power would have liked to achieve a different interpretation of freedom of expression that provides greater protection of human dignity.*

As a conclusion, we can say that although the CC followed its former interpretation of certain fundamental rights in consideration of the new wording being simply the codification of its former case law, this methodology is not beyond doubt. In the Hungarian legal literature, the codification – primarily as a result of an amendment – of certain principles from case law shall result in at least a reassessment of the previous jurisprudence. Gábor Attila Tóth also finds this method to be problematic because, if a legal principle is followed by the court on the basis of precedent (and not on the basis of a written, codified rule), it is always possible for any applicant to have the court change its prior case law by simply referring to public opinion or international tendencies (Tóth and Sólyom 71).

The influence of the decisions of the European Court of Human Rights

As we could see in the previous chapter, the CC found no reason to make any alteration from its previous interpretation of the freedom of expression on the basis

* According to „Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary" (edited by Halmai Gábor and Kim Lande Scheppele), it is also possible to interpret this amended provision of the Fundamental Law, as a special rule to the freedom of expression, which derogates the general restriction rule of necessity and proportionality. See: Bánkuti et al. 33.

of the textual changes of the new Fundamental Law. Nevertheless, the CC has expressly changed its previously consistent interpretation of freedom of expression due to a recent decision of the ECtHR. The Criminal Code of Hungary prohibits the public display of certain symbols, including the swastika, SS-badge, the hammer and sickle, and the arrow cross, a symbol associated with the country's fascist World War II-era government. The Criminal Code prohibiting the public display of the five-pointed red star remained in effect despite ECtHR ruling in 2008 that declared the law a violation of the right to freedom of expression. The CC overruled its previous decision from the year 2000[*] in which the CC rejected the petitions seeking to establish the unconstitutionality and annulment of this regulation. The legal basis for overruling the previous interpretation was due to a „legally relevant new fact and circumstance" resulting in the Case Vajnai v Hungary of the ECtHR.[†]

Apart from the concrete problem surrounding freedom of expression, this case in general raises another important fact. As we have seen in the previous chapter (and as we will also see in the following chapter as well), the CC did not consider the new Fundamental Law as a "legally relevant new fact and circumstance". It is clearly visible in the Decision of the Constitutional Court No. 3005/2012. (VI. 21.). There the CC expressed the opinion that, after the effective date of the Fundamental Law, it is possible to apply *res iudicata*[‡] on the basis of previous decisions if there is the same or similar content in the Fundamental Law as that of the previous Constitution.[§] This means that – under certain circumstances – the decision of the ECtHR has greater influence on the interpretation of a fundamental right by the CC than a new or amended text of a constitution.

So far, there has not been an absolute consensus in the CC about the legal effect of ECtHR decisions on future decisions of the CC. According to the majority of CC decisions, the obligation arising from international agreements is that the CC shall interpret the internal law in conformity with the generally recognized rules of international law and, in the case of other sources of international law, the CC shall interpret the internal law in conformity with the legal regulation promulgating the international treaty. The CC shall accept this method of interpretation as long as it is in compliance with the value system of the Fundamental Law.[¶]

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* Decision of the Constitutional Court No. 14/2000. (V. 12.).

† *Case of Vajnai v. Hungary, (Application No. 33629/06),* Judgment of the ECHR on 8 July 2008.

‡ According to Act CLI of 2011 on the Constitutional Court **Art. 31** para 1, if the Constitutional Court has already ruled on the conformity of an applied legal regulation or a provision thereof with the Fundamental Law based on a constitutional complaint or judicial initiative, no constitutional complaint or judicial initiative aimed to declare a conflict with the Fundamental Law may be admitted regarding the same legal regulation or provision thereof and the same right guaranteed by the Fundamental Law, with reference to the same constitutional law context – unless the circumstances have changed fundamentally in the meantime.

§ Decision of the Constitutional Court No. 3005/2012. (VI. 21.), Reasoning [12].

¶ Decision of the Constitutional Court No. 34/2013. (XI. 22.), Reasoning [25].

According to the Constitutional Court, if the essential content of a certain fundamental right in the Constitution/Fundamental Law is defined in the same way as it is formulated in international treaties (e.g. International Covenant on Civil and Political Rights or the European Convention on Human Rights), the level of fundamental rights protection provided by the CC may not, under any circumstances, be lower than the level of international protection (typically that detailed by the ECtHR).*

Among the members of the CC, Béla Pokol has issued a dissenting opinion, according to which „the generally recognized rules of international law" can be interpreted in compliance with the national sovereignty of the Hungarian State only as a legal framework for the Hungarian State in case of signing an international treaty. This means that the obligation arising from „the generally recognized rules of international law" is that state organs in charge of concluding international treaties shall not sign any covenant that is contrary to „the generally recognized rules of international law". However, recognition of „the generally recognized rules of international law" by the constitution shall not in any way mean the subordination of the entire Hungarian legal system to „global legal material" that has not been accepted by the Hungarian State.†

Therefore, Pokol cannot accept the subordination of the CC to the case law of the ECtHR in the course of interpreting rules of the Fundamental Law. According to another member of the CC, Péter Kovács, who is an international law professor, the question is not the legal character of the duty for the CC to either follow or not follow ECtHR case law (Kovács 84). The most important fact is to be aware that an alteration of the level of protection of fundamental rights in a negative direction (i.e. a reduction in the level of the protection) creates an international liability for the state. However, in our opinion it is the liability of the legislature and not the CC.

The textual differences considered to be irrelevant

In many cases, the CC realized the textual difference between the wording of the previous Constitution and the Fundamental Law; however, these differences were considered to be irrelevant. Therefore, the CC has not seen any reason to change its previous case law.

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* See most recently: Decision of the Constitutional Court No. 36/2013. (XII. 5.) (Reasoning [26]), which refers back to the Decision of the Constitutional Court No. 61/2011. (VII. 13.); Decision of the Constitutional Court No. 166/2011 (XII. 20.) and Decision of the Constitutional Court No. 43/2012. (XII. 20.) (Reasoning [67]). See further details: Chronowski and Csatlós 16.

† Concurring opinion of judge Béla Pokol to the Decision of the Constitutional Court No. 34/2013. (XI. 22.), where Pokol refers to Allott (309-38) and to Elmendorf (953-1128).

In case of the right of human dignity, the CC declared that, although the wording of the Fundamental Law varies from that of the Constitution, it is possible to use the arguments and legal principles of its earlier decisions regarding human dignity.* As we have previously mentioned, human dignity appeared in Art. IX as a right that cannot be violated by exercising the right to freedom of speech.† This could be a reason for reassessing the content of human dignity (see details in the previous chapter). Furthermore, the text of Art. II regarding human dignity has also changed compared to that of the earlier Constitution. The Constitution declared the inherent right to life and human dignity in one sentence, with respect to which no one shall be arbitrarily denied.‡ Art. II of the Fundamental Law declares human dignity alone to be inviolable in its first sentence.§ In the second sentence of this Article, Fundamental Law states that „Every human being shall have the right to life and human dignity; the life of the fetus shall be protected from the moment of conception." The CC, from the very beginning of its operation, followed the principle that „Human life and human dignity form an inseparable unity and have a greater value than anything else. The rights to human life and human dignity form an indivisible and unrestrainable fundamental right which is the source of and the condition for several additional fundamental rights".¶ In the Hungarian legal literature, this doctrine has been criticized. (Tóth J. 293-311.) Following the effectiveness of the Fundamental Law, critics appeared again, saying that according to the Fundamental Law, human dignity stays solely on the top of the hierarchy of fundamental rights, and not together with the right to life (Zakariás 101).

In case of the „right to privacy", though this right is not mentioned expressly in Fundamental Law (nor in the former Constitution), the CC recognized the textual changes between the two constitutions. According to the Decision of the Constitutional Court No. 32/2013. (XI. 22.), Art. VI of the Fundamental Law regulates one's private sphere differently and thoroughly in that it guarantees the right to have their private and family life, home, communications and good reputation respected. The previous constitution mentioned only the right to good standing of one's reputation, the privacy of one's home and the protection of secrecy in private affairs. Despite the textual changes, the CC has not found any obstacles to using its previous decisions regarding the „right to privacy".** Judge Béla Pokol, in his concurring opinion, criticized the majority decision for creating a general „right to privacy", even though the text of the Fundamental Law differentiates between certain rights

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* Decision of the Constitutional Court No. 30/2013. (X. 28.).

† See Art. IX para 4 of the Fundamental Law.

‡ Art. 54 of the former Constitution.

§ However, in the Hungarian constitutional law, inviolability of a fundamental right has never meant to be unrestrictable. See: Gárdos-Orosz 403-404., Gárdos-Orosz 36, footnote 60.

¶ See for the first time in the Decision of the Constitutional Court No. 23/1990. (X. 31.) on capital punishment. Reasoning V. 2. 10.

** Decision of the Constitutional Court No. 32/2013. (XI. 22.), Reasoning [82].

within the private sphere. Similar criticism has also been levied by judge Pokol against the extension of the right to the protection of personal data. The CC continuing to adhere to the Decision No. 20/1991 (X. 4.), does not interpret the right to the protection of personal data as a traditional protective right, but as an informational self-determination right, with regard to the active aspect of this right.*

The basic question for us about this methodology of the CC is the following: if we accept that the codification of former CC case law amounts to a reinforcement of that former case law by the constitution-forming power (as discussed in the previous chapter), then that power's failure to codify that existing case law might have, as a consequence, the reassessment of previous, extensive jurisprudence by the CC.

In case of „right to privacy" and „informational self-determination right", neither the new Fundamental Law nor the former Constitution expressly recognized these rights, rather just „the right to have their private and family life, home, communications and good reputation" and „the right to the protection of their personal data". Had the constitution-forming power wanted to confirm the previous extensive interpretation of these rights, such rights should have been expressly written into the new Fundamental Law.†

In some cases, the CC continued to follow its prior interpretation despite the absence of a specific legal provision on the subject in the Fundamental Law. For example Fundamental Law does not define Hungary's economy to be a "market economy" (unlike the previous constitution), but as an economy based upon work which creates value, and upon freedom of enterprise.‡ One of the leading politicians of the governing party who took part in drafting the Fundamental Law explained this change: namely, that the governing party would like to establish an economic program that builds on work, saying they want a work-based state in order to preserve the values of European civilization (Ablonczy 83). Contrary to previous claims, they assert that the market cannot solve everything so they want a workfare state rather than a welfare state (Ablonczy 83). Despite this background, the CC still declares Hungary's economy to be a "market economy" because the Fundamental Law contains the two most important conditions of a "market economy" as previously defined by the CC: freedom of enterprise and fair economic competition.§

The same situation can be found in another provision, according to which "public and private property shall receive equal consideration and protection under the

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* Decision of the Constitutional Court No. 15/1991. (IV. 13.), Reasoning II. p. 10. This reasoning has been reinforced by the CC in the Decision of the Constitutional Court No. 32/2013. (XI. 22.).

† Just to be absolutely precise in this sense, the official reasoning originally submitted to the Parliament as an explanation of the bill mentions the „right to privacy", but not the „informational self-determination right".

‡ Art. M para 1 of the Fundamental Law.

§ Decision of the Constitutional Court No. 3192/2012. (VII. 26.).

law." This rule became part of the Hungarian Constitution as a result of the political and economic system change in 1989,* in comparison to the prior communist regime where property of the state was more dominant and received greater legal protection.† The Fundamental Law fails to expressly contain either the phrase "market economy" or the equal consideration and protection of public and private property under the law. That said, the CC considered certain legal provisions to still be part of the Fundamental Law, even though not formally codified. Judge Béla Pokol has criticized this method of reasoning in his concurring opinion to the Decision of the Constitutional Court No. 20/2014. (VII. 3.).‡

Nonetheless, the CC could find a way to "by-pass" certain provisions expressly included in the Fundamental Law. In the case of the legal status and remuneration of judges, the CC found the compulsory retirement age of judges unconstitutional,§ despite the explicit provision of the Fundamental Law mandating such retirement.¶ That said, the CC found the way to interpret a new regulation of the Fundamental Law contextually, in conformity with the rule of law and the Court's previous case law.

We can also find an example, where the Fundamental Law codified the previous case law of the CC, but the CC did not refer to its previous interpretation. In case of social security, the previous Constitution provided social security as the funda-

* Act No. XX of 1949 on The Constitution of the Republic of Hungary, Art. 9 para 1.

† For example there had been a difference in punishing vandalism of public or private goods. Any person who had vandalized public property with negligence during the communist era, used to be guilty of a misdemeanor punishable by a fine. This provision was annulled by the CC after the political system change as to be contrary to Art. 9 para 1 of the totally amended constitution, according to which "public and private property shall receive equal consideration and protection under the law." Decision of the Constitutional Court No. 6/1992. (I. 30.).

‡ In this decision the CC examined the provisions of Act on the Integration of Cooperative Credit Institutions.

§ Decision of the Constitutional Court No. 33/2012. (VII. 17.). According to the Reasoning of this Decision, the CC held that the new regulation violated the constitutional requirement for judicial independence on both „formal" and „substantive" grounds. From the formal point of view, a Cardinal Act must determine the length of judicial service and the retirement age in order to guarantee the irremovability of judges. Reference to the „general retirement age" in an ordinary Act does not fulfill that requirement. As regards the substantive unconstitutionality of the provision, the CC held that the new regulation resulted in the removal of judges within a short period of three months. Notwithstanding the relative freedom of the legislator to determine the maximum age of judges, and the fact that a certain age cannot be deduced from the Fundamental Law, the CC held that the introduction of a lowered retirement age for judges must be made gradually, with an appropriate transition period and without violating principle of the irremovability of judges. About the judicial independence, the CC referred to it as being one of the achievements of our historical constitution. It is important in a sense, that according to art. R) para. (3) of the Fundamental Law, the provisions of the Fundamental Law shall be interpreted in accordance with the achievements of our historical constitution. See details about this CC decision in *Case of Baka v. Hungary, (Application No. 20261/12)*, Judgment of the ECHR on 27 May 2014. point 45. (Constitutional Court's judgment no. 33/2012 of 16 July 2012). About the historical constitution of Hungary see: Rixer.

¶ According to Art. 26 para 2 of Fundamental Law: „Except for the President of the *Kúria* and President of the National Office for the Judiciary the service relationship of judges shall terminate upon their reaching the general retirement age."

mental right of every Hungarian citizen.* However, according to the interpretation of this regulation by the CC, social security had been interpreted only as a state objective (Jakab 221; Juhász 2586–2587). This interpretation was codified in the Fundamental Law, saying that Hungary only "strives" to provide social security to all of its citizens.† Despite this, the Decision of the Constitutional Court No. 23/2013. (IX. 25.) did not consider this regulation as the codification of previous CC case law but rather as a new provision resulting from the condition of sustainable economic growth and the gradually decreasing demographic situation in Hungary such that the state is only able to provide social security in a constantly decreasing measure. In this Decision, the CC found the legislation to restructure retired servicemen's pensions to be constitutional on the basis of a rule of the previous Constitution. Even before the new Fundamental Law became effective, the parliament amended the previous Constitution to establish the constitutional basis for the conversion of service pensions into an allowance.‡ This amendment was to remain in force even after the Fundamental Law entered into force.§ With this amendment, the constitution-forming power would have liked to avoid the constitutional review of this provision by the CC, although later a decision of ECtHR found the reduction of these benefits to respect a reasonable relation of proportionality between the aim pursued (that is, rationalization of the pension system) and the means employed (a commensurate reduction of benefits).¶

CONCLUSIONS

In this paper, the methods of using arguments and legal doctrines have been investigated with respect to fundamental rights and freedoms in the course of interpreting certain provisions of the Fundamental Law.

Certainly, there have been rights which codified – or later modified – by the constitution-forming power in the text of the Fundamental Law such that the CC had no other way but to follow the text of the regulation (e.g. servicemen's pensions).

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* Art. 70/E of the former Constitution.

† Art. XIX para 1: Hungary shall strive to provide social security to all of its citizens.

‡ Act No. XX of 1949 on The Constitution of the Republic of Hungary, Art. 70/E para 3, third sentence.

§ According to point 19 para 5 of the Closing and Miscellaneous Provisions of the Fundamental Law: „The third sentence of Art. 70/E para 3 of Act No. XX of 1949 on the Constitution of the Republic of Hungary in force as of 31 December 2011 shall be applicable to the benefits which qualify as pension until 31 December 2012 under the rules in force as of 31 December 2011 with respect to any change in their conditions, nature and amount, and to their transformation to other benefits or to their termination."

¶ *Case of Markovics v. Hungary, Béres v. Hungary and Augusztin v. Hungary (Application Nos. 77575/11., 19828/13. and 19829/13.)* Judgment of the ECHR on 24 June 2014.

In other situations, even against the clear intend of the constitution-forming power, the CC could find the way to "by-pass" certain provisions expressly incorporated in the Fundamental Law (see the legal status and remuneration of judges).

However, in case of the most fundamental rights and freedoms, the CC reinforced its formerly established rationale for its holdings in this area whether there was a textual change in the constitutional provision due to codification of its former case law or whether the textual changes were not deemed relevant so as to compel a change or reassessment of its previous case law.

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Dilemmas of the Constitution-Making Power

Fruzsina Gárdos-Orosz

Constitutional Amendments and their Judicial Review: the Case of Hungary

INTRODUCTION

In Hungary, one party alliance won a two-thirds majority in Parliament both in 2010 and in 2014. They adopted a new Fundamental Law and up to October 2014 modified it five times.* In Hungary, the so-called eternity clauses do not help identify the limits of the changes in the constitution, and a simple two-thirds majority of all the members of parliament is enough to adopt and also to amend the constitution. In the latest decision of the Constitutional Court on the review of the fourth amendment to the Fundamental Law [Decision of the Constitutional Court No. 12/2013. (V. 24.)], the Constitutional Court emphasised that it is beyond the competence of the Court to carry out a substantive review due to the provisions explicitly prohibiting it as adopted by the Parliament with the fourth amendment to the Fundamental Law.† The Court, however, added that in the course of exercising its powers, as the principal organ for the protection of the Fundamental Law, it will continue to interpret and apply the Fundamental Law as a coherent system and, when making decisions, it will take into account every provision of the Fundamental Law relevant to the decision on a given matter (Decision of the Constitutional Court No. 12/2013. (V. 24.), Reasoning, [46]-[48]).

Even if we sympathise with the substantial concept of a democracy based on the rule of law (Allan) and moral theories of law (Dworkin 1986; Dworkin 1977), we cannot abandon efforts to further justify the necessity of implementing judicial means testing the constituent power against the vast concept of rule of law principles. In the following pages I will set out a selection of foreign solutions in order to give an overview of this debate. Systems that do not recognize eternity clauses

* However, after 2010 the former Constitution was also amended several times. The first amendment after 2010 e.g. set forth the radical reduction of the number of members of parliament, and created the status of government officials instead of civil servants. The Parliament with the two-thirds majority changed the composition of the parliamentary commission nominating the judges to the Constitutional Court. The fourth amendment in 2010 changed the rules on public service media. The sixth amendment after 2010 created the conditions for retroactively taxing certain payments on leaving the office. The seventh amendment e.g. changed the rules on legislation and on public prosecution. One amendment limited the powers of the Constitutional Court in cases when the act to be supervised is related to state finance.

† As it is a 15 pages document it is not possible to list all the changes in this article. However, for the purposes of the need to further prove the importance of the issue in the Hungarian jurisprudence, I mention that the amendment reflected on many points of the original text of the Fundamental Law on human rights issues as well as the organisation of certain state institutions. See the thorough analyses of the Fourth Amendment (Halmai and Scheppele).

might also develop solutions that differ from the original idea of Abbé Sieyès granting total inviolability to the constituent power. According to Abbé Sieyès's theory some of the states supreme courts (constitutional courts), in the interest of developing the interpretation of civil and political rights and the preservation of the "basic structure", the "identity" or the "integration" (Halmai 2013, 31-47) of the constitution, even have the power to annul constitutional amendments that, according to the courts' interpretation, violate the "constitution". This paper, however, focuses on exploring the Hungarian debate and jurisprudence therefore it cannot provide a thorough analysis of foreign jurisprudence (Gözler) or related theoretical problems (Jacobson). I will thus restrict myself to mentioning some practical, theoretical and methodological issues with regards to the Hungarian Constitutional Court's standpoint to this controversy.*

THE PROBLEM OF THE JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS – COMPARATIVE AND THEORETICAL APPROACHES

My analysis in this part of the paper can be divided into two parts. The starting point will be the problem of eternity clauses, namely explicitly non-amendable clauses of constitutions. I find that this phenomenon influences the assessment of the relation between the constituent power and the constitutional court in many jurisdictions. It is worth noting that this relation might also depend on the fact whether a separate constitutional court is responsible for constitutional review, whose members are elected by the parliament with established competencies on the level of the constitution, or a supreme judicial body belonging to the branch called independent judiciary, which is charged with deciding on the question of unconstitutionality. Secondly, I will show some theoretical arguments for and against the possibility to justify the judicial review of constitutional amendments.

Controversies and solutions in foreign jurisprudence

Certain constitutions exclude the possibility of amendment. There is no such constitution that exists in Europe. The Constitution of the United States is not amendable, but Amendments can be accorded to it, and one amendment might overrule another amendment. This basically qualifies as a modification (for instance, Amendment XXI repealed Amendment XVIII.). The German Basic Law's eternity clauses are always a point of reference in Hungarian constitutional jurisprudence. Art. 1

* Relevant parts of this paper are based on my article about unconstitutional amendments published in Hungarian: Gárdos-Orosz Fruzsina. "Az alkotmánymódosítások alkotmányossági felülvizsgálata: elméleti koncepciók, nemzetközi trendek és magyar kérdések." *Alkotmányozás és alkotmányjogi változások Európában és Magyarországon*. Eds. Gárdos-Orosz, Fruzsina, and Szente, Zoltán. Budapest: Nemzeti Közszolgálati Egyetem, 2014. 167-184.

and 20 of the Basic Law of Germany and the basic principles incorporated in those Articles are not amendable. This means human dignity, the inviolability of human rights, a social and democratic *Rechtsstaat*, federalism, sovereignty of the people, that state institutions are bound by law, and the right to resistance cannot be modified. The French (Art. 89 of the French Constitution), the Italian (Art. 138 of the Italian Constitution), the Greek (Part IV Chapter II of the Greek Constitution), the Cypriot (Art. 182 of the Cypriot Constitution) and the Romanian constitutions all contain eternity clauses. These usually concern democracy, rule of law state, the concept of the form of government, the territory of the state and the most important human rights (dignity, equality). The Romanian constitution went the farthest in defining eternity clauses: it also considered judicial independence, political pluralism and the official language of the state as non-amendable (Art. 18 of the Romanian Constitution). Eternity, however, does not mean that the people cannot agree upon a new constitution. This would be contradictory to the nature of democracy (Paine 15-16).

In case there is an eternity clause in a constitution, it is easier to approach the question of the possibility of judicial review. It is in any case true that constitutional amendments may be reviewed if they violate an eternity clause. This, however, does not automatically mean that rules that may be amended can be reviewed if the non-amendable parts of the constitution are respected.

The French *Conseil Constitutionnel* emphasizing the sovereignty of the French people has always rejected the possibility of a substantive review of constitutional amendments although the constitution contains an eternity clause, it is not possible to change the republican form of government (Baranger 389-428). Interestingly, this it is not only a reservation of the French but also a general phenomenon in Europe, that constitutional courts do not exercise their power to annul unconstitutional amendments to constitutions, not even in cases where a substantive review takes place, where the courts otherwise declare that they have competence for such reviews.

The German Constitutional Court, for instance, ruled that it is possible to review constitutional amendments if they do not affect provisions protected by the eternity clauses. When the German Constitutional Court did indeed conduct the review (during the 60s and 70s of the last century) it declined to annul the provision, even when it had a legitimate opportunity to do so. The German Constitutional Court also emphasized that when reviewing constitutional amendments, the main task of the Court is interpretation. Interpretation means that the Court has to define the meaning of the new text by taking into consideration the Basic Law as a whole and the structure, the basic order of fundamental values.

In contrast, Austrian and Czech constitutional court practice, similarly to India, includes cases when the courts declared constitutional amendments substantively unconstitutional. Irrespective of this, in Austria and the Czech Republic, the relevant cases were naturally much less controversial and the courts' interpretation was much less activist than in India (Pfersmann 98-103). In the *a priori* constitutional review procedures it is quite rare in Europe that constitutional courts review constitutional amendments. The Romanian constitution makes it explicitly possible in an ex officio procedure. The Turkish constitution also allows the a posteriori review of constitutional amendments in a procedural sense (Art. 148 para 1 of the Turkish Constitution), and the Turkish constitutional court went even further with interpreting this provision towards the substantive review. This was the case in Turkey with a key decision about democracy, Islam, secularism and headscarves (Decisions No. E.2008/16 and No. K.2008/116.).

In France, Spain, Austria, Cyprus and Germany judicial bodies conducting the review were not hesitant in accepting the theoretical possibility to check whether the constituent power has followed the procedural rules (Gözler 120-162). However, constitutional courts of Austria, Cyprus and Germany were quite uncertain whether it is possible to conduct a substantial review of the constitutional amendments in addition to the formal review. The relevant decision of the Austrian Constitutional Court claims that a differentiation has to be made between the amendments that do not affect fundamental issues and can be regarded as more technical. The Austrian constitutional court does not review such amendments. However, when the amendment concerns fundamental changes in the constitution, constitutional courts should have more say concerning the review of the amendment (Decision of 10 March 2010, No. G 12/00, No. G 48-51/00 of the Austrian Constitutional Court).

In sum, it was quite rare in Europe that a constitutional court declared a constitutional amendment unconstitutional. In a constitutional democracy, this does not happen, even if the constitutional court accepts or establishes a competence for the review (Troper 105-107). Despite, this diverse trend it only shows us that in established democracies there was no particularly strong social and political need for the substantial review of constitutional amendments.

Theoretical debates

Abbé Sieyès in further developing the guarantees of Montesquieu's three-pillar separation of powers system, constructed his own concept of the constituent power outside Montesquieu's trial realm of the separation of powers, which was the people themselves. At that time, the idea of the constituent power was definitely a good means to prevent tyranny in government and it also guaranteed popular control

over the government (Sieyes Chapter 5.). The constituent power traditionally was not incorporated in the system of state powers, but was constituted outside the institutional side of the state (Klein 8). A great Hungarian jurist, politician and political theorist of the twentieth century also defined the constituent as having the right to check state functioning, the branches of power. This ability to check the functions of the state establishes the constitution and thus distributes competencies (Bibó 386-387). Although constituent power appeared as a concept to balance the "*pouvoir constitué*", namely the institutional side of the state, today it is a matter to justify what role this concept may have in 21st century's political and constitutional law theory (Mouton 2012).

In Hungarian legal literature, it is mostly accepted that the constituent power forms the basis of the democracy and is not a part of it similarly to other state actors. However, the scope and immunity of this power is debated even if Art. S of the Fundamental Law* is taken into account. It is a lively discourse whether constitutional amendments qualify as original acts of the constituent power or not. As I mentioned above in Hungary, the two-thirds majority of Parliament can adopt the constitution without any further requirements such as a referendum or a special verification rule, and this majority can also amend the constitution without any further requirements. This had been the case before the Fundamental Law took effect, but despite this many authors believe that the act of adopting the constitution as a whole is the act of the constituent, but the power that amends the constitution is not acting in the name of the constituent, rather in the name of the Parliament, the elected representatives (see for instance Petrétei 78-80; Chronowski, Drinóczi and Zeller; Drinóczi). In spite of this strong view I agree more with other acknowledged Hungarian authors who say that it is not possible to make this distinction in Hungarian constitutional law (see e.g. Takács 64; Csink and Fröhlich 70; Szente 18). Hence the question whether the Constitutional Court might have the right to review the constitutional amendments can be interpreted as whether the court has the competence to review the legal acts of the constituent power, review if it has ruled within its competencies.

Promoters of procedural or political democracy argue that the substantive restriction of the democratic decision-making process may create a "Rule of Platonic Guardians", namely it may give "unjust privilege to the views of judges". Richard Bellamy, professor of political science argues in his recent book that although "Judicial review conducted by constitutional courts is often said to be a necessary supplement to democracy, following the republican tradition, the traditional democratic mechanisms of free elections between competing parties and deci-

* Art. S para 1of the Fundamental Law. The President of the Republic, the Government, any parliamentary committee or any Member of Parliament may submit a proposal for the adoption of a new Fundamental Law or for any amendment of the Fundamental Law.

sion-making by majority rule, this competence of the judiciary is not legitimate As judges are not accountable to the public, judgments become arbitrary. The traditional concept of democracy provides to ensure that rulers treat the ruled with equal concern and respect. Moreover, the focus on individual cases challenges the real public debate. States should not watch over the constraints on democracy, but rather promote the improvement of democratic processes by the development of electoral systems and strengthening parliamentary scrutiny" (Bellamy; the Hungarian promoters of this view are Pócza and Antal).

Under this theory imposing substantive limits on the will of the constituent power would necessarily lead to the preference of one interpretation of justice over the other. Preferring the justice of one to the other systematically limits equal political rights and therefore the general implementation of equality. Political equality here means that every man's considerations are taken into equal account in the course of the state's operation. Without procedural equality the existence of the state as such cannot be justified (Győrfi and Jakab 204). A basic manifestation of this procedural equality is the joint effort of the political community of adopting a constitution. The possibility of unjust outcomes of the decision-making process must be managed as rare side-effects and therefore they can be disregarded.*

In contrast to this theory, John Rawls, legal theorist promoting the substantial concept of rule of law and the legitimacy of judicial review argues that a judge assessing constitutionality issues must apply a substantive test in addition to review procedural justice. However, this substance is not morality. The judiciary's competence extends to passing judgements under the rules of constitutional interpretation, which might be regarded as another special procedural rule in the democratic process whose sole purpose is to achieve a decision in line with the interpretation principles generally accepted in rule of law democracies. In this sense the enforcement of the rule of law principle promoting the protection of fundamental rights does not impose an *a priori* limit on procedural democracy but offer another level of procedure. Therefore it can be managed within the framework of procedural democracy's terminology. (Rawls 85).

As constitutions themselves are not merely political but legal documents, the acts of the constituent should also belong to this realm of legality where interpretation is a natural part of the law in action. There is no acceptable reason why constitutional interpretation could not be enforced by independent courts the implementation of this extra procedure, would enable the enforcement of the rule of law and democracy to be more effective. However, the courts cannot overrule the constitutional text on moral grounds (Kis 112–114). Hungarian authors who argue on the

* Tamás Győrfi himself argues for an interim solution, but he provides excellent arguments for both the simplified procedural democracy and the material rule of law. (Győrfi 321-324.)

grounds of the theory of Rawls (and also of Dworkin) emphasise however, that interpretation as legal phenomenon means much more than the textual interpretation of certain clauses in the constitution. Their basic notions of rule of law and democracy can be derived from the general principles mentioned in the constitution (Halmai 1994, 83–87).

To cut this debate short Martin Loughlin writes in one of his recent articles that

> "it is widely accepted in modern politics that power rests ultimately with the people. But the notion that power rests with the people is ambiguous. The constitution is adopted in the name of the people. Constitutions, however, are often replaced by those exercising the constituent power with new constitutions, and each constitutional institution feels that it is the one that best represents the people and therefore has the right to overrule the others' decisions or interpret them autonomously" (Loughlin 218).

In relation to the topic of constitutional adjudication and the constituent power the autonomous legal interpretation poses many further theoretical questions: some say that, sole interpretation can lead to the modification of the text of the constitution. But is this really equal to the modification of the text of the constitution or it does only mean the modification of the original intent of the constituent power? May interpretation amount to be the modification of the constitution itself? Ricardo Guastini Italian legal theorist distinguished two types of decision-making processes that may apply to constitutional adjudication: one based on the "interpretation as an act of will" and the other "interpretation based on knowledge" (Troper 35-36). The interpretation based on knowledge presupposes that the text analysed has some meaning. It is thus an exercise to decide between true and false. Alternatively, interpretation as a function of will defines interpretation as a prescriptive task where the person carrying out the interpretation will decide on the meaning of the text.*

To sum up, it is not only the constitutional practice of the states that are divergent, but also theoretical approaches lead to different interpretations of the problem of the possibility of review of constitutional amendments. However, from a theoretical point of view there is not much difference in the justification of constitutional review in general and the justification of the review of the constitutional amendments. This is certainly the case if we sacrifice the constituent power (Loughlin 218-237) and invite it to take part in the realm of legality. It is rather the interpretation of the constitutional court regarding its own tasks (deference) that can be different in cases facing constitutional amendments.

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* See the summary of the different standpoints of the Hungarian scholarship about the legitimacy of judicial review and judicial activism: (Tóth 15-30).

THE RIGHT TO REVIEW CONSTITUTIONAL AMENDMENTS BY THE HUNGARIAN FUNDAMENTAL LAW AND THE INTERPRETATION OF THE CONSTITUTIONAL COURT

I will separate this subchapter into two parts. I consider it necessary to make some observations on the position of the Constitutional Court in Hungary, its role, and its relevance. As one of the most radical changes implemented by the Fundamental Law was the transformation of the competencies of the Constitutional Court, it is worth to summaries the essence of the new competencies and the nature of the changes. After this short introduction I will introduce the practice, and the interpretation of the Constitutional Court regarding its role to review unconstitutional constitutional amendments.

The position of the Hungarian Constitutional Court and its competencies, its actual relation to the Parliament

The Hungarian Fundamental Law effective from the first of January 2012 has significantly modified the competencies of the Constitutional Court and the role of the different constitutional institutions in constitutional adjudication.* Changes implemented already by the amendments to the Fundamental Law in 2010 and 2011 (mentioned in the Introduction in detail) stayed in force concerning the government coalition gaining fundamental influence in nominating judges, and limiting the competence of the court regarding economic constitutionality issues. The president of the court was formerly elected by the judges for three years, but with the reform of the system the president became elected by the Parliament for the duration of the whole term of his office. Finally an amendment raised the number of judges from 11 to 15 without any justifiable pressing need.

Among several changes the Fundamental Law introduced three types of constitutional complaints and abolished the former existing *actio popularis*. The lively system of *actio popularis* meant that it was a legal possibility for anyone to turn to the Constitutional Court claiming that a law, legal provision or a regulation was contrary to a constitutional provision. The petitioner could also request the annulment of that piece of law. Constitutional complaint under former jurisdiction was to be lodged only in case of personal injury caused by the application of an unconstitutional norm during the ordinary judicial process.

The solemn aim of the new constitutional complaint mechanisms were to protect against personal injuries caused by ordinary courts and provide a possibility for constitutional review also in cases where the complainant cannot turn to the ordi-

* See about the former system of constitutional adjudication in English (Brunner 539), in Hungarian: (Sólyom).

nary court. Moreover, the Constitutional Court may supervise the constitutionality of legal provisions when applied in certain judicial cases and leads to an unconstitutional court decision. In addition the new system encourages civil petitioners to turn to the ombudsman in order to initiate the ombudsman's procedure to question the constitutionality of a legal provision before the Constitutional Court. Judicial referral as it existed formerly before 2012 stayed in force, which means that judges in pending cases turn to the Constitutional Court in case they state that an applicable piece of law is unconstitutional.

As a result of the new system, however, the control of the legislation became more fable as the initiatives for the review of the constitutionality of a given piece of legislation became more frequent in procedures attached to a concrete judicial case or launched in another type of constitutional complaint procedure. The non-admissibility of these constitutional complaints means a severe restriction on the number of cases examined on the merits by the Constitutional Court.

Originally in 2012 besides the ombudsman (who initiated almost all abstract *ex post facto* review procedures), the Government and a one-fourth minority of the MPs (from 2010 the latter would need the cooperation of all the opposition parliamentary groups) were entitled to initiate the abstract *ex post facto* review procedure of the Constitutional Court, but from March 2013 with the entering into force of the Fourth Amendment to the Fundamental Law, not only these actors, but also the Head of the *Kúria* and the Public Prosecutor can submit a proposal for review of constitutionality. The new regulation can still be qualified in this regard as a very restrictive one especially in comparison with the former solution. For civilians the ombudsman is the only forum which could be reached as a step for requiring the Constitutional Court to consider the unconstitutionality of a particular issue in question.

It is important to note that there could be differences also in nature between petitions arriving from the public and from the private sphere, meaning that initiations for review arriving from the ombudsman and formerly from the public in the form of *actio popularis* do not aim to fulfil direct political goals in the name of constitutionality. This procedure was not accepted by political actors who usually use this possibility to initiate the abstract review procedure at the Constitutional Court as their timely political assessments demand. It might have been the result of the proposal of the Venice Commission on three legal questions of constitution-making (Opinion of the Venice Commission 2011), that besides political actors the ombudsman at least became entitled to initiate an abstract constitutional review procedure at the Constitutional Court in 2012.

In summary: although the new provisions in the Fundamental Law on the competencies of the Constitutional Court provide for several procedures to initiate the

review of a piece of legislation, in reality due to the court-packing and the modified ways of the election of the members and the president, plus the fact of the two-thirds majority the Constitutional Court has lost much of its competence compared to the period before 2010, due to the new mechanisms in action.

What is more, although the Constitutional Court in December 2011 annulled several provisions of the act on the regulation of the media*, in 2012 interpreting the constitutional amendment on the invalidation of former decisions of the Constitutional Court ruled on the conditions when they can still use arguments that they set forth in former decisions made before 2012 [Decision of the Constitutional Court No. 22/2012. (V. 11.)]. The Constitutional Court ruled on the unconstitutional retirement of judges at the age of 62 [Decision of the Constitutional Court No. 33/2012. (VII. 17.)], they annulled certain regulations that formed the basis for the future criminalization of homelessness [Decision of the Constitutional Court No. 38/2012. (XI. 14.)], they also declared that the definition of the family in the act on the protection of families is too narrow and unconstitutional [Decision of the Constitutional Court No. 43/2012. (XII. 20.)], as a response to all these decisions and some others the Parliament adopted the Fourth Amendment to the Fundamental Law emphasizing that in basic questions of law and state it is the Parliament who has the last word. The government having a two thirds majority in the Parliament thus clearly voted for basing its acts on the idea of the traditional concept of democracy (Ackerman 7-16; Waldron 1346-1406) mentioned above in part 2 of the paper. The question is whether the Constitutional Court agrees with this concept or not.

Case law of the Constitutional Court on the possibility of the review of constitutional amendments

Hungary does not have non-amendable eternity clauses since the democratic transition and it is not clear if there are any implicitly non-amendable parts of the constitution (Gárdos-Orosz 387-432). In contrast with the Swiss† or the Norwegian‡ constitution, it has not been codified in the Fundamental Law (neither formerly in the Constitution) if content barriers apply at all to constitutional amendments. The Hungarian Constitutional Court faced the problem of the judicial review of constitutional amendments only in the fourth year after the transition of 1989–1990.

* With this decision the Court limited the investigative powers of the National Media and Infocommunications Authority, took out the print and online media from the scope of the act on the media, annulled the institution of the "media commissioner" as a constitutional institution, and struck down the possibility that the journalist protects her source.

† Art. 193. para 4 and Art. 194 para 2 of the Swiss Constitution states that the constitutional amendment cannot be contradictory to international law.

‡ Art. 112 of the Norwegian Constitution states that the spirit of the Constitution is inviolable also by amendments. In Switzerland and Norway, the institution of constitutionality review is unknown, therefore it is clear that the eternity clauses are protected by the parliaments.

The decision of 1994 (Decision of the Constitutional Court No. 293/B/1994.) was followed until 2011 and was substantially sustained also from 2012 January when the new Fundamental Law came into effect. The Constitutional Court has always stated since the transition that it has no competence to review constitutional amendments from a substantial point of view as they do not amount to being a piece of ordinary legislation that it has competence to review (for a summary see Decision of the Constitutional Court No. 1260/B/1997.). The Constitutional Court emphasized that the Constitution does not include any rule that would disallow another rule to be modified or repealed [Decision of the Constitutional Court No. 39/1996. (IX. 25.)]. The Court also explicitly declared that amendments belong to the competence of the constituent power and that the text of the amendment will become part of the Constitution (Decision of the Constitutional Court No. 293/B/1994.). The Constitutional Court usually assessed the question whether it is possible to review a constitutional amendment and declare it unconstitutional as a classic issue on the separation of powers (Stumpf 23-40).

Concerning the possibility to review constitutional amendments the main problem that occurs today in Hungary is that the Parliament amended the Fundamental Law when it did not agree with the decision of the Constitutional Court in a certain matter as explained above. The Decision of the Constitutional Court No. 61/2011. (VII. 12.) reacted first to the fact the Parliament codified the possibility to levy such a tax that was previously said to be unconstitutional by the Constitutional Court. The Court said that it was highly problematic that the Parliament used the Fundamental Law to serve its political interest of the day. From the standpoint of rule of law, the stability of the law and the constitutional order, this conduct is not acceptable. The Court found this political behaviour problematic also because it weakens the democratic legitimacy of the Fundamental Law as there is no wide social consensus on each and every provision of the Fundamental Law (Decision of the Constitutional Court No. 61/2011. (VII. 13.), Reasoning, V/1.). In spite of this harsh statement the Constitutional Court still claimed that it is not authorized to carry out a substantial review of the amendments of the Fundamental Law. One slight novelty was that the Court clearly emphasised that it is within its competence to review whether the Parliament kept the procedural requirements (Erdős 213-219). In this decision the Constitutional Court also affirmed that the *jus cogens* of international law, common principles of constitutional heritage and international law accepted by the Hungarian State are obligatory for the constituent power as well. The Court in the same part of the decision concluded that separation of powers comes first, and the Constitutional Court has to respect its limits and it is not possible to take the place of either the legislative nor the constituent power (for a detailed analysis of the decision see Szente 11–21).

The next cornerstone decision on the possibility of judicial assessment of constitutional amendments was the Decision of the Constitutional Court No. 45/2012. (XII.

29.). The Constitutional Court established that the part on the transition from communist dictatorship to democracy (preamble), and many articles of the transitional provisions of the Fundamental Law of Hungary (31 December 2011) are contrary to the Fundamental Law of Hungary and therefore annulled them with a retroactive force as of the date of their promulgation. The Constitutional Court articulated that it is not possible to amend the constitution with another piece of legislation outside the Fundamental Law even if the legislator calls it a part of the Fundamental Law. This way the legislator takes the competence of the assumed constituent power, violates the separation of powers and makes it impossible for the Constitutional Court to conduct a substantial review on that piece of the legislation. The decision of the Constitutional Court, however, stayed within the limits of procedural, formal reasoning of unconstitutionality and Parliament after this decision again made it clear that the political decision of the constituent power cannot stay unaccepted, that is, it can modify the Fundamental Law through the normal procedure at will (Decision of the Constitutional Court No. 45/2012. (XII. 29.), Reasoning, [111]). The text relies on the translation found on the website of the Constitutional Court.).

In the latest decision concerning the review of the constitutionality of constitutional amendments, on the Fourth Amendment to the Fundamental Law, Decision of the Constitutional Court No. 12/2013 (V.24.), as the principal organ for the protection of the Fundamental Law, declared that although it does not have the right to carry out a substantial review of the amendment, it will interpret and apply the Fundamental Law in the future as a coherent system and will consider all provisions of relevance to the decision in a given matter and it will interpret them consistently with each other (Decision of the Constitutional Court No. 12/2013. (V. 24.), Reasoning, [47]-[48]). The translation of the decision relies on the translation found on the website of the Constitutional Court).

In this case, the Commissioner for Fundamental Rights filed a petition with the Court for the establishment of the unconstitutionality of certain provisions of the Fourth Amendment to the Fundamental Law. The Ombudsman mostly relied on formal, procedural unconstitutionality, but he also claimed that in addition to the narrow interpretation of the violation of the procedural requirements of adopting the amendment, in a broader sense the amendment is also unconstitutional because it creates a controversy within the Fundamental Law. Amendments which generate incoherence of the Fundamental Law cannot be incorporated in it. In his opinion, the coherence of the Fundamental Law was clearly violated by the Fourth Amendment because it contradicted previous Constitutional Court decisions (Decision of the Constitutional Court No. 12/2013. (V. 24.), Reasoning, [9]-[11]).

The Constitutional Court stated that under Art. 24 para 5 of the Fundamental Law, the Court may only review the Fundamental Law and amendments to it for conform-

ity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and enactment (in the case of procedural error). This wording obviously encompasses the proponents of the Bill, the legislative process, the two-thirds adoption, provisions with regard to the designation of the act and the rules of signature and enactment, i.e. observance of the provisions of the Fundamental Law are required for the amendment to be valid. The Court emphasized its competence of reviewing constitutional amendments in terms of the structure of separation of powers and also the limits of such competence. It also added that it would not extend its powers to review the Constitution and new norms amending it without express and explicit authorisation to that effect. It resolved therefore only to allow limited judicial review of the Fundamental Law and amendments to it (Decision of the Constitutional Court No. 12/2013. (V. 24.), Reasoning, [30], [36]-[37], [43]).

The Court added to these arguments, however, that, when interpreting the Fundamental Law in the future, it will also take into consideration the obligations Hungary has undertaken in its international treaties or those that follow from EU membership, along with the generally acknowledged rules of international law, and the basic principles and values reflected in them. It stated that these rules constitute a unified system of values which are not to be disregarded in the course of adopting the Constitution or legislation or in the course of constitutional review (Decision of the Constitutional Court No. 12/2013. (V. 24.), Reasoning, [46]-[48]).

Agreeing with other Hungarian authors (Erdős 213-219) I argue that the Hungarian Constitutional Court created a loophole with this decision. This loophole, following further reflection on the requirement of coherent interpretation, may lead to a solution allowing the *de facto* substantive review of constitutional amendments and to an interpretation that would basically amount to being a reinterpretation of the original intent of the constituent power.

In sum, by preserving the competence for the "coherent interpretation" of the Fundamental Law, the Constitutional Court at least partly treated interpretation as an act of will by declaring that its duties are not limited to identifying the original intentions of the constituent power but they will rule based on autonomous interpretation of the provisions of the Fundamental Law (see also Csink and Frőhlich 5-6).

CONCLUSION

The rules of social coexistence and also the organisation of the state are constantly evolving, classical theories further develop, and the basic functions that can be identified in the course of exercising state powers are possibly carried out by constitutional institutions within the framework of a different set of rules. The set of issues related to unconstitutional amendments to constitutions is a perfect case

study as a number of fundamental questions need to be analysed to gain an overview of the problem. Such issues include the theory of the constituent power, the justification the constitutionality of review or the principles of rule of law, democracy and separation of powers. In my paper, I showed that it is indispensable to reflect on a number of related topics to understand and assess the current circumstances of adopting constitutional rules. Political factors might influence how the constitutional ideas apply in everyday practice. Today, judicial activism could lead to the preservation of the principle of the vast concept of the rule of law.

The coherence-principle is well-known from the practice of the Constitutional Court presided over by László Sólyom right after the democratic transition in the 90s: "for the sake of coherence our constitutional jurisdiction–especially in hard cases–is often on the borderline of the creation of a constitution" (Tóth 395). A key justification of this approach was that in the very historical situation of the transition the Constitutional Court needed to be activist. The idea of the president of the Constitutional Court concerning the "invisible constitution" was widely expected: "The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and the rights included in it and to form a coherent system with its decisions in order to provide a reliable standard of constitutionality - an "invisible Constitution" - beyond the Constitution, which is often amended nowadays by current political interests; and because of this "invisible Constitution" probably will not conflict with the new Constitution to be established or with future Constitutions. The Constitutional Court enjoys freedom in this process as long as it remains within the framework of the concept of constitutionality" (Decision of the Constitutional Court No. 23/1990. (X. 31.), concurring opinion of Judge László Sólyom).

I argue that activating the principle of coherence as we have seen in the jurisprudence of the present Constitutional Court, the constitutional interpretation could also lead to the judicial adjustment of a constitutional norm believed to be unconstitutional as accepted by the Parliament. Coherent interpretation requires, albeit indirectly, a substantive review of the constitutional norm interpreted. The coherence argument therefore might become a means of protecting the rule of law if the majority loses control of constitutionality. But the question whether this interpretation leads to the judicial amendment to the constitution or at least the conceptualising of it or it amounts to be not more than sole interpretation as a legitimate means in the competence of the judiciary, stays at the centre of current debates (Tóth 24).

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Nicola Lupo

What Hungarian constitutional experience can teach European Constitutionalism

INTRODUCTION

The basic assumption from which this contribution stems is that what happened in Hungary in the last 25 years has much to teach everyone studying or using constitutional law in general, and especially for those who approach the subject with reference to a Member State of the European Union. In some ways, the evolution of the Hungarian Constitution can be considered as a metaphor of the difficulties with which European constitutionalism has been struggling in recent years (Vecchio 187).

Clearly, the current picture of the Hungarian constitutional system, as depicted in the first pages of the contribution of Pál Sonnevend, is far from being satisfactory. It is difficult to deny that "a permanent constitution-making process, a deterioration of the guarantees of fundamental rights and a lack of effective checks and balances" are all elements that show a phase of difficulty and crisis of constitutionalism in Hungary.

How could it happen that a state which in 1989 seemed to be at the forefront, among the former communist countries, of the transition process towards constitutional democracy has lost so much ground in the last fifteen years? How could the situation of constitutionalism in Hungary deteriorated so much in the years that followed the accession to the European Union in 2004?

These are the rather dramatic questions that every external observer of the Hungarian recent constitutional experience tends inevitably to ask. Of course, it is not easy to give answers to these questions, especially if you are examining Hungarian recent constitutional experience from a certain distance.

My very broad hypothesis is that this process is caused partly by some specific features of the Hungarian transition to democracy: that is, over-simplifying, to the excessive trust in "legal constitutionalism" and to the underestimation of some elements that usually help to build a constitutional identity. For other parts, this process seems to find a fertile ground due to the democratic problems the European Union is facing. In fact, they determine negative effects also on the functioning of democracy inside its Member States, especially those who do not have strong and long-lasting democratic traditions, without offering many safeguards that

democratic principles and values are effectively protected inside all the Member States.

In other words, the recent Hungarian constitutional experience seems to show a road that potentially every EU Member State might take if it does not control the excesses of legal constitutionalism and if the EU does not correct its main democratic problems.

That is why this contribution is structured as a series of three lessons – each addressed by one of the following paragraphs – that can be drawn from the Hungarian constitutional experience. Later on, consideration is given to how this experience can be evaluated from the viewpoint of an Italian constitutional law scholar. In the last paragraph, a parallel between the Hungarian and the Italian recent constitutional evolutions is attempted: it is clear, indeed, that also in Italy, especially during the Berlusconi governments, serious constitutional problems have been experienced, and some of them could have roots not too different from the Hungarian ones.

THE NECESSITY OF A FOUNDATIONAL MYTH TO BUILD A "CONSTITUTIONAL PATRIOTISM"

The first lesson that can be drawn from the Hungarian experience could be summarised as follows: some form of foundational myth should accompany any change of a political regime, in order to offer solid roots to the new constitution.

The peculiar way that the Hungarian transition process followed, with a crucial role of the "roundtable talks" and which brought about the approval only of a series of several constitutional amendments instead of a new constitution, did not help the construction of such a mythology (Arato and Miklósi 350).

It is well known that also in other former communist states the transition has seen an important role played by the "roundtable talks". See the contributions collected by Elster (Sajó 69). However, elsewhere the outcome of these roundtable talks seems to have been somewhat internalised by each nation state, to be transferred, in reasonable times, into a successful new constitution-making process (Poland having been the last one, with the new constitution entering into force in October 1997).

In Hungary, on the contrary, "the system change was based on the principle of legality: each step of the negotiated revolution had to have a clear legal ground, and in 1989 the new democratic constitutional changes were issued by the still communist-dominated Parliament, before the free elections" (Sólyom 5). This "pacific transition", that could even be considered as a point of strength, instead revealed itself as a weakness, essentially because the transition did not accomplish the task of the en-

actment of a completely new constitution, as it did, at the end of other two cases of pacific constitutional transitions in the previous "constitutional wave", in Portugal (with the Constitution of 1976) and in Spain (with the Constitution of 1978).

Everywhere, the constitution-making process has, by definition, a constitutive and foundational role of a new legal order. That is why some forms of "constitutional patriotism" (on the history of this concept, from Habermas onwards, Müller 15) are necessary, especially in the first years of the life of a new regime, in order to mark a clear discontinuity and to build a popular consensus on institutions and values affirmed by the new constitution.

Sometimes, this is clearly an artificial construction, as the guidelines of many constitutions have been conceived and even drafted mainly by external forces. Nevertheless, in these cases an operation that is at the same time political, institutional and cultural has been regularly put into place in order to include some internal forces among the "fathers" of the new constitution, who often overstate their role. So that the new constitution can be truly regarded and felt as a product of the people of the country that is going to be ruled by it.

However, it is evident that, as in the Hungarian case, if the new constitution does not exist, and if the new political regime is founded only on a series of constitutional amendments – albeit very relevant under both quantitative and qualitative perspective – it is almost impossible to build any effective form of "constitutional patriotism" and to use the constitution as a "manifesto" of the new democratic regime.

THE DISTINCTION BETWEEN "*POUVOIR CONSTITUANT*" AND "*POUVOIR CONSTITUÉ*" AND THE LIMITS TO CONSTITUTIONAL AMENDMENTS

The second lesson seems to derive quite directly from the first one. If the new Constitution has a foundational myth at its basis, it becomes easier to accept the distinction between the "*pouvoir constituant*" (constituent power) and the "*pouvoir constitué*" (constituted power), which is the basis of every modern Constitution and of the definition of the limits to constitutional amendments.

According to this distinction, whose origins date back to the French revolution (since Sieyès: Jaume 67; Klein 6), the birth of a new Constitution, founding a new regime and a new legal order, is considered an exercise of "*pouvoir constituant*", while the approval of one or more constitutional amendments or a constitutional revision are deemed to be qualified as exercises of "*pouvoir constitué*".

This traditional distinction is actually something almost impossible to demonstrate following merely logical or legal criteria. It is a sort of pre-assumption, based on non-legal – but historical and sociological – elements, that the "*pouvoir constituant*" can be invoked only once, at the beginning of each political regime or legal order. On the contrary, the constitutional revision is a power that can be used many times without determining a change of the political regime or legal order.

Actually, it is not easy to determine, in the concrete constitutional experience, what is the distinction between the two categories we have been referring to. That is, to distinguish between a new constitution or a revised one. Comparative constitutional law is full of cases that, at least according to an evaluation attempted according to theoretical criteria, can be considered borderline (at the search of some criteria for such a distinction, Elkins, Ginsburg and Melton; Oliver and Fusaro).

What is particularly interesting, here, is that in Hungary both the main constitutional events that took place in the last twenty-five years could be qualified as borderline between a new Constitution and a constitutional revision.

First, as it has been just seen, the new democratic regime was founded on a series of constitutional amendments, approved following the procedure provided by the Communist Constitution, in full respect of the principle of legality. Therefore, such constitutional amendments should not be classified, almost by definition, as an exercise of "*pouvoir constituant*", although the new form of State was radically different from the previous one (Bartole 15; Sólyom 7).

Second, it is not easy to qualify the new Constitution which entered into force on 1st January 2012 as an exercise of "*pouvoir constituant*", because there is clearly a high degree of continuity in the main institutions, in the political parties as well as in the key political players (Lubello 33, 39). Furthermore, the fact that this new constitution has been approved only by the majority (Jakab and Sonnevend 9: 102) and has already been amended five times in the last three years. For a reconstruction of the content and of the procedure of each amendment. Sonnevend, Jakab and Csink, seems to confirm this position (Sonnevend, Jakab and Csink 33, 52). The new Fundamental Law, far from marking a moment of discontinuity or from representing the end of a long constitutional transition (Trócsányi), tends to be seen merely as one of the outcomes of the transformation of the constitutional debate in the day-to-day politics: just a step slightly bigger than the others.

At any rate, once it has been defined, in specific and according to historical more than logical criteria, which is the act that can be deemed as an outcome of the "*pouvoir constituant*", it becomes possible to accept the idea of limits to the constitutional revisions and to try to identify them. This issue has been addressed by the contribution of Fruzsina Gárdos-Orosz, who clearly demonstrates the difficulty of

identifying, under the new Hungarian constitution, substantial and, to a certain extent, even procedural limits to the constitutional amendments.

Limits to constitutional amendments usually reflect the essence of the "*pouvoir constituant*". Namely, they aim to stabilise and to protect some of the elements on which the new Constitution was based from the risks of future constitutional revisions. This is the case of the so called "eternity clause", in Germany, provided by Art. 79 para 3 of the German Basic Law, as well as of other explicit limits to constitutional amendments recognised in some other contemporary constitutions (Klein and Sajó 419). According to Albert these clauses are examples of conterconstitutionalism (Albert 1:1, 25).

However, if, like in the Hungarian case, we do not have a clear exercise of "*pouvoir constituant*", it is almost impossible to identify some limits to constitutional amendments. This is particularly true for substantial limits. Also procedural limits have a weak status if the Constitution that provides for the procedure to be followed in case of constitutional revision cannot rely on the fact of being established by the "*pouvoir constituant*".

Nevertheless, and to a certain extent, the identification of these limits could be eased by current evolutions in the relationships between national constitutional law, on the one side, and EU law and international law on the other (which have been clearly examined in the contribution by Pál Sonnevend). The open character of a constitutional order to EU law and international law does not exclude – but in some ways implies – the recognition of some features that, composing each constitutional identity, cannot be altered neither by EU or international law, nor by constitutional amendment.

This seems to be the case of Italy. The Italian Republican Constitution of 1947 is normally considered a manifestation of "*pouvoir constituant*", following the events of the Second World War and the "resistance" to the fascist regime (Scoppola 33). In the text of the Constitution, however, only Article 139 identifies the explicit limits to the constitutional revision, stating that "the form of Republic shall not be a matter for constitutional amendment".

Notwithstanding, further limits to constitutional revision, consisting of "supreme principles and fundamental rights", these have been identified by the case-law of the Constitutional Court, and substantially accepted also by the Parliament. At first, this case law has identified these limits moving from the necessity to recognise some restraint to the entrance, in the national legal order, of international law and EU law which have, in Italy, a rather differentiated legal status according to Repetto (Repetto 37).*

* And then referred also, more specifically, to constitutional amendments (Decision No. 1146/1988).

This doctrine is called "*controlimiti*" doctrine, because these limits act as counter-limits of the limitation of sovereignty allowed by Article 11 of the Constitution, originated from the necessity of "a world order ensuring peace and justice among the Nations" and from the promotion of "international organisations furthering such ends". In other words, although the eternity clause stated by the Italian Constitution explicitly refers only to the Republic as an object non-amendable through a constitutional revision, the case law of the Italian Constitutional Court has progressively built up these "*controlimiti*" (Cartabia 133, 138), which have been very often recalled by the Italian Constitutional Court, but only very recently enforced in order to avoid to comply with a decision of the International Court of Justice (Decision No. 238/2014).

In some way, also the Treaty of Lisbon encourages a process of this kind, especially when, in Art. 4, para 2, TEU states that "the Union shall respect" national identity of the Member States, "inherent in their fundamental structures, political and constitutional". The definition of what national constitutional identity is, therefore, a task to be accomplished by the Court of Justice of the European Union, but inevitably with the involvement of national (constitutional) courts and other national institutions (Claes 109, 134).

Along this path, an important role can be played by the eternity clauses, where existent, but probably also by the constitutional preambles, such as the "National Avowal" which opens the new Hungarian Constitution (Horkay Hörcher). Of course, this is a dynamic that, at least inside the EU, needs to be deeply inspired by the cooperative approach and by the respect of the principle of loyalty in EU law (Klamert 209).

THE ACTIVISM OF THE HUNGARIAN CONSTITUTIONAL COURT AND THE EXCESSES OF LEGAL CONSTITUTIONALISM

The third and last lesson that can be derived from the Hungarian recent constitutional experience could be summarised in the following terms: without a strong and unifying constitution, it is better, for a constitutional or supreme court, to exercise cautiously the judicial review of legislation. In other words, when the constitution is not very strong, it is advisable for the constitutional court to make intense use of its own self-restraint and to refer to its so called "passive virtue" (Bickel 75:40).

On the contrary, notwithstanding the fact that the newly established Hungarian Constitutional Court was called to enforce not a new Constitution, but the Constitution of 1949, as amended in 1989, it has used very intensively its own wide range of powers.

The new Hungarian Constitutional Court could be considered a powerful example of a body of this kind, having received all the main functions and ways of accessing foreseen in recent times, included the *actio popularis,* according to which any Hungarian citizen had the right to initiate abstract constitutional review of legislation regardless of his/her specific interest in the case in question this way of access, was abolished by the new Constitution, (Sadurski 15).

According to some scholars, all these features made the Hungarian Constitutional Court, at that time, "perhaps the most powerful court of its kind in the world" (Scheppele 8:81). The Court exercised its powers, since the beginning, without many hesitations, in line with the most advanced trends of international constitutionalism, playing a very important role in respect of the old as well as new legislation in force, using especially its abstract review (that is, without any reference to a concrete case in which the contested legal provision was going to be applied) and making frequent reference to the general principles of constitutional state.

This approach is clearly shown by the fact that the newly established Constitutional Court struck down, in the first four years, "nearly one-third of the reviewed laws and ministerial decrees (112 out of 420)", among which 21 acts of the new Parliament (Sólyom 9). Some scholars have criticised this activist approach, characterised by a sort of "constitutional enthusiasm", also on the basis of a comparison with the first years of activity of the Italian Constitutional Court, the most active among the constitutional courts of the first wave, but by far more cautious than the Hungarian one (Sajó 15:253, 256).

In order to reconcile this judicial activism with the absence of a new constitution, and to show the many gaps and inconsistencies of the heavily amended 1949 Constitution, the Constitutional Court, in a concurring opinion of its first President, László Sólyom (then President of the Republic), made also reference to the concept of an "invisible constitution", placed "above the Constitution in force, which is still subject to modifications dictated by daily political interest" (Decision of the Constitutional Court No. 23/1990 (X. 31.), on the abolition of the death penalty: for the most important decisions (Sólyom and Brunner). The image of an "invisible constitution" is quite effective and fascinating (see, for instance, Laurence Tribe), but with all due respect – too strong: probably, not the best words to legitimise the very important decisions issued by a new constitutional court, because it let people and especially politicians think that constitutional judges were creating their own standards for review. Furthermore, as it has been remarked, the reference to an "invisible constitution" endangered the value of legal certainty (Sajó 258), which is one of the traditional justifications of the European model of judicial review of legislation, concentrated in an *ad hoc* constitutional court (Ferreres Comella, 20).

More generally, the role of judges, and especially of constitutional courts, is crucial, and "national high courts and constitutional tribunals have become increasingly important, even crucial, political decision-making bodies" (Hirschl 1), but it needs to rely on a constitutional foundational myth as well as on one or more constitutional texts to be used as a parameter. Of course, following Guastini's dichotomy between "acts of knowledge" and "acts of will" recalled by the contribution of Fruzsina Gárdos-Orosz (Guastini 27), no one is saying anymore that legal interpretation, and especially constitutional interpretation, is a pure act of knowledge. Of course, interpretation is an act of will, but this does not mean that it is the product of a free will: the will of the judges has to face some limits and constraints, coming first of all from the legal procedures, but also regarding the content of the interpretation of constitutional provisions. Moreover, in any case, it is well known that judges, and especially constitutional judges, have to exercise some forms of self-restraint.

Up to a certain extent, the idea of an "invisible constitution" could recall that of a "material constitution", which was conceived by the Italian Constitutional Law scholar and member of the Constituent Assembly Costantino Mortati (Mortati). With the difference that the idea of the "material constitution", although with all the limits that could be rightly referred to this formula, was intended to underline – especially after the reformulation of the theory with reference to the Republican Constitution of 1947 – that the constitution should be considered as the result of the will of dominant political forces. Therefore, it stressed the political constitutionalism's side of the (Italian) Constitution. On the contrary, the idea of the "invisible constitution", as conceived by the Hungarian Constitutional Court, was meant to support a legal constitutionalism approach in order to compensate a constitution characterised by a weak popular legitimation and support and, at the same time, a parliament unable to adapt the legislation to the new constitutional values.

Here, I am not saying that legal constitutionalism should be abandoned and substituted by the rival doctrine of political constitutionalism (Bellamy): what I want to signify, and what the Hungarian example seems to show rather clearly, is that the task of enforcing constitutional values and principles should not be left entirely on the shoulders of the courts.

Not by chance, some scholars have recently used the recent Hungarian and Romanian backlashes in order to demonstrate that the democratic promise of 1989 largely gave way to "a technocratic and top-down view of judicial control of politics", a state of affairs that has been reinforced by EU accession. And have argued, adopting a civic constitutionalist approach, that Hungarian and Romanian cases in more detail "pose the most radical challenge to legal constitutionalism in the last few years", paving the way to a "resentment against legal constitutionalism" (Blokker 45, 135).

THE "DEMOCRATIC DISCONNECT" IN THE EU AND THE SEPARATION BETWEEN POLITICS AND POLICIES: THE RISE OF POPULISMS IN THE EU MEMBER STATES AND THE INHERENT SHORTFALLS OF THE ART. 7 TEU PROCEDURE

As specified in the introduction, also the contribution of the EU to the evolution of the Hungarian Constitution should be taken into consideration. Of course, the perspective of the EU accession has helped and accelerated the democratisation process in Hungary as well in the former communist countries, but it has also brought some downsides.

In particular, and excluding the influence of the Council of Europe (especially through the Venice Commission), which would deserve a specific analysis, the EU influence is at least twofold. Firstly, features and difficulties of the democracy in the EU – intended as comprehensive both of EU institutions and of Member States' institutions, which are strictly intertwined – have determined some negative effects for the Hungarian young democracy. Secondly, the mechanisms provided by the EU legal order to ensure the persistent respect of democracy and rule of law by its Member States have revealed themselves to be rather weak, namely with reference to the most recent evolution in Hungary.

The democratic problems of the EU are renowned and analysed with many different conceptual instruments, used in a very wide and interesting debate. Among them, I would like to make explicit reference to a couple of them.

First, those who have pointed out the existence not a lack of democracy in the EU, comprehensive of its Member States, and thus avoided to use the recurring expression of the "democratic deficit", but of a "democratic disconnect". Focussing the attention on the relationship between supranational institutions and national oversight and control, this approach shows that in the EU regulatory power there has been supranationalised to a considerable extent, while legitimacy resources remain mainly concentrated at the national level. Thus, it suggests that the linkages between supranational norm-production and democratic legitimation derived from the national level should be reconceived and strengthened (Lindseth 281).

Second, those who have observed, in the EU democracy, a dissociation between policies and politics: "while the EU makes policy without politics, given the marginalization of national partisan politics, it member-states suffer from having politics without policy". This implies that there is a technocratic danger at the EU level and, symmetrically, a risk of populism at the national level (Schmidt 5).

Of course, it is not possible to go deeper here inside these approaches, nor to evaluate in which measure they could be deemed to be overcome by recent devel-

opments in the European integration. For instance thanks to the more active involvement of national parliaments in the EU decision-making or to the politicisation of the EU Commission which followed the EP election of 2014 (Lupo 107; Bertoncini 9). Or, on the contrary, whether they have been even accentuated due to the economic crisis and the new mainly intergovernmental policies put in place at the EU level and, in parallel, by the austerity policies implemented at national level.*

We have now to come back to what has happened in Hungary in the last decade, which indeed seems rather perfectly consistent with these analyses. As it has been observed, "the process of EU accession has prioritized the top-down imposition of EU norms presented as self-evident and as 'beyond discussion', thereby embedding the new democracies in the European order based on democracy and the rule of law, but at the same time 'depoliticising' democratic politics in these countries due to the limited involvement of national parliaments and the public, and providing room for the instrumentalisation of constitutional dimensions" (Blokker 147; Puchalska 108).

Therefore, it should come as no surprise that once accessed the EU and also in reaction to the austerity measures taken by the Hungarian government, there has been a sort of relaxation and, subsequently, a turn in Hungarian constitutional politics, especially in the determination of the balance between legal and political constitutionalism. Unfortunately, passing, as it often happens, from one extreme to another.

At the same time, as already happened regarding Austria in 2000 (Sadurski 84) the EU showed the inability to react timely and effectively to the limitation of fundamental rights in Hungary and to the reduction of the independence of the Constitutional Court and of the judiciary deriving from the new Constitution and from most of the recent legislation. As it has been remarked, the procedure foreseen by Article 7 TEU does not work well, partly because it requires a threat of particular gravity and duration to the fundamental values affirmed by Article 2 TEU (Bogdandy and Ioannidis 51:59, 66), partly because its application has to be decided by the EU institutions, of which the representatives of the Member State to whom the measures are addressed are an essential component.
Other mechanisms, in the EU or in the Council of Europe (the latter has been kept outside this study) have been imagined. Some are based on a judicial reaction, in particular by the EU Court of Justice, which should adopt a "reverse *Solange*" doctrine in order to assure the respect of fundamental rights by the EU Member States (Bogdandy, Kottmann, Antpöhler, Dickschen, Hentrei and Smrkolj 49: 489; www.

* http://eurocrisislaw.eui.eu/

verfassungsblog.de).* Others scholars have tried to foresee several options, among which a reform of the Treaty, in order to establish a new body, called 'Copenhagen Commission': "an independent institution, non-partisan, and designed to be involved in 'democracy protection', thus going beyond simple monitoring", which, aided by experts and institutions such as the Fundamental Rights Agency (FRA), "could serve as an early warning mechanism" (Closa, Kochenov and Weiler 22). It is clear, however, that all those mechanism are difficult to construct and to implement, especially in the short term, because they could be seen as infringements to the sovereignty of EU Member States and their citizens.

CONCLUSION: A (VERY QUICK) PARALLEL WITH THE ITALIAN CONSTITUTIONAL EXPERIENCE, ESPECIALLY DURING BERLUSCONI GOVERNMENTS

Of course, it is rather easy to draw lessons or to show better solutions when evaluating *a posteriori*, and from a certain distance, difficulties which have arisen in a certain constitutional system. It is much more difficult to understand when and why the constitutional crisis starts being inside a political system and a legal order, trying to avoid excesses and, at the same time, to skip the risks of infringement of democratic principles and fundamental rights.

This problem of "information asymmetry" can be shown and maybe softened just through a quick reference, in conclusion, to the Italian case. Although in a country with a rather different constitutional history (see *supra*, par. 3), some problems similar to those examined with reference to Hungary, have been experienced in the last 20 years, particularly during the Berlusconi governments.

Also in Italy, indeed, a form of populism has taken place and has found a fertile ground on the anti-European rhetoric. Furthermore, the frequent invocation of a "Second Republic", which allegedly would have started in 1993, especially if transferred from the political science to the constitutional law approach, could endanger the consensus on the 1947 Constitution and on its persistent validity. According to this thesis, widespread among historians and political scientists, the crisis of the political parties and the fact that none of the parties which were at the basis of the Republican Constitution had survived after the fall of the Berlin wall and after the "Bribesville" scandal burst in 1992 would determine also the end of the "Constitution of the First Republic", the one approved in 1947. This would have been substituted, even implicitly, by a new one, founded among other things on an assumed direct electoral legitimacy of the head of the government. During this time there was an attempt to move the Constitution into everyday politics and this was ex-

* For a synthesis of the debate see Vecchio.

perimented many times. Indeed, all the debates and proposals on constitutional and institutional reforms could be seen also as a way of de-legitimising the Constitution currently in force, in order to soften the constitutional limits on majoritarian politics. And also the Constitutional Court has been frequently accused (in particular after the Decision No. 262/2009, on the so called "*lodo Alfano*", granting immunity for the head of state, the head of government and the speakers of the two houses of Parliament, during their mandate) playing a counter-majoritarian and political role, quashing laws approved under the Berlusconi government and being dominated by "leftist" judges.

In this scenario, however, some elements have assured – at least for the moment – the overall endurance of the constitutional system. I would particularly stress two main differences, particularly evident in light of the examination of the Hungarian case.

First, the fact that those who have defended the validity of the 1947 Constitution – included some of the last Presidents of the Republic – have generally managed to distinguish between the values, principles and fundamental rights affirmed in that text, to be preserved and re-affirmed, and the provisions on the institutions, which needed to be updated and adapted to the new reality. In this way, re-affirming the distinction between the "*pouvoir constituant*", still valid, and the "*pouvoir constitué*", used in order to propose some constitutional reform. It must be added that the result of the constitutional referendum held in June 2006, with which the Italian citizens rejected the reform of the second part of the Constitution, showed that the majority of the people were not ready to renounce the institutional framework designed in 1947 and did not trust the logic of the Second Republic. Secondly, the fact that the Constitutional Court, although issuing several important decisions quashed some of the laws approved by the Parliament in order to delay or to escape from accusation and the imprisonment of Berlusconi, managed to eschew some of the excesses of legal constitutionalism. The Constitutional Court successfully avoided an involvement in daily politics, recognising some discretion to the legislator. The Constitutional Court, however, benefitted from the time span between the entry into force of the law and its constitutional review which derives from the *incidentaliter* way of access, as the doubt about the compliance of a law with the Constitution needs to come from a judge who would be about to apply the same law during a judgment.

These two elements, together with the longer tradition of democracy, have since now helped Italy to stay away from some of the features of the constitutional crisis that Hungary is currently facing. However, of course, nothing is set and, as the risks are still quite high, it would be better not to lower the guard and to look closely at what is happening in other countries which are facing similar problems, in order to learn from their experience.

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New Trends in the System of Government and the Principle of Separation of Powers

Ákos Cserny

Hungarian Governmental Operation from a European Point of View

BASIC ASSUMPTION

The political responsibility – in the beginning that of the individual, later mainly collective – of the executive power had an indisputable role that parliamentary government, also referred to as parliamentarism, has roots and is enhanced all over the world. In countries where there is such a form government the axis of state power operation is the relationship between the parliament and the government is accountable. In this relationship, however, – at least legally – the parliament shall have the dominant role, which is mostly expressed by the parliamentary responsibility of the government – from the 19th century (Schmitt 339-340).

The civilian transition resulted in the growth of the importance of popular representation, and, as a consequence, the governments and their ministers could not be independent from the will of parliamentary majority any longer. The first guarantee of this was the accountability of the ministers through the control of the legislation over the execution, which actually urged the leaders of the executive power to operate according to the will of the representative body. From the outset the provision of responsibility and accountability before parliament meant that the legislation should be continuously scrutinized, assessed and control the activity of the government and its members. Additionally the citizenry increasingly gained strength which vindicated the right to remove ministers through parliamentary representation, since the negative assessment expressed through exercising control rights may finally have resulted in the removal of ministers. The principle was the essence of the political element of government responsibility that the government and its ministers can only stay in power if they enjoy parliamentary confidence. If this parliamentary confidence was lacking they would be obliged to resign this was the guarantee of the institutionalisation of the governmental system, which was the most important constitutional guarantee. If the government and its members want to remain in their positions they shall have the support of the majority of the representatives. Consequently parliamentary confidence is a criterion of the operation of the government, which is the basis of the parliamentary government. The priority of popular representation over the executive power originates from the fact that it actually depends on the parliament – the confidence thereof – can prevail through the institution of the political responsibility of, above all, the government and the ministers (Beyme 42). This, however, had only been present in the European parliamentary practice as a constitutional habit for a long time. The rules which re-

sulted in the possibility of removing the highest body of the executive power through a motion of no confidence were set in the Continental constitutions in a wider range from the beginning of the 20th century.

The parliamentary accountability of the executive power is not only the possibility of overthrowing the government but a wide-range of actual instruments for the control are connected as well. Regarding the fact that the political responsibility of the government can mainly and actually be realized through the instruments of parliamentary control the period of the civilian transition established differentiated control solutions. This particularly significant because since the 20th century more emphasis has been placed on the control of the executive power considering the increasing weight of the government against the representative bodies. Since the role of the legislative has more independence the function of parliament seems to be lost. One explanation for this is due to the enhancement of the executive power in legislation, or the governmental representation in supra-national organizations – wherever the issue of parliamentary control is raised more intensely.

However, both in the Hungarian and international literature it is increasingly envisioned that due to the dominance of the executive power in public authorities parliaments may lose their significance not only in the regulatory function (Schambeck 649-656; Soltész 279-290). Concerning parliamentary control of the government several serious problems have been raised even in developed democracies whether the pro-government majority is able to control – and if yes, in what way – the highest organ of the executive power, since the government is formed by the parliamentary majority. Despite our doubts, it is necessary to state that in countries with such a practice of lack of the motion of no confidence against ministers does not mean that parallel the cessation of the individual parliamentary responsibility of the government member. Parliaments with instruments – basically those of the opposition – at their disposal can usually just importune ministers, but sometimes, as a result of a series of coordinated opposition attacks, the resignation of a government member may also occur.

The tendency of the increasing weight of the government forces parliaments to take new measures in the field of control and to enforce responsibility. Nowadays, in accordance with this, the classical instruments for and bodies of parliamentary control, filled with the power of publicity, try to perform the traditional parliamentary control function and enforce governmental responsibility with the "cooperation" of the media, which is also a new – related to a political aspect, not legally regulated – way and tool to control the executive power.

MAKING POLITICAL RESPONSIBILITY COLLECTIVE

In the course of the development of the civil constitution, parallel with the fading of individual responsibility, the joint liability of the leaders of the executive power came to prominence and took root. It is noted that the responsibility that was made collective prevailed even under the socialist circumstances so that due to the particularity of the government system – unlike in the civilian transition period – it was primarily of collective nature not "politically" but legally. Nowadays, when the responsibilities of the ministers of the member states have been increased with the tasks performed in the Council of the European Union as a result of the European integration process, the government members' integration-political responsibility dissolves in the – supranational – collective nature of the decision making body to a great extent.

While discussing collective responsibility we consider it important to state that the individual responsibility of government members – even in countries where it is exclusively regulated – is of minor importance since with solidarity the government can save the ministers from being called to account. So nowadays when the ministers – as members of the government – are responsible for their activities rather indirectly through governmental solidarity, they "only" have to enjoy each other and the prime minister's confidence, and it is the prime minister who shall enjoy the confidence of the parliament.

In the constitutional systems it is also a result of the political responsibility becoming collective that the governmental responsibility of the prime minister and ministers can be barely separated from each other just as – in a different context – from the minister's responsibility point of view the responsibility for the administrative management of the portfolio cannot be separated from the responsibility for the government's policy. Perhaps this is why the "general responsibility for governance" is colloquially used for this form of responsibility. It is also important to show that there is a connection between the responsibility becoming collective and the scope and authority of the ministers gradually becoming narrow, the continuous weakening of the decision making competence*. This tendency is strengthened by the fact

* It is worth referring to the fact that in the trichotomy of exercising the power of the state (power-decision making authority-responsibility) the scope of making decisions cannot be neglected. Power always presumes decision making authority, in other words power is held by the one who makes decisions (Kröger 313). Decisions, however, are not often made in the place and by the person where and who are entitled and assigned by law. We consider it important that the holders of power and those exercising it, who are indicated by the constitution – for instance "all power is vested in the people", or "the highest parliamentary organ is the depositary of sovereignty" – are not in every case the actual holders of power at the same time. The main power and "party power" have been merged especially since the appearance of political parties and their dominance in power, in spite of the fact that fundamental laws usually prohibit the parties to directly participate in exercising the power of the state. It is even evidenced by practice that "real decision" does not coincide with formal decision making several times, however, power and responsibility can only exist where real, actual decisions

that, as a result of the complexity of modern society, government decisions are necessarily increasingly complex, the preparation of which extremely diverse interest and volitional efforts shall be considered. All this overshadows the application of the principle of authority, – which previously made a one-sided approach possible – consequently, instead of the decisions of the particular minister the collective decisions of the government are becoming dominant.

Due to the establishment of collective government responsibility the prime minister has had a dominant role in elaborating and enforcing the government's policy. The political responsibility of government ministers' cannot be separated from the prime minister's responsibility, they form a unit so lurking behind the so called governmental decisions of a prime ministerial nature there is rather a political volition of the head of government which shall be assumed within the body. When it comes to the enforcement of responsibility the government becomes identical with the prime minister embodying and impersonating the body. This situation, is notable as a result of the fundamental laws which indicate that the prime minister – or in addition to the government also the prime minister – as the addressee of the motion of no confidence against the government.* The vote against the head of government in case of a motion of no confidence – on the basis of the principle of political solidarity with the prime minister – always results in the fall of government.

The responsibility becoming collective can be observed in the constitutional practice of the European countries, even if some constitutions, laws or for example the English constitutional or parliamentary practice, besides establishing the government's political responsibility, theoretically enable the enforcement of the ministers' individual responsibility before parliament through the formal withdrawal of confidence.†

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are made. In the past century the presence of modern political parties in parliament, within the framework of parliamentarism, basically transformed the relationship based on political responsibility between the legislative and executive powers. It has clearly made the parliamentary government system weaker, a result of which the institution of the classic responsible government is nowadays hardly more than "constitutional fiction". (Tölgyessy 91). Party discipline in fact prevents the representatives from e.g. supporting a motion of no confidence against the government which enjoys the parties' confidence, or from initiating the dissolution of parliament.

The government's political responsibility nowadays increasingly prevails towards the governing party or parties, their governing bodies, and the parliamentary faction. (Regarding this perhaps we can say that the political responsibility of the government today is not more than party responsibility. In this case the basis of responsibility is the party/faction's concept, expectations and possibly the norms set in the statute of the party.) While – in the classical sense – the possibility for the parliament to overthrow the government, due to the above mentioned, is practically small, the governing party or coalition parties and their governing bodies can easily force the government having lost confidence to give up their position or any member thereof. Due to the strong dependence on the governing parties or their parliamentary faction nowadays the government functions as the executive body of the governing parties, i.e. the parliamentary majority of the government.

* For example the Irish Constitution of 1937, the Fundamental Law of 1949 of Bonn.

† Such regulation prevails in the case of Austria, Denmark, Sweden, Greece, Finland, and Estonia, Croatia, Poland, Latvia, Lithuania, Serbia, Slovakia and Slovenia from among the ex-socialist countries.

THE DEMAND FOR GOVERNMENTAL STABILITY

In the cross-fire of the social-political issues emerging in the first half of the 20th century are those governments whose parliamentary coalitions having been formed are compared with how they handle the major political issues. It was realised that they turned out to be weak and vulnerable, and the "failure to govern" became more serious in Europe between the two World Wars. By then the government members had been in political solidarity not just with each other but rather with the party's which delegated them to the government, and – with instruments outside law – could even terminate their mandate. As a consequence – parallel with establishing the governments' political responsibility in the constitution – there was an increasing interest in strengthening the executive power. The stability of the government's constitutional operation – besides the provisions which set the government's parliamentary responsibility – was significantly influenced by the party system of the country concerned, or by the extent to which the regulation of suffrage enabled the parties to enter parliament.

With the progress of the civilian constitution development there has been a gradual impairment of the enforcement of the government's political responsibility. While in the 19th century – because of the lack of a written legal regulation – the vote against any, of the crucial proposals of the leading body of "the executive power integrated in the parliament" might have led to the fall of the government. From the beginning of the 20th century the specifically prescribed motion of no confidence emerging under the rationalizing of parliamentarism made it hard to terminate the governments' mandate by the parliament, and from the second half of the century the institution of constructive no confidence practically inhibited it. Such change in the parliamentary practice of the government's accountability significantly decreased the constant dependence of the highest organ of the executive power on the legislation as a public authority.

With the spread of collective responsibility for governance different constitutional methods have been developed to make the withdrawal of confidence regarding the leaders and the highest body of the executive power more difficult. These steps to making the process more difficult include, for the sake of government stability setting the leading role of the prime minister within the government in the constitution, fading the ministers' individual responsibility parallel with the introduction of collective responsibility, or the institution of the collective motion of no confidence. Despite this, the application of parliamentary tools on withdrawing confidence were narrowed by the constitutions respectively, in some cases they were even abolished, thus limiting or preventing the enforcement of the government's political responsibility before the parliament because the motions of censure were not duly considered. This is the aim of the guarantees – rather the type of procedural law – which set the terms that a specified number of parliamentary representatives' support is needed for

a motion of censure. The consideration of the motion is bound to a so called cooling down period and the decision – in order to avoid governmental vagueness – to an extremely short time limit. In the course of the decision-making on the motion – compared to simple majority – an increased majority of votes, sometimes special voting form is required. Governmental stability is under scrutiny when the provisions according to which after the unsuccessful – and the successful in lesser extent – motion of censure, a new one with similar content can only be submitted after a definite period of time (Kis and Cserny 139-141). Experience indicates that despite such regulations the minister cannot be removed against the prime minister's will even in countries with the "traditional way" of minister's responsibility, since, in this case, the political-confidential relationship between the head of government and his minister is usually provided by political instruments – through parliamentary majority (Sári 322). Without considering the substance of the arguments to which these solutions have been found, we have to say that nowadays, due to this process, the traditional, individual responsibility of the minister does not prevail in a practical sense. The topic of government responsibility can practically – nearly exclusively – be interpreted with regard to the "responsibility for the party" (or perhaps it can prevail with the help of popular elections if we consider it as a responsibility). This issue has been raised more often where the decrease of the government and government members' responsibility to such an extent – nearly irresponsibility – is further counterbalanced by the cardinal principle of government stability.

Regarding the practice of calling the ministers to account several thinkers of constitutional law and political science emphasize the decreasing significance and content modification of the instruments providing the enforcement of political responsibility. It is based on the tendency that nowadays the actual role of the motions of no confidence is minor in government crises. In addition to regarding the practical application of calling to account we can see that the concept of collectivity of government responsibility does not prevail unabatedly either. As a consequence of setting government responsibility new governments are formed with significantly – or less significantly – different programs and several members of the previous government take a seat in the new government. The minister whose authority included the activity causing the fall – "ideally" – resigns with the head of government; this principle, however, is not considered obligatory concerning the rest of the ministers. Moreover, sometimes the head of government and/or the minister also stay. So in case of calling the ministers to account – be it ever so clear in theory – there is often no collectivity in practice and a broad interpretation of responsibility is possible.

Keeping the prime minister or the government's office despite the fact that the no confidence of the parliament has been expressed explicitly – either by the adoption of a motion of no confidence or an unsuccessful vote of confidence – is a category beyond the boundaries of constitutionality, as far as we are concerned. This is the

case even if the obligation of the head of government to resign is not regulated in some constitutions concerning this matter.

From another point of view the legal institution has lived up to the expectation by having protected the governments from raising confidence issues every day. At this point it is necessary to establish our standpoint that – as it is generally valid for regulations of public authority liability – the significance of the instruments of (political) accountability is provided rather by their existence than the frequency of their application. It is the awareness of the possibility of accountability which withholds a minister even with a seemingly strong support of government majority from unlawful or harmful – sometimes just unethical – activities.

Parallel with the above practice the role and significance of the vote of confidence in the governments' instruments have noticeably increased. The vote of confidence initiated by the government, more precisely by the prime minister does not primarily serve as the enforcement of the government's parliamentary responsibility but just the opposite; it functions as an instrument of "governance technique". The government can measure its parliamentary support by it, and it functions as a disciplinary tool – for instance in case of an uncertain government proposal – against the recalcitrant members of the parliamentary majority supporting the government. It can also be appropriate for political pressure – with the threat of the announcement of a new election – to reunite the pro-government forces who are about to fall apart, and put the parliamentary majority under pressure by raising the issue of confidence and keeping it on the agenda (Kilényi 279; Körösényi 316-317). With regard to the fact that the lack of confidence results in the fall of government even in this case, the vote of confidence – to such extent – is still appropriate for the enforcement of the government's political responsibility.

THE HUNGARIAN GOVERNMENT SYSTEM

After the period of the political system change from 1989 the values and elements of democratic governance system were also revived through establishing/restoring the parliamentary government form in Hungary (Law No. XL of 1990). A chancellor-type government model was formed according to the German model, in which the previous equality between the head and members of the government ceased to exist due to the primacy of the prime minister.

The constitutional status of the Government is primarily defined by its relation to the Parliament. The determining element of the relation between the two organs is the relationship based on political trust, which at the same time – different from other areas of state operation – does not mean a hierarchy. The legislation shall not direct the highest organ of the executive power, it cannot take over its responsibil-

ity. The constitutional position of the government has actually become constant over the past twenty years, its bases have not been changed by the Fundamental Law adopted in 2011 either; it has merely updated and specified the former text of the constitution when it regulates governmental responsibility towards the parliament based on confidence, and the position of the prime minister within the government (Kis and Cserny 135-156).

Parliamentary responsibility of the government

The new Fundamental Law is in line with the European tendencies. The ministers are accountable for their activities to the head of government, and the government is responsible to the National Assembly. We note that the Constitution, until it ceased to be in force, included a provision (Art. 39 para 2) on the ministers' responsibility to the Government, which actually meant the survival of a regulation coming from the communist era. Regarding the vagueness on the subject of responsibility, the method of accountability, the procedure and the application of the possible legal consequences made, however, the respective regulation of the Constitution entirely formal.

The Fundamental Law – in line with the regulations of the Constitution of 1998 – originates from the principle of the shared responsibility of the government when it provides for the form of the enforcement of parliamentary confidence, i.e. the constructive motion of censure (Art. 21) – which can be submitted specifically against the head of government, but at the same time against the entire government. During the regulation of the legal institution by the Fundamental Law the procedural guarantees, which have been shown earlier, served as a form of governance stability prevailed.

In Hungary the Law No. XLIII of 2010, Art. 25 para 1 reintroduced* – besides the constructive motion of censure against the prime minister, which is ensured by the Fundamental Law – the "destructive" motion of censure against the prime minister, which can be initiated by any member of parliament. According to the Fundamental Law the statement of censure against the prime minister results in the fall of the government, consequently the motion against the prime minister shall be considered as the motion against the whole government, of which the support of the majority of the members of parliament is needed in order to be effective. The prime minister cannot resign office within three working days from the announcement of the initiation at the Speaker of the Parliament, or from the submission of the motion till

* The background was the Law No. VIII of 1989 on the amendment of the Constitution, which introduced the motion of censure against the Council of Ministers and its members in the frame of the one-party system in the national socialist law system.

the close of voting – but maximum within 15 days (Art. 25 paras 2 and 3). With this the legislator protects the prestige of the parliamentary institution of political accountability so that in this case it prevents the "escape" of the head of government.

In international practice we have not found any examples of the "cohabitation" of the constructive and destructive motion of censure regarding the prime minister. As far as we are concerned the starting point of the regulation might have been that the maintenance of the constructive censure, which was introduced by the German model. Within the domestic parliamentary forces it seems that it served the over-insurance of the present government. Therefore in the Fundamental Law the institutionalization of the destructive censure in Hungary – as the "easier" way of confidence withdrawal from the prime minister (government) by the parliament – can be considered as the increasing counter-balance of the National Assembly against the government, and as the enhanced enforcement of opposition rights in the parliament, which, after all, helps to decrease the power of the executive arm. At the same time regulating the government's parliamentary responsibility this way abolishes the function of constructive censure – meaning its essence – as stable governance. To put it in other words the destructive censure against the head of government questions the maintenance of constructive motion in the same relation.

These days raising the question of parliamentary confidence cannot only be tied to the initiation of the parliament. Recently the constitutions have several provisions according to which the government – possibly through the prime minister – can initiate the statement of confidence against itself, independently or attached to a law proposal, a specific issue, or to the government program. Measuring the parliamentary support through vote of confidence has developed with a different aim and form from the motions of censure in parliamentary law, so in practice it predominantly does not function as the enforcement of political responsibility but as a "governance-technical" tool. The government can judge its support through this, e.g. regarding the renitent members of parliamentary in the majority of case concerning an uncertain government proposal. Regarding the fact that, in this case, the lack of confidence also results in the fall of the government, the vote of confidence, after all, is capable of enforcing the political responsibility of the government.

The Fundamental Law – similarly to the Constitution – also provides for these forms of enforcing parliamentary confidence, in the forms of individual votes of confidence attached to a government proposal, measuring the support which can be initiated by the prime minister but actually on behalf of the government (Art. 21 paras 3 and 4).*

* The independent vote of confidence measuring parliamentary support took place on 6 October 2006, when the National Assembly guaranteed the government in power by further parliamentary support.

In case of losing confidence in a destructive way the obligation of the government's resignation was also set out in the Constitution (Art. 39/A para 5).* The Fundamental Law goes further and sanctions the statement of this type of censure with terminating the office of the government "automatically" (Art. 20 para 1 and para 2 point c). In this case the government crisis will not be solved without the intervention of the Head of State, perhaps without the dissolution of the parliament and setting the date of the new elections. The Fundamental Law does not make the dissolution of the National Assembly constitutionally possible – which can generally be seen in international practice – in case of declaring censure against the government. At times this limitation of the dissolution of parliament might lead to the situation that the positions of power become "constant" as the result the cohabitation of the two organs by force even if the dissolution of the legislation was necessary (Bragyova 172).

The Fundamental Law (Art. 18 para 4) – similarly to the regulation of the Constitution – sets the minister's responsibility before parliament. With the institution of constructive censure as the constitutional tool of governmental stability the possibility of declaring parliamentary censure against certain ministers is generally incompatible logically if we regard the fact that the ministers' responsibility submerges with that of the government. The Fundamental Law also takes it as a basis when it excludes the possibility of submitting a motion of censure against the ministers. So it maintains the government-stabilizing function of the constructive censure thus the minister cannot be removed from office against the head of government's will.

All this, however, does not mean, as in the case of the international practice, that the parliamentary responsibility of the government member ceases to exist entirely. The ministers' policy and the confidence towards them can constantly be controlled by the so called slighter parliamentary tools, which – based on the national regulation – are not appropriate to enforce the minister's political responsibility directly. With the basic "opposition" tools at disposal – such as speeches before the order of the day, interpellations, questions, immediate questions, periodic reports or committee hearings before appointment – the National Assembly can rather cause inconvenience to the ministers, their application does not have any consequences due to the lack of their expressing censure.† However, national and inter-

* Until the end of 2011 – theoretically – the deregulation that the Constitution did not provide for deadline on the government's resignation could cause governmental uncertainty. In case of a withdrawal of confidence from the government the demands of rational parliamentarism justify the requirement that the obligation of resignation shall be realized immediately or at least within the shortest time.

† The problem of this was rather felt during the Antall administration when after the answers to the interpellations of the minister responsible for privatization without portfolio were continuously rejected neither the prime minister nor the minister concerned found it necessary to draw the political consequences (Müller 2010).

national parliamentary practices have proved several times that with the harmonized and planned application of control rights, with the use of publicity and with the help of the media – indirectly – the government member who has lost the confidence of the National Assembly can be forced to resign from office.*

The "overpower" of the prime minister

The prime minister's priority status of public law is clear from the regulations of the Fundamental Law, which includes that the government and ministers' political responsibility before the National Assembly can only be forced through the responsibility of the head of government. In one respect this is expressed by the fact that parliamentary censure against the government can only be realized through the motions against the prime minister, in the other respect the ministers' loss of parliamentary confidence can be manifested in the proposal of removing the head of government from office.

The ministers are appointed and dismissed by the president on the proposal of the prime minister according to the Fundamental Law (Art. 16 para 7). So the person of the head of government is crucial in selecting the member of government and in terminating ministerial office (Holló 458). During governmental duties the ministers are accountable to the head of government as the person determining governmental policy.† Based on the above, however, it is only the prime minister who is entitled to enforce political responsibility – through a proposal of removing from office. The minister is politically accountable directly and exclusively to the prime minister (Müller 176).

It is, however, a key issue in this government's mechanism that what relationship is established in the prime minister–minister relation, and whether it is excluded or allowed at the constitutional level that the head of government instructs the "leaders of the portfolio". The dominant role of the prime minister in the work of the government cannot mean theoretically that the minister is subordinated to and can be instructed by the head of government, but in Hungary, for instance, informally a hierarchical relationship has been characteristic of the prime minister-minister relationship since 1990.‡ In this system of relationship the scope of control

* This happened for example in 1996 before the resignation of Imre Dunai minister for industry and trade, or in the same year in the case of Tamás Suchman minister for industry, trade and tourism, which led to the minister's removal by the president on the prime minister's proposal.

† As we have already indicated the Constitution formally provided (Art. 39 para 2) for the minister's responsibility before the Government, which obviously did not mean more than the – already prevailing – responsibility and accountability before the head of government.

‡ We note that Law No. LVII of 2006 made an effort to formalize this informal relationship when it stipulated that in the course of setting out general guidelines on governance the prime minister can allocate tasks for the ministers in normative decree, and the minister acts according to this and within its framework.

is determined by the prime minister's character and his actual weight within the government, which, in certain cases, may further strengthen the significant public position of the heads of government.

Art. 18 para 2 of the Law No. XLIII of 2010, and Art. 18 para 2 of the Fundamental Law of 2011 unequivocally returned to the solution prior to 2006 that regarding the general direction of the government program the prime minister can allocate the tasks for his ministers, who are obliged to manage the sector under their state administration authority and the subordinated organs by performing those tasks. (The basis for the entitlement of the head of government to allocate the task is that the prime minister is directly attached to the program of the Government, consequently the prime minister has political responsibility for its implementation.) As a consequence, nowadays the hierarchical relationship between the minister and the head of government prevails informally. It is important to emphasize that according to the Fundamental Law the deputy prime minister (Art. 16 para 2) does not mean an intermediary governing level between the prime minister and his ministers.

Based on the above we can ascertain that the substantive character of the parliamentary government form stipulated by the Constitution and later the Fundamental Law, and the government's political responsibility before the parliament exclusively prevail through the prime minister in Hungary. Besides this the Hungarian constitutional regulation – mainly due to the institution of the constructive no confidence – has increased the stability of governance, the independence of the government and government members against the parliament, and at the same time – as a result of the continuous strengthening of the prime minister's position – the role of the ministers' political loyalty towards the head of government. Conversely, however, the dwindling of the minister's individual parliamentary responsibility can be observed, which have been increased by the administrative

This authorization – probably not on purpose – allowed the head of government to do less than earlier, without regulation – even in the relation of the minister – since the right to give direction was narrowed exclusively to task allocation. At the same time we can say that the ministers' individual responsibility – including also the one towards the parliament – was also formally reduced to the minimum by the above provision so that one of the basic elements of responsibility, the substantivity of the minister (decision making) was eliminated. However, the Decision of the Constitutional Court No. 122/2009 (XII.17) – without challenging the strengthening of the prime minister's power – did not acknowledge the hierarchical relationship between the head of government and the ministers by terminating the right of the prime minister to give normative direction which was due as a tool for determining the government policy guideline. (The reason for this primarily was that the normative direction is the management tool of the administrative – hierarchical – legal relationship. The particular public-political relationship between the prime minister and ministers – according to the opinion of the body wearing a robe – is not hierarchical as the minister is not directly directed by the head of government thus the prime minister's task allocation can exclusively be of political nature.) Even according to the text of the law created by the Constitutional Court the head of government – necessarily in order to determine government policy – could allocate tasks for the ministers, which in fact expressed the prime minister's already existing informal right to give direction (Müller 176-185).

phenomena that have resulted in – primarily due to the centralization of the budget and the government's operation as a body –limiting the minister's independence and decision-making authority further (Mónus 270-278).

The public law basis for the government structure that can be characterized by the "overpower" of the prime minister has been established without expressly stating the ministers' position and the rules of their responsibility in the regulations of the Constitution and later the Fundamental Law (Müller 171). The ministers' political responsibility for legislation seems to become empty regarding both its content and consequences, this process can also be considered as the domestic feature of the governance of the prime ministerial nature. The enforcement of the individual responsibility of the ministers "in the service of" the head of government is excluded by the prime minister's – formal or informal – right of direction, in this regard the liability for the government members' "overall" operation lies with the head of government. Since in case of the same person parliamentary responsibility for activities based on direction or done individually is difficult to separate from each other in practice, the lack of the ministers' individual parliamentary accountability – at least in this approach – seems a sensible legislative measure. With regard to this, however, the responsibility for the minister's activity within and outside the scope of authority to direct is borne by the head of government before parliament, which may be modulated by the instruments of accountability – for instance a proposal for dismissal – to be enforced against the prime minister's minister. Finally we can say that the ministers' individual political responsibility towards the parliament can exclusively be an issue under the constitutional and political conditions of the 21st century if the exclusion of the ministers to be directed is stipulated at the Fundamental Law level. Besides this the constitutional regulation of the existing constructive no confidence is a – primarily logical – obstacle to the establishment of the minister's individual responsibility under domestic conditions.

Besides the above the prime minister's charismatic personality as a leader, the creation of the system of the highest ministry consisting of few elements (similar to the English cabinet governance), the centralized central administration, and parallel with these the prime minister's direct manageability of the leaders of bodies which are directed or supervised by the minister help to make the government operate in a presidential way in Hungary (Art. 18 of Law No. XLIII of 2010).

Despite the fact that, compared with the previous Constitution, the Fundamental Law has only brought about correctional changes regarding the regulation of government operation, according to many, the Hungarian state system operates similarly to the French semi-presidential system (informal presidential governance) in practice. The basis of this is the earlier established chancellery-type government model, the frame to which the two-third parliamentary-governmental majority following the parliamentary elections of 2010 and 2014 was provided, which ena-

bled the creation of the current form of government operation. We note that the presidential feature of governance (in terms of political science) can also be observed in the West-European parliamentary democracies but due to democratic traditions and the habits of the heads of power the voluntary restraint of power is different in each country (Sárközy; Müller 208-212).

THE GOVERNMENT'S POSITION IN THE SYSTEM OF STATE ORGANS

The changes in the existing political responsibility of the government towards the parliament have significantly transformed and influenced the concept of the separation of powers. This is seen even today, since the "existence" of the government in fact depends on the parliamentary majority. In this regard – in classic terms – we cannot speak of the separation of the legislative and executive powers, which may be modulated by possibilities like in the case of withdrawal of confidence, the prime minister may initiate the dissolution of parliament by the head of state.

Finally we can say that nowadays the separation of powers is rather dependent on the party system than on the legal system set in the constitution. Within the framework of modern parliamentarism the government is the most important constitutionally institutionalised governing body of the party or parties winning the elections, the parliamentary basis of which is provided by the representatives who form the majority, have the same political commitment and act within the ties of party discipline. The government positions are mainly in the hands of the party leaders. The bills are drafted in the workgroups of the government parties, passed by the parliamentary factions of the same parties and executed by the government consisting of the same parties. In this approach the operation of public authority – according to Duverger's wording – is not very different from the one-party practice at first sight, in which the executive and legislative powers, the government and parliament are merely "constitutional scenery" (Duverger 518).

In the parliamentary systems the concentration of power is obviously increased by the majority party or parties' cohesive force and discipline. If the strict requirements of party discipline prevail in the course of voting the parliamentary factions are forced to be obedient, to the decisions of the parliament which are in accordance with the majority party or parties' standpoint. Within such a framework the real content of responsible governance is rather embodied merely in the possibility to publicly debate the government activity (Tölgyesy 91). This mechanism does not exclude the application of the instruments for parliamentary control but – in fact – it is always without consequences. As a counterpoint to the described process a decrease in party discipline and in the number of parliamentary majority results in the decrease of government stability, consequently in such cases – even if temporarily – the separation of powers can be increased (Duverger 522).

Such political lines of the separation of powers between parties have emerged much stronger at the boundaries of constitutional institutions since the second half of the 20th century, because, for instance, in case of a coalition government the mandate of a minister does not depend on the parliament but on the prime minister and the minister's party in coalition (Sári 224). We must add, however, that despite the above described tendencies without the centuries-old relation of constitutional institutions or the legal systems set in the constitutions the parliamentary government system would fail to function, consequently the government's political responsibility is only faded by the existence of being pro-government or in opposition (Sári 224).

The question is – which is put by many – whether the separation of the parliament from the government, due to the above mentioned processes, and in connection with this the government's responsibility towards the parliament has a real content nowadays, when the government is supported by the same parliamentary majority, which has the right to make a decision on expressing confidence or no confidence against the government. We share the opinion that in the parliamentary system where the operation of the government depends on the confidence of the parliament and the majority of the parliament is in party political aspect the same as the government the separation of power is being degraded to a functional organizational issue (Schambeck 650). With the diminishing of the differentiation between the legislative and executive powers the government's "real" political responsibility towards the parliament also sinks slowly into oblivion. Our conviction is also strengthened by the standpoints which consider the state systems based on the classic principle of the separation of powers incompatible with the absolute requirement for government stability (Kilényi 277).

Under these conditions we think that the real restraint on government activity, with regard to the European tendencies in Hungary as well, is – besides legislation – rather the operation of the bodies which can be evaluated in practice as a kind of factor limiting execution. Most frequently it is the body of constitutional protection, the economic supervisory body of the parliament, or the state organ competent expressly in the control of budgetary management. But the institution of the ombudsman also fits the bill, which is nowadays an important tool of execution – within this public administration – control of "political nature", and as the body of the parliament it gradually supplements the control built on the subjection to administrative law with the aspect of expediency and "beyond the law". Apart from the above the institution of the president of the republic can also be mentioned, which may be appropriate for the correct counterbalance of the executive power in countries where it recieves a significantly different interpretation from that of the traditional parliamentary democracies due to the personal belief of the person in position.* The democratic operation can be strengthened by the increase of the

* This is what the period of the head of state was like in Hungary between 2005 and 2010.

number of authorities with the possibility of independent legislation (self-regulatory organisations) which supplement the government operation and are directly accountable to the legislation (Sárközy 9). According to this the government which is not supported by a qualified parliamentary majority, according to the standards of the rule of law, may further be limited in its freedom to act in the system of state organs functioning as the counterpoint of the executive power.

There is no need to explain the unequivocal increase of the area of operation of the executive power in the past one and a half centuries. This can happen with the appearance of new areas to be influenced and its integration in the power (such as the management of integration cases following the establishment of supranational organizations), or at the expense of the scopes of other organs with public authority. The extension of the executive can only be accepted within the framework of the rule of law if parallel with this process we can receive constitutional guarantees that the exercise of power is kept within the constitutional framework either by appropriate regulation of government responsibility or by providing rights for parliamentary control and for control from outside parliament. Failure to do so, however, may result in the lack of the deficit of democracy and democratic sense, and may cause an overwhelming dominance of the executive power.

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Fanni Mandák

Signs of Presidentialization in Hungarian Government Reforms – Changes After the New Fundamental Law

INTRODUCTION

In the last three decades political and institutional assets of modern democracies have encountered several changes. Some parliamentary democracies have become more presidentialized in their political attitude without changing their formal institutional structure. This process, the so-called presidentialization of politics, has appeared in three fields: the executive arena, the party arena and the electoral arena. This paper analyses the changes of the Hungarian executive with a special focus on the relevant articles of the new Fundamental Law and its effects on the presidentialization of Hungarian politics.

The position of the executive is determined by two elements, its power in the political system and the balance of power in the government. The paper studies how the presidential tendencies, such as the reinforcement of the government and of the Prime Minister, have appeared in Hungary examining the relevant reforms of the internal structure and everyday function of the government and of its decision-making processes. The paper takes into account the period between the 1980s and the 2010s.

THE PRESIDENTIALIZATION OF POLITICS

The interpretation of presidentialization requires a distinction between *de facto* and *de jure* presidentialization. During the process of *de facto* presidentialization, leaders increase their power resources and their autonomy both in relation to their own party and within the executive branch. Electoral processes change and, as a result, attention shifts to the candidates. While the system formally remains parliamentary, functions and relations between dominant players change fundamentally. The process of presidentialization influences a particular political system by causing a shift from collective political power and responsibility to individual power and responsibility, while the form of the government remains unchanged (Poguntke and Webb 4-7).

De facto presidentialization is based on the working logic of presidential political systems and it generates three major changes: firstly, it ensures increased power

resources for the leader of the executive branch, secondly, it grants greater autonomy to the leadership, and thirdly, it personalizes the electoral process in a way that it becomes leadership-centred.

De jure presidential systems ensure a greater executive power for the leader that is based on her/his constitutional independence from the legislature. In these systems presidents are not answerable to parliament, in most cases they can individually select their cabinet and may govern without significant external interference. The president enjoys a great degree of intra-executive autonomy, without having to face intra-party influence and leverage.

According to Poguntke and Webb, presidentialization occurs in three major fields, specifically in the executive branch, at the party level and in the electoral arena (about presidentialization see also Foley, Pryce, Poguntke, Mughan).

In the executive branch the presidentialization of politics can be identified with the weakening of the cabinet's collective character and the empowering of the premier's executive power (about the strengthening of the prime minister's powers see also King, Dunleavy and Rohdes 68:3-28.). Increasing the power of premiers has two important effects: firstly, the number of fields directly controlled by the head of government expands, secondly they are able to successfully overcome other political players with differing opinions.

The criteria of presidentialization on premier and cabinet level

The presidentialization of politics can be seen through numerous changes at the level of the premier and the cabinet. The conceptualization of those phenomena is of crucial importance, because these conceptual criteria will be used in scrutinising events in the country studies later in this paper.

The criteria do not bear the same weight in all cases; moreover, sometimes their use can even be counterproductive. It is not possible to establish a generalized system of criteria applicable with maximum reliability and efficiency to each and every country, because presidentialization is an extremely complex phenomenon that is influenced by the very different historical heritage and traditions of the political systems under review. I prioritised the following list of criteria taking into account the increase of powers and degree of autonomy, the expansion of administrative staff and functions, belonging to the premier. The criteria of presidentialization vis-ŕ-vis the change of relations between the head of government and the cabinet are as follows:

- the expansion of the premier's powers,
- the greater centralization and coordination of political processes,
- the increase of the control that the Prime Minister's Office exercises over political decision processes,
- the shifting of policy decision initiatives from ministries to the Prime Minister's Office or to external consultants,
- the concentration of controlling and consultative resources in the centre of government,
- the growing importance of bilateral relations and meetings between the Prime Minister and certain ministers,
- the growth of the premier's personal advisors and consultative bodies in numbers, allowing her/him to achieve greater autonomy and independence from the cabinet and from bureaucracy itself,
- the increase of financial resources controlled by the head of government,
- the shift towards an integrated communication strategy controlled by the premier (setting up communication and public relations offices with the purpose of articulating and explaining the Prime Minister's political ideas to the voters),
- opinion polls concluded by the Prime Minister's Office about the premier's popularity and voters' preferences,
- increasing fluctuation of ministers,
- the growth of the numbers of technocrats and politicians without party allegiance.

In order to examine whether the above-mentioned changes can or cannot be observed in present day's Hungary, I shall scrutinize Constitutions, laws related to government bodies and their reforms. The application of rules and regulations and the functioning of everyday politics will be looked at through the glasses of available statistical data.

THE INSTITUTIONALIZATION OF PRESIDENTALIZATION OF THE HUNGARIAN GOVERNMENT

The governing system that was formed by the law No. XXXI of 1989 and law No. XL of 1990 became consolidated in recent years in spite of lacking political consensus, and its essential fundamentals remained the same until the Fundamental Law of 2011. However, the central body of the government and the working body of the Prime Minister, the Prime Minister's Office (PMO) and the office of Prime Minister itself, have substantially changed.

In order to introduce how and in what measure the presidentalization of the Hungarian political system appeared at the level of the executive, I am going to analyse

in detail how the PMO has developed into a governing centre of authority in the recent 25 years, how this office has exerted a growing control over the political decision-making processes, and how the concentration of controlling and advisory means has grown at the centre of government. Has the number of the Prime Minister's personal advisors and advisory syndicates grown, have the available financial sources been modified and how, has an integrated communication governing system been developed, which is led and controlled by the Prime Minister?

In order to review the antecedents, I am briefly going to discuss the predecessors of the PMO before the political system change, the post of the Secretary of the Cabinet Council in operation until 1 April 1988, and the Office of the Cabinet Council in operation until 5 June 1990.

The working body of the Prime Minister until 1998

The changing of the political system and the beginning of the 1990s

In the totalitarian state, the government was not the centre of political power, power was not vested in the government but in the party, the secretary general of MSZMP and the Central Committee. The government practically "administrated" the party's political decisions (Müller 13-20.). This kind of structure started to change at the end of the 1980s, well before the political changes. While the Secretary of the Cabinet Council was not, the Office of the Cabinet Council was led/headed by an undersecretary from 1988 onwards. The Secretary of the Cabinet Council fulfilled the legal and administrative tasks in connection with governing. The Secretaries edited the official papers, provided the necessary economic and technological conditions for the operation of the government, furthermore, they also dealt with personal issues or affairs of high-rank political leaders. However, the secretary only had a formal role in the decision-making process. From 1987 a real political opposition started to be formed and the government had to react to it. From 1988 the office of the Secretary of the Cabinet Council changed, its former spheres of action were expanded and its name was changed to the Office of the Cabinet Council. The Administration of the Cabinet Council was introduced with an important role in political decision-making, and this new office was led by an under-secretary and the number of apparatus was increased. Furthermore, the coordination of the Government Committee Secretaries, the role of government spokespeople and media management, and the coordination of government and parliament were reorganised and included in the responsibilities of this new office.

Starting from the Németh cabinet, the government gradually changed into a centre of power and an actor of policy forming. This change of course became even more

significant along with the events of 1989-1990. Antall József made efforts in concentrating power and centralizing. He expanded the Prime Minister's Office and appointed a number of ministers without portfolio and political under-secretaries. With the help of Government Committees and Cabinets, he built a structure of a double decision-making system of ministers. But despite all the efforts, in the first term the Prime Minister's Office did not get too much of a central role.

It is important to highlight one more change. The political changes did not only lead to the changing of the name of the Cabinet Council Office, but also to the changing of its essential substance as it did not work now as a government apparatus but as a prime ministry apparatus. (Hungarian Constitution, Law No. XX of 1949, Art. 33/A).

The Prime Minister's Office changes into a ministry: the provisions of the Horn government

MSZP - despite of having a stable majority in the beginning of the second term - decided to form a coalition. The needs of a coalition led to another increase in the number of leading positions. As a result of the government coalition, the Coalition Reconciliation Council (CRC) got an important function in the preparation of decisions. The role of the institution was to oppose a chancellor-type governing in the beginning of the first term because the important questions were not discussed within the government but at reconciliation meetings of the two parties. The under-secretary of the executive led the Office of the Prime Ministry in this term, however, it should have been led by a minister from 1997 (Law No. LXXIX of 1997, Art. 39). This change was a huge step in the life of the institution and in the role it fulfilled in the governing system as it offered the possibility of lifting the PMO to the rank of a ministry. This change of the PMO and the possibility of appointing a minister to lead it also reaffirmed its role in the political system and in the decision-making.

The role of the PMO is to harmonize the government's parliamentary work, to prepare decision-making and to harmonize government communication. The main institution preparing decisions however in this term was not the PMO, but the meeting of under-secretary executives, where the PMO, the under-secretaries of ministries, the deputy under-secretary of the PMO, the cabinet leaders of the ministers without portfolio, the Minister of the Interior and the deputy of the Prime Minister's cabinet leader, all took part. The various cabinets working beside the government (Government Cabinet, Economic-, European Integration- and Home Security Cabinet) had an important role in the preparation of decisions in which the affected ministers took part. It is important to also mention the government committees, which in contrast to the cabinets did not only have a consulting role but also an independent decision-making role.

From 1996 onwards the PMO has had a more significant role in the preparation of decision-making and has helped the harmonizing of the government's parliamentary work. The PMO prepares an expert's report on the discussed proposals and bills that is not only a constitutional and legal but also an economic and political evaluation.

The Hungarian government system between 1998 and 2010

The "flagship" of government: the Prime Minister's Office

The most outstanding change of the term was the changing of the PMO into a central institution which as a result of a 1997 law was led by a minister. The minister leading the PMO appeared in sessions, which operated with an increased number of participants because with the emergence of the new ministries eighteen people took part. The charter of the PMO stated that the institute led and harmonised the government's strategic activities (Government Decree 137/1998). So the change of the PMO to a chancellor office began. As a result, the whole procedure of decision-making was in the hands of the Prime Minister. The government aimed to provide the conditions of a political leadership and government coalition (Müller 123).

The coalition reconciliation order changed and was decided. Reconciliations about parliamentary work were made by the chancellor minister leading the PMO, while the political reconciliations were made in the cabinet sessions. These later were only attended by the leaders of the important ministries and the leading minister of the PMO. In this way, the order of coalition reconciliation was also partially changed. It is important to highlight that although a coalition government was established this term, the necessity of reconciling with partners caused less trouble to Orbán Viktor now, than to Horn Gyula in the previous term. According to this, one can conclude that the issue of how strong and dominant the Prime Minister turns out to be in the government and in the political system is determined by the constitution and union of the coalition.

Among the reforms aiming to make the PMO stronger, one outstanding issue was the system of reference-units. Altogether six reference-units were established within the institution of the PMO, namely an economic and financial, a socio-political, an agricultural, an environmental and infrastructural, an internal affairs and justice, and one on external affairs and defence. The reference-units were the different specific policy units and main departments of the PMO. Their tasks were to follow and harmonise the work of the specific portfolios and to work out individual specific advice. The reference-units limited the freedom of action of the ministries (Müller 122).

Besides introducing the system of reference-units, a kind of reorganisation also started because those offices that did not connect to the strategic tasks of the institution directly were reorganised. The Government Office for Hungarian Minorities Abroad was joined to the State Department, the Government Office of National and Ethnic Minorities was joined to the Department of Justice but youth was handed to the Youth Portfolio. These reorganisations had a positive effect on the PMO because they reduced the tasks that did not relate to leadership and coordination but rather had to do with specific policies.

From here onwards, the PMO did not only have administrative tasks but it turned into a political body because it was also concerned with the strategic leadership of the government and validated the needs of the local governments with the decision-making processes.

Reforms of the fourth term

The scope, the structure and the running of the PMO were all freshly regulated being the first new regulations of the Medgyessy government (Government Decree 1481/2002). These did not cancel the system of reference-units but they changed its name. The position of minister without portfolio was cancelled and their tasks were taken over by the leading minister of the PMO. The PMO's scope of duties was extended with the inclusion of tourism and territorial development while previously cancelled institutions (The Government Office for Hungarian Minorities Abroad and the Government Office of National and Ethnic Minorities) were rejoined to the PMO. The aim of the reform was only to leave tasks for the PMO that are directly connected with the Prime Minister and the government's decision-making and coordination. However, the post of Government Commissioner was cancelled, a lot of cabinets, councils and committees were established and the number of honorary and political under-secretaries with individual specific tasks increased. Due to these changes, the number of people working in the PMO increased from 540 to 700 by 2002.

When examining the interests and causes behind these reforms, it is important to highlight that Medgyessy Péter became a Prime Minister as an "outsider", therefore for him it was twice as important to strengthen the position of the PMO as his own.

In autumn 2004 Gyurcsány Ferenc became the new Prime Minister, who – owing to the strange political situation – did not change the governing structure or the programme of the government. But he managed to develop an autocracy for himself by 2005. The party turned into a one-person party (Körösényi 144-146). The minister leading the PMO remained Kiss Péter, but the leadership of the Prime Minister's Cabinet was taken over by Szilvásy György. In order to increase the number of Gy-

urcsány supporters, he significantly increased the number of PMO workers and turned it to be the most important institution in political patronage. He established parallel apparatuses, formed informal advisory syndicates, increased the number of government commissioners and founded the informal Prime Minister Commissioner position. He separated his own cabinet from the PMO apparatus.

The changes of 2006

After the elections of 2006 there was no change in the government, and the changes in the government structure made under the second Gyurcsány government were the more limited since 1994. The basis for the changes was Law No. LVII of 2006 which is about government institutions, members of the government and the status of the under-secretaries. Besides the content of the reform its preparation, elaborations and acceptance are also important as this so-called government law was developed without the apparatus, with the involvement of external experts without technical agreements (Müller 27). The reform had formal effects in three fields: the Prime Minister's function, decision-making and the scope of authority of the office-leading minister. It is important to mention the introduction of professional-political agreements that limited the single ministers' authority and strengthened the Prime minister a lot more than the system of reference units, as this new system controlled and influenced the portfolios' work. At these meetings the political, professional, judicial and financial sufficiency of the amendments were examined (Müller 134).

Besides the formal changes, there were visible informal changes of government work-style as well. Among the informal changes the most important ones were: the growing number of cabinet sittings led by the Prime Minister and the decreasing the length of the government sittings (Rákosi and Sándor 346).

As a result of the reforms of 2006 the PMO was reorganised. The office structure became vertical, and its units depended on the Prime Minister or the leading minister of the PMO. The Prime Minister's Cabinet was dissolved and as a result the Prime Minister could use the whole office apparatus to fulfil his duties. The scope of authority of the leading minister of the PMO was expanded as the civil home security services and the National development Agency were joined to the institution.

Although the government organisation law of 2006 strictly limited the number of under-secretaries who can be appointed, its effect was weaker concerning the PMO. Within the PMO four or five under-secretaries could be appointed. Along with the institution leading minister, the maximum number of government leaders was ten in the PMO (Gallai and Lánczi 304-306).

It is essential to highlight among the reforms concerning the PMO's structural organisation those that dissolved the prime minister's cabinet and the cabinet leader position. The aim of this regulation was to develop a one-person, one-centre type of leadership (Rákosi and Sándor 357-358). The change of the institution because of its size and versatile scope of authorities was a failure. In 2007, the Prime Minister's Cabinet was restored (Müller 127). In 2007 the government cabinet was rearranged, which then became a strategic and operative body and did not merely deal with decision-making. As a result of the reforms, it was the task of the government cabinet to define the activities concerning the realisation of the government programme, to discuss medium- and long-term strategies, to prepare the government's decision-making, and to make declarations about uncertain amendments (Government Decision 1044/2007).

Government decision-making changed first as the result of the reforms of 2006 and then 2007. The most important aim of the first actions of the second Gyurcsány government was to ensure that only those amendments reach the under-secretary meetings that have already been technically and professionally agreed. In order to do this, a three-step agreement system was developed, within which the very first step was a professional political discussion in the PMO. This was the so-called prescreening that examined whether the given amendment accords with the government's programme. After this came agreements with the portfolios and social partners and finally a discussion at the under-secretary meeting.

The second Gyurcsány government did not only rearrange the PMO and the process of decision-making but also strengthened the Prime Minister. According to the reforms, all the political leaders were appointed or dismissed by the Prime Minister, he ratified the structural and operational regulations of the different ministries and appointed commissioners to key fields who were directed by him. The reform law of 2006 stated that the Prime Minister can instruct ministers and the leaders of the government offices (Law No. LIV of 2006).

The aforementioned actions of the Prime Minister in the fifth period all served the formal and informal strengthening of the Prime Ministers authority. The PMO turned into a government centre directly led by the prime Minister.

The Hungarian governing system after 2010

The structure and the essential fundamentals of the government

The second Orbán government basically left the government model of 1990 unaffected in spite of introducing a lot of changes concerning the structure, the operation and the character of the government. The most important elements of the govern-

ment (its structure, inner connections, situation of the Prime Minister) were left unmodified, but drastic changes were made concerning the number of ministries, which were radically decreased. Orbán formed the so called "top-ministries", rearranged the division of tasks among the portfolios and introduced the position of a deputy Prime Minister, with which he modified the setup and operation mechanisms of the government and dismissed the principle that all the ministers are equal.

The Constitution of 2011 changed the former regulations concerning the tasks and scope of authorities of the government (Hungarian Constitution, Law No. XX of 1949 Art. 35, [a]-[m]). It states that the government is the executive's general, and the administration's major, body. It explains that the government's scope of authority is everything that according to the constitution or any laws does not belong to any other bodies (Constitution of 1949, Art. 15). This kind of determination of the scope of authority would not mean the strengthening of the government by itself, if all the other departments' scope of authority was clearly defined, whether in the constitution or in any other laws. Furthermore, the number of the controlling bodies (the Constitutional Court, the Parliament, the president of the Republic) did not decrease. The full picture is more layered and in several cases contradictory. The Constitution differentiated the government from the other offices on a constitutional level and made it stronger in opposing them. The opportunity of a Constitutional Court review was decreased in the cases of economic and financial laws. Furthermore, it limited the cases in which one could turn to the Constitutional Court. While the Law No. XX of 1949 said that anyone can start a procedure at the Constitutional Court (Constitution of 1949, Art. 32/A para 3), according to the Constitution now, this can only be done by the government, one fourth of the representatives and the Commissioner for Fundamental Rights (Fundamental Law of Hungary, Art. 24 para 2, [e]).

It is important to mention that some of the direct or indirect changes aiming to strengthen the government made it even more difficult to compensate for the presidentalization of the institutions. The Constitution expanded the circle of the two-thirds laws beyond fundamental rights and the regulation of the state offices to social and economic policy cases (family protection, national wealth management, exclusive state property, burden sharing and the regulations of pension system). Furthermore, it expanded the scope of cases belonging to these institutions with regulations on forming and operating institutions that are independent from the government, and with the bank-act.

The structure and organisational system of the government

The government used to stand for the Prime Minister and equal in status ministers until 2010 (Constitution of 1949, Art. 33). This structure changed as a result of the

reforms of the second Orbán government as the position of the Deputy Prime Minister was introduced and with this one or more of the equal ministers emerged. The minister of the Ministry of Public Administration and Justice rose to higher status than the other members of the government because besides being in charge of eleven professional policies, he became in charge of the unification of government work. Besides government coordination, the minister of the Ministry of Public Administration and Justice became the general deputy of the Prime Minister as well[*] , something that strengthened his advantaged position and breached the former principle of equality of ministers. This was somewhat modified by a government regulation which stated that all the members of the government have the same equal right of vote (Government Decision 1144/2010, Art. 67).

The government significantly decreased the number of ministries with the development of the previously mentioned "top-ministry" system. The structural rearrangement of the government – the general number of thirteen, in the previous period eleven, ministries was decreased to eight[†] – did not only simplify the structure of the government and made a more solid government policy possible, but it also centralized the procedure of decision-making. A significant concentration of tasks and scope of authority was achieved by fusing different departments (Vadál 43).

Another change of the government structure meant that the Prime Minister could appoint a Commissioner to deal with the tasks belonging to his duties. The mandate of the Prime Minister's Commissioner is not limited in time, it is not maximised as in the case of government commissioners, but it is only for a given period.[‡] It is noteworthy that the first Prime Minister's Commissioner – right after the reshuffle of the government – was appointed as a spokesperson by Orbán Viktor, thus strengthening the Prime Minister's communication within the institution as well (Law No. XLIII of 2010, Art. 32).

The regulations concerning the position of government commissioner remained almost unchanged since Law No. LVII of 2006. A change, however, was that their limitation in number was removed and they could get appointed according to the recommendation of the Minister of Government Actions, and that their secretary was also in this ministry and not in the Prime Ministry (Law No. XLIII of 2010, Art. 31). The new structural government law ended the limitation of the number of ministers without portfolio.

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* Besides the general deputy prime minister Viktor Orbán nominated a second deputy prime minister too, Zsolt Semjén.

† Ministry of Defence, Ministry of Foreign Affairs, Ministry of human Resources, Ministry of interior, Ministry of National Development, Ministry of National Economy, Ministry of Public Administration and Justice, Ministry of Rural Development.

‡

As a compulsory element of the structural changes of the government, the Prime Minister's Office was removed and the Prime Ministry was established. The tasks of the former Prime Minister's cabinet, such as the political coordination of the government was taken over by the Prime Ministry while professional and administrative tasks were given to the Ministry of Public Administration and Justice and its leading minister. The Prime Ministry was led by the Prime Minister and operated by the under-secretary (Law No. XLIII of 2010. Art. 36). The tasks of the former government coordination centre were divided between two bodies which created a kind of parallelism and created a "competition" between the two institutions.

Changes in government coordination tools in terms of centralization

Among the reforms of 2010 that were concerned with the tools of coordination, we must mention three. With regard to all three tools, one can discover a will of centralization and strengthening of the authority of the Ministry of Public Administration and Justice's leading minister. Owing to the 2010 reforms, the government agreements on the amendments were no more decided according to the professional political agreements of the second Gyurcsány government but by the Ministry of Public Administration and Justice's under-secretary (Government Decision 1144/2010, Art. 24). According to this change the administration centre of the government decided whether the ministries' initiatives could enter the procedure of government decision-making.

Government coordination from 2010 was broadened with a new tool – the personal control – as the authority of the Prime Minister was getting stronger. According to the 2010 law on government structure, the Minister of Public Administration and Justice and the administrative under-secretary must ratify the appointment to positions from deputy under-secretary to department leaders of the ministries. With this centralization reform the independence and leeway of certain ministers were limited, and, as there were no written criteria of suitability, it became possible to re-politicise civil service (Müller 135-137).

The last coordination tool to be examined is the approval of the organisational and operational regulations of the ministries. The 2010 law on government structure took this right from the Prime Minister and gave it to the Minister of Administration and Justice and added that the Prime Minister can work out and define the overall regulation system (Law No. XLIII of 2010, Art. 60 and Government Decision 212/2010, Art. 2).

Such a strengthening of the minister leading the Ministry of Public Administration and Justice can limit the Prime Minister's authority in decision-making in the case of some amendments, although basically it cannot become a more general author-

ity limitation tool as the minister leading the Ministry of Public Administration and Justice also depends on the government.

The position of the Prime Minister within the government

After the laws of 2006 and 2010 on government structure, the second Orbán government strengthened the leading role of the Prime Minister within the government at a constitutional level by saying that the Prime Minister determines the general policy of the government (Fundamental Law of Hungary, Art. 18 para 1). The former constitution merely defined that meetings on government regulation and decisions and their realisation should be led/conducted by the Prime Minister (Constitution of 1949, Art. 37 para 1). From 2010, the Prime Minister had a determining role within the government. He formed/shaped government policy and made the important strategic decisions. In defining the general policy of the government, he was obviously the leading figure in the government. The ministers are becoming more and more dependent on the Prime Minister's decisions as, according to the Constitution, the ministers are leading their ministries within the framework of general government policy (Fundamental Law of Hungary, Art. 18. para 2). The general policy of the government is defined by the Prime Minister. The Prime Minister decides the list of the members of the government and under-secretaries and chooses his deputy or deputies. He can appoint ministers without a portfolio. Like this the Prime Minister's personal authority fully encompasses the scope of work of all under-secretaries, the commissioners and the Prime Minister's Commissioners. While earlier it was a constitutional duty to introduce and accept the government's programme in Parliament (Constitution of 1949, Art. 33 para 3), the new Constitution did not contain anything about this. It does not automatically mean that the presentation of the government's programme could be avoided, however, it is obvious that repealing a constitutional command increases the Prime Minister's freedom, as, apart from the need of presentation, the need of a vote has also been repealed. The second Orbán government's regulations allow the Prime Minister to issue a government regulation or resolution on his own right between government sessions if it is reasonable, and these can be submitted to the full government later (Government Decision 1144/2010, Art. 77).

The reforms – concerning the power and authority of the prime Minister – between 2010 and 2014 strengthened the position of the Prime Minister even further, thus intensifying the previously started process.

Changing the emergence of the syndicate's principle

The principle of the government's syndicate may have originated in the concept of the government and the regulations about its content. The form of the syndicate is a government session which is regulated in a detailed resolution about the government's procedure. The second Orbán government reinforced the Prime Minister's role, however, it would not have decreased or ended the view of government as a syndicate. As a result of government reforms, this syndicate view changed both in its legal and its practical aspects. While the previous constitution named the government meetings as the government's decision-making forum (Constitution of 1949, Art. 37 para 1), the new constitution does not include the issue of a government meeting, nor does it contain a reference to it as the working form of the government. The regulation about the work of the government (Government Decision 1144/2010), in contradiction to the constitution and the government law, provides that the government fulfils its tasks and scope of authority as an institution and regularly holds meetings (Government Decision 1144/2010, Art. 1-2). However, it is important to point out that the definition of a syndicate has moved from constitutional level to the government level.

Regulations say that government meetings can only be attended by the members of the government, regularly invited advisors (the leading Prime Ministry undersecretary, the Ministry of Public Administration and Justice's communication under-secretary, the administrative under-secretary of the Ministry of Public Administration and Justice, the Prime Minister's spokesperson and the government spokesperson), the proponents of a measure and those invited by the Prime Minister (Government Decision 1144/2010, Art. 59-60). The regulation does not specify who the Prime Minister can invite to the meeting. When talking about the characteristics of a syndicate, it is important to highlight two practical changes that have been present in Hungarian political life as a result of long practice. One is that although according to government regulations, the government decisions are made by voting (Government Decision 1144/2010, Art. 67), they usually decide without a formal vote, a fact publicly admitted by the government spokesman's office in 2007 (Müller 37:1-11). This lack of a formal vote may strengthen the position of the Prime Minister as thus he cannot find himself in a minority position on any point. The other important tendency was reducing the number of government meetings that was due to agreements within the government's inner consultation bodies, pre-decisions at meetings and the growing number of informal meetings.

Indexes of the institutionalization of presidentialization

After the analysis of institutional evolution and development I now turn to the practical consequences of the reforms.

My first aim was to analyze the changes of the PMO and Prime Ministry staff. Unfortunately staff numbers are available only for the period of 1995-2001 and 2010-2013. Because of the lack of data for the whole period under study, I cannot examine the evolution of staff numbers.

Other important indexes are the frequency of government meetings, the number of the proposals and drafts presented at these government meetings and the budget of the PMO. In the next paragraphs I shall analyse these indexes in detail.

The frequency of government meetings and the number of presented drafts

As the consequence of the institutionalization of presidentialization, decisions are not made in government meetings, but in other fora (for example at bilateral meetings between the PM and the most important ministers). The decrease of government meetings and the shortenings of the sittings testifies to a presidentialization.

In Hungary there are no official statistics about the duration of government meetings, only about their frequency. From the diagrams we can see that there are no great differences, almost every legislature has held one meeting per week.*

Table 1.
Number of government meetings and proposals

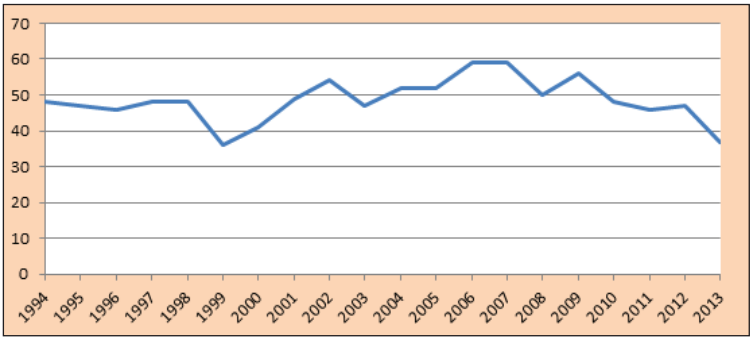
	Number of meetings	Number of proposals	Proposals per meeting (average)	Meetings per month (average)
1994	48	797	16,6	4
1995	47	1288	27,4	3,9
1996	46	1188	25,8	3,8
1997	48	1214	25,3	4
1998	48	1123	23,4	4
1999	36	974	27,1	3
2000	41	858	21	3,4
2001	49	1085	22,1	4,1
2002	54	1156	21,4	4,5
2003	47	1129	24	3,9
2004	52	1181	22,7	4,3
2005	52	1215	23,4	4,3

* The only exceptions are the periods between 1998 and 2000, and 2010 and 2013. Both periods are part of the Orbán governments.

	Number of meetings	Number of proposals	Proposals per meeting (average)	Meetings per month (average)
2006	59	1143	19,4	4,9
2007	59	1186	20,1	4,9
2008	50	790	15,8	4,2
2009	56	949	16,9	4,7
2010	48	758	15,8	4
2011	46	1110	24,1	3,8
2012	47	1360	28,9	3,9
2013	37	1402	37,9	3,1

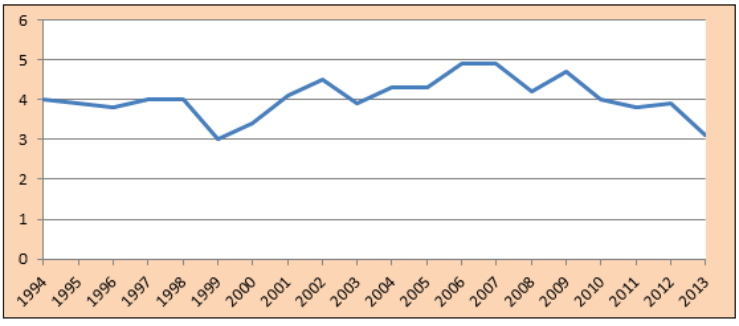
Resource: Reply to data demand for public interest (XVII/73/4/2014) Ministry of Public Administration and Justice). Interpretation of data is my own.

Diagram 1.
Number of government meetings



Resource: Reply to data demand for public interest (XVII/73/4/2014) Ministry of Public Administration and Justice). Interpretation of data is my own

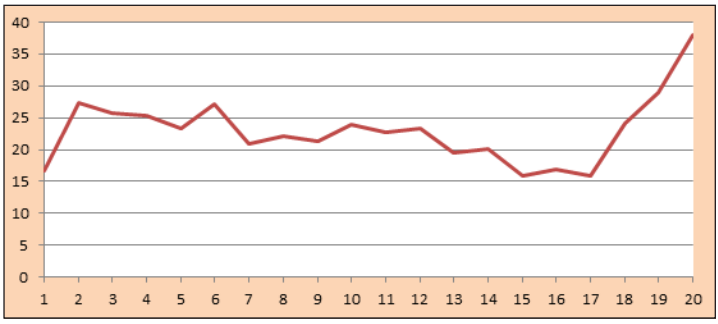
Diagram 2.
Monthly average of government meetings



Resource: Reply to data demand for public interest (XVII/73/4/2014) Ministry of Public Administration and Justice). Interpretation of data is my own

It is interesting to observe that the number of presented drafts is higher in those two periods when there were less government meetings. It is presumed that more drafts were presented per meeting than in other periods. To analyse whether the time dedicated to single drafts was decreased in these two periods or not, so that there was not a real and detailed debate about drafts in government meetings, we should know the exact duration of the sittings. Despite the lack of information it is assumed that government meetings were no longer than in other years, on the contrary, they were shorter.*

Diagram 3.
Number of drafts presented at the government meetings



Resource: Reply to data demand for public interest (XVII/73/4/2014) Ministry of Public Administration and Justice). Interpretation of data is my own.

Budget of the PMO and the Prime Ministry

The strengthening of the PMO and the Prime Ministry can be verified clearly not only by the development of their staff and the increase of their rights and competencies, but also by the evolution of their annual budgets. The growth of the institutions' budgets is very visible and linear, with the exception of the year 2004. It is important to note that the significant increase in year 2002 was done by the Medgyessy government. The PM Péter Medgyessy was usually described as a less carismatic politician and a PM who owned less party support than his predecessors and successors.

The reason of the decrease of 2010 is that the new Prime Ministry had much less staff and tasks and competencies than the PMO had previously. As from 2011 only the total budget data is available, the diagram does not contain the last years of the second Orbán government.

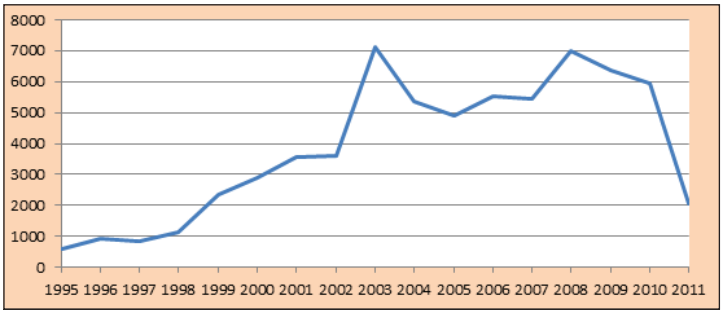
* Interview with György Müller who was the legal deputy under-secretary of the PMO between 1990-2006.

Table 2.
Budget of the PMO

	Administration	Maintenance	Total
1995	590,6	450,1	1040,7
1996	916,4	603	1519,4
1997	823	1087,6	1910,6
1998	1152,6	1628,7	2781,3
1999	2355	2118,1	4473,1
2000	2905	2293,2	5198,2
2001	3540,7	2235,9	5776,6
2002	3612	2268,4	5880,4
2003	7098,5	3821,5	10920
2004	5343,6	5077,1	10420,7
2005	4893,8	4728,9	9622,7
2006	5525,8	4733,9	10259,7
2007	5456,4	47735	10229,9
2008	6976,6	14758,9	21735,5
2009	6383,2	14388,3	20771,5
2010	5946,8	12370,8	18317,6
2011	2038,7	934,1	92972,8

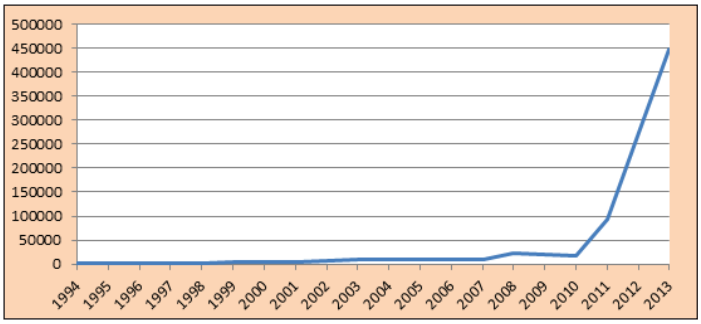
Resource: Reply to data demand for public interest (XVII/73/4/2014) Ministry of Public Administration and Justice). Interpretation of data is my own.

Diagram 4.
Budget on administration of the PMO



Resource: Interpretation of data is my own on the basis of the state budget laws.

Diagram 5.
Total budget of PMO



Resource: Interpretation of data is my own on the basis of the state budget laws.

Both the budget on administration costs and the total budget show a linear growth in the analysed period. The significant increase from 2010 is caused by the fact that the resources for emergency cases are transferred to the Prime Ministry column in the state budget law.

CONCLUSIONS: A NEW PHENOMENON OR A LONG-TERM TENDENCY?

The Prime Minister's Office and later, from 2010, the Prime Ministry are the most dynamically developing parts of the system of Hungarian government. As a result of continuously widening and increasing their tasks and competencies and growing their staff, the two institutions have become a real centre of political power. The development of the two organs has caused also the strengthening of the Prime Minister's position both in the political system and in the government.

The governing system formed in 1989 and 1990 remained unaltered for more than twenty years, but as a result of the government reforms the persistent strengthening of the executive (the government) as against the legislative (the parliament) and the PM's reinforcement became general tendencies.

Several criteria of the presidentialization of the executive and the PM are present in the reforms of Hungarian governments in the studied period. From 1997 onwards the continuous strengthening of the PMO is observable. From 1998 the PMO was led by a minister. The first Orbán government significantly strengthened the institution, centralized the decision making processes by introducing the system of reference units, established a new political under-secretary and unified the system of the PMO's organs responsible for government communication. The Medgyessy government continued its predecessor's efforts and reinforced the institutional structure of the PMO, and expanded its duties with new competencies. Ferenc Gyurcsány increased the number of PMO staff, widened the PM's functions and the legal instruments at his disposal.

The PMO gradually became an institution led and controlled by the Prime Minsiter. The PMO was reformed as the principal institution which coordinates government administration, elaborates the government's strategic plans and creates government communication (Stumpf 88-90). In line with this process there was another trend in the government and in the procedures of the decision making. The bilateral meetings between the Prime Minister and single ministers and their informal reunions became more important for decision making than the official government meetings.

The results of this normative and empirical research show that the signs of presidentialization are present in the office of the Hungarian Prime Minister and cabinet throughout the whole period under study. The expansion of the PM's rights and competencies, the gradual strengthening of his or her central institutional basis (the PMO and later the Prime Ministry), the decrease of the government's syndicated character and the developing and centralization of the organs responsible for government communication are visible from the time of the second legislation, from the time of the Horn government onwards.

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Péter Paczolay

The Transformation of the Constitutional Court in Hungary

SEPARATION OF POWERS AND CONSTITUTIONAL COURTS

A new approach to the explanation of separation of powers has come from political science and economics, from the background of rational choice institutionalism. According to this theory, the new phenomena of the State have been most often explained by a broad application of the delegation theory. The logic of delegation is described by the agency theory, i.e. the principal-agent model. The principal in principal-agent theories represents someone who delegates. The agent represents someone to whom authority is delegated. When a lawmaker delegates authority to an agency, for example the lawmaker is the principal and the agency is the agent (Lupia 3375-3377).

The delegation model was further developed by the fiduciary model of Giandomenico Majone (Majone 103-22). He entered a third element into the principal-agent framework, namely trusteeship. Courts are, according to Majone, more than agents, rather trustees. This trusteeship metaphor has been applied not only to the EU governance, but first of all also to the Court of Justice of the European Union (CJEU), and in a broader sense, to constitutional courts in general (Sweet 77, 88). As a matter of fact, the appearance and expansion of constitutional courts is the sign of a new era where constitutionalism replaced the old system of legislative sovereignty, in which parliaments and governments – forming together the "power bloc" of political parties – ruled the political community. Constitutional courts, unlike ordinary courts, control directly legislators and governments. Thus, they were trusted with an excessive power where parliament and government are not principals to constitutional courts any more (Sweet 89-90). Constitutional judges exercise substantive constraints on law-making power, even if political parties often transfer unresolved political problems to judges.

We may rightly conclude that the transfer process ended in constitutionalised and judicialised politics, and in a politicised judicial role (that was the fear of Carl Schmitt when discussing the role of constitutional courts with Kelsen who wanted to limit the scope of constitutional adjudication to control legislative procedures, and not to substantial limits to legislation).

The common feature of constitutional courts and other independent regulatory institutions or central banks is that they are non-majoritarian institutions (NMI). Their legitimacy and accountability are highly different from the electoral legitimacy of original institutions of majority sovereignty. The justification for the increased role of NMIs is the so-called "output legitimacy". It means that the NMIs

perform better policy outcomes than the elected politicians and political organs who act under the pressure of majority will. Constitutional courts defend better human rights than legislators or executives, independent central banks might lower information better than finance ministers, and independent regulatory agencies are more effective than their governmental counterparts.

It is noteworthy to mention Bruce Ackerman's paper published in 2000 in the Harvard Law Review on "*The new separation of powers*". Ackerman argues against American-style separation of powers as a model for other countries, and, instead, praises the idea of "constrained parliamentarianism" that tries to check the executive and the legislative power by granting independence to a variety of other checking institutions, including a constitutional court (Ackerman).

There is a tendency to "invent" new branches of power. In my opinion, we should keep the tripartite division as the theoretical framework of the question. The tripartite division should be kept as the main rule against inflation of power branches by multiplying them. Independent agencies and their role should be understood and explained but it is misleading to consider any independent agency as a new branch of power.

The question might be raised whether a constitutional court is the fourth branch in the separation of powers system or part of the judiciary. How can judicial review cope with the newly emerged phenomena concerning separation of powers? Does the new Hungarian Constitutional Court fit into this scheme? Does it fulfill its role in the separation of powers system after the changes that occurred in recent years? Or has the legislator become the principal to the court? In order to seek an answer I describe how the Hungarian Constitutional Court has been transformed in recent years.

THE 2011 CONSTITUTIONAL REFORM IN HUNGARY

The introduction of judicial review in the 1989 Act on the Constitutional Court followed the European model with a mixture of competences taken from various examples of other constitutional courts. Among the proceedings, the one that became most prominent was the posterior constitutional review of legislation initiated by individuals (*actio popularis*). Anyone could submit such requests without need to show personal injury, which led to a great number of cases.

After 20 years, the transition process and constitutionalism in Hungary reached an important point of change, embodied in the new Constitution (called Fundamental Law) enacted in 2011 and entered into force on 1 January 2012. The reforms have been controversial, and much of this has concerned the changes to constitutional justice. Thus, it may be apt to make a few remarks on these reforms and on the political implications of and reactions to the constitutional justice in transition, thereby situating the events in the age-old debate on the relationship between law and politics.

Dramatic and radical changes in the competences of the Constitutional Court were already made in 2010 and during the drafting of the new constitution in 2011. After the elections in 2010, the new two-thirds parliamentary majority, which was large enough to amend the constitution, announced a proposal to limit the subject matter jurisdiction of the Constitutional Court. The original plan was to exclude some laws from the constitutional supervision of the Constitutional Court, such as budgetary, pension and tax laws in general. One month later, the Parliament adopted the constitutional amendment on the limitation of the competences of the Constitutional Court. According to the new wording, budgetary and tax laws became subject to constitutional review only if the petition refers exclusively to the violation of the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or the right connected to Hungarian citizenship. Hence, the Hungarian Constitutional Court had to suffer limitations of its powers for the first time in its 20-year existence. The new constitution – the Fundamental Law – unfortunately upheld this limitation, and otherwise radically changed the organization and the competences of the Constitutional Court. Furthermore, the new system brought important changes regarding the types of procedures before the Constitutional Court. On the one hand, the old *actio popularis* was abolished. On the other hand, the reform introduced a procedure for an individual constitutional complaint against individual acts of public authority. The reactions to the reforms were mixed. In its opinion on the new Hungarian Constitution, the Venice Commission of the Council of Europe acknowledged that "since 1990, the Constitutional Court has played a vital role in the Hungarian system of checks and balances. Moreover, the Venice Commission is pleased to note that the Court has gained international recognition through its case law." (Opinion of the Venice Commission on the new Constitution of Hungary, para 91.) On the one hand, the Venice Commission noted with satisfaction that the individual constitutional complaint has been introduced into the constitutional review system. It welcomed the introduction of the "real" constitutional complaint that makes possible the review of the decisions of the ordinary judiciary. On the other hand, in light of the 2010 curtailment of the Court's powers which were confirmed by the new Constitution, the Commission was concerned that the number of provisions of the new Constitution may undermine further the authority of the Constitutional Court as a guarantor of constitutionality of the Hungarian legal order (Opinion… paras. 93, 97.).

COMPOSITION OF THE CONSTITUTIONAL COURT

A constitutional amendment raised the number of constitutional judges from eleven to fifteen. The official explanation for the increase was the heavy caseload of the Court but such an argument is not as convincing as the method of appointing the

judges was also changed. As a consequence, since 2010 all new judges were nominated and elected by the present two-thirds majority.

As far as the composition of the Court is concerned, the new Constitution increased the number of its members from 11 to 15 and prolonged their term of office from 9 to 12 years. In addition, it transferred the election of the Court's president from the Court to the Parliament (by two-thirds majority) and prolonged his mandate to the entire duration of the mandate. Changes also concerned the nomination of judges who are elected by the Parliament. One of the first amendments to the constitution changed this nomination process. Previously, the parliamentary Nomination Committee comprised one representative of each parliamentary party who all had the same vote, thus avoiding one party dominating the selection. In contrast, under the new constitutional text the number of representatives is proportionate to the number of seats held by each political party in the Parliament. The motivation behind this constitutional amendment was the long-lasting vacancy of seats due to disagreements on the nomination. Since the amendment, twelve new judges were elected under this procedure. A lot of concerns were raised that the judges would be biased in favour of the ruling party electing them, but some of the newly elected judges were examples of the "duty of ingratitude".

COMPETENCES OF THE CONSTITUTIONAL COURT

As regards the competences not listed in the Constitution, first of all it is necessary to note that the previous Constitution did not list the Constitutional Court's competences, and the Court itself urged the Parliament to enact for the sake of guaranteeing them in the constitution. The Court also argued in favour of a closed list of competences, namely that all competences should be regulated in the constitution, and solely in it. The drafters of the new constitution decided to leave open the possibility to establish further competences not only in the Fundamental Law but also in cardinal laws. Presently, six competences are regulated in Art. 24 of the Fundamental Law which is devoted to the Constitutional Court.

The Constitutional Court

a) examines adopted but not yet published Acts for conformity with the Fundamental Law,
b) reviews any piece of legislation applied in a particular case for conformity with the Fundamental Law at the proposal of any judge,
c) reviews any piece of legislation applied in a particular case for conformity with the Fundamental Law further to a constitutional complaint,
d) reviews any court ruling for conformity with the Fundamental Law (on the basis of a constitutional complaint),

e) examines any piece of legislation for conformity with the Fundamental Law at the request of the Government, one-fourth of the Members of Parliament or the Commissioner for Fundamental Rights,
f) examines any piece of legislation for conflict with any international agreement.

The Fundamental Law contains provisions related to the Constitutional Court in other places but it does not determine further competences.

The new Constitutional Court Act provides for the following competences:

1) Ex ante review of the provisions of adopted but not yet promulgated Acts regarding conformity with the Fundamental Law (Preliminary Norm Control) – based on a petition of the Parliament or the President of the Republic.
2) Ex post review of conformity with the Fundamental Law (Posterior Norm Control) – initiated until now only by the Government, by one-quarter of the Members of Parliament or by the Commissioner for Fundamental Rights (ombudsman), a fresh novelty extended to the President of the *Kúria* (the Supreme Court) and the Chief Prosecutor.
3) Judicial initiative for norm control – if a judge is bound to apply a legal regulation that is perceived to be contrary to the Fundamental Law, or which has already been declared to be contrary to the Fundamental Law by the Constitutional Court, shall suspend the judicial proceedings and submit a petition to the Constitutional Court.
4) Constitutional complaint – if a right guaranteed by the Fundamental Law is violated in the course of a judicial procedure, even by the applicable legal norm itself or by the judicial decision. Exceptionally, the procedure may be initiated also when due to the application of a legal provision or when such legal provision becomes effective, rights are violated directly, without a judicial decision.
5) Examination of conflicts with international treaties upon the petition of one-quarter of the Members of Parliament, of the Government, of the Commissioner for Fundamental Rights, of the President of the *Kúria*, of the General Prosecutor or even *ex officio*.
6) Examination of Parliamentary Resolutions related to ordering referendum, and examination of the Parliamentary Decision related to the recognition of organisation engaged in religious activities.
7) Opinion in principle on the dissolution of a local representative body, or b) Opinion on the withdrawal of the acknowledgment of a Church – which operates contrary to the Fundamental Law.
8) Removal of the President of the Republic from office (impeachment proceeding).
9) Elimination of conflicts of competences among state organs, or state organs and local governments.

10) Examination of local government decrees, normative decisions and orders regarding the conformity with the Fundamental Law exclusively, without consideration of other legal provisions; and examination of decisions on the uniform application of the law.
11) Interpretation of provisions of the Fundamental Law – on the petition of Parliament or its standing committee, the President of the Republic, or the Government.

In my opinion, the open-ended possibility of creating further competences in other cardinal laws is not really to be welcomed. It is better that the new competence is not regulated only in the respective law but also inserted by an amendment into the Constitutional Court Act. Despite this, a more practical problem is that one year after the new Act was adopted, constitutional and legal regulations have already been modified, which also affects the competences and the procedure of the Constitutional Court. (The amendment for example prevents the Court from annulling constitutional amendments on substantive grounds. Art. 24 para 5, now provides that the Court may only review the conformity of the Fundamental Law and an amendment with the procedural requirements of the Fundamental Law pertaining to the adoption of the Fundamental Law or its amendments.) Furthermore, it is almost in line with the previous practice despite, that in the reasoning of the Decision of the Constitutional Court No. 45/2012 (XII. 29.) the Court also stated that "it would be irreconcilable with the idea of a democratic State under the rule of law if the contents of the Fundamental Law were becoming constantly disputable, thus making the contents of the Fundamental Law, as the Constitutional Court's standard, uncertain", and the constitutional legality has not only procedural requirements, but also substantial ones, and the constitutional criteria of a democratic State are at the same time constitutional values, principles and fundamental freedoms enshrined in international treaties], frequent changes – either forward-looking or not – challenging the stability of the constitutional system.

RESTRICTION OF THE COMPETENCES

As mentioned earlier, following the Court's decision regarding the unconstitutionality of a retroactive 98 per cent tax, the government quickly restricted the competence of the Constitutional Court to review certain fiscal matters, so now the Hungarian Constitutional Court does not examine the constitutionality of financial, budgetary and tax laws – as long as the state debt exceeds half of the gross domestic product (GDP). State debt is likely to remain above 50 per cent for the foreseeable future.

Although it is without a doubt that the constitution-making power has competence to amend the competences of the Constitutional Court, their curtailing is hardly in line with the rule of law. It is definitely not acceptable if an entire sector

(finances and taxation) is exempted from the requirement of compliance with the constitution. The Constitutional Court interprets this restriction as narrowly as it can, however it cannot control the Acts on the State Budget and its implementation, the central tax type, duties, pension and health care contributions, customs and the central conditions for local taxes to the extent that would affect the main budgetary total expenditures, but controls decrees introducing local taxes, and procedural questions of taxation (e.g. in the Decision of the Constitutional Court No. 9/2013 (III. 6.) a constitutional requirement pronounced about the company member liable to pay tax, is entitled to exercise the rights of a taxpayer after the liquidation of the company that allow the challenge to the plea of the tax debt and the amount of tax; and also in the Decision of the Constitutional Court No. 2/2013 (I. 23.) the person liable to pay tax as an inheritor can challenge the ascertainment of the tax debt, etc.) The Court is split (and has always been) between two interpretational approaches: one interprets the concept of the "law related to budget" strictly, understanding under it only the yearly adopted budgetary law as subject of the restriction; while the opposite group of judges tries to subsume under the restriction all laws, and all provisions that have budgetary aspects (e.g. in the Decision of the Constitutional Court No. 40/2012 (XII. 6.) a dissenting opinion stated that the Constitutional Court has no competence on the review of the statutory provisions defining the elimination of disability benefits).

A new Amendment of the Fundamental Law extends the restriction of the Constitutional Court's further, Art. 37 para 5 provides that in the case of statutory provisions which entered into force during the period when the state debt exceeded half of the GDP, the restriction shall also apply if the state debt no longer exceeds half of the GDP, even if only in respect of this period.

INTRODUCTION OF FULL CONSTITUTIONAL COMPLAINT

After 2012, the constitutional justice in Hungary has turned from *actio popularis* and from a limited scope normative constitutional complaint to the full constitutional complaint.

The *actio popularis* overburdened the Court with excessive numbers of cases on fragmented issues, so putting the emphasis on the constitutional complaint can be welcomed, but there are some critical points which should be keep in mind to reach a really efficient constitutional protection. Firstly, we should avoid that the stricter formal conditions of issuing a complaint would restrain the admissibility of the cases (truly, it was easier to challenge a law with an *actio popularis* which did not require proof of personal interest or exhaustion of remedies, and had no deadline like the constitutional complaint now has). Secondly, the submissions of the ombudsman – initiatives which supplements the complaints and is reflected in all major problematic issues – are essential elements to the working of the system, because he or she can challenge provisions on such constitutional grounds which are

not possible by single applicants (for example referring to the rule of law generally does not includes single constitutional rights which can be adduced by complainants, etc.). Without an active ombudsman, the level of efficiency in the protection of constitutional rights could decrease.

Thus, three different types of constitutional complaint exist presently:

a) The first type was available also based on the precedent Act on the Constitutional Court (1989). If the fundamental rights of a person or organisation have been injured by the application of an unconstitutional law in a procedure and there are not any other instrument of legal remedies, a constitutional complaint may be submitted (Art. 26 para 1 of the ACC). The subject of the review is the legal regulation. The legal consequences can be the annulment or exclusion of the application of the legal regulation.
b) The second type is based on Art. 26 para 2: Constitutional Court proceedings may also be initiated – exceptionally – if due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and there is no procedure for legal remedy or the petitioner has already exhausted the possibilities for remedy. The subject of the examination is also the legal norm.
c) Constitutional complaints may be submitted not only against the legal regulations, but also against concrete judicial decisions. The person or organisation affected in cases may turn to the Constitutional Court claiming that the judicial decision was contrary to the Fundamental Law if the decision regarding the merits of the case or other decision terminating the judicial proceedings violates their rights laid down in the Fundamental Law. The criterion that possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available still exists. The Constitutional Court can annul the challenged judicial decision.

During the transition, upon the entry into force of the Act on the Constitutional Court all ongoing proceedings were extinguished which aimed the abstract ex post review of constitutionality of a legal regulation and which were not submitted by petitioners specified in the Fundamental Law. Nevertheless, every applicant, who submitted such petitions which were extinguished, were notified of the possibility to renew petitions until 31 March 2012 (if this date was missed not by his own fault, than latest until 30 June 2012) with the same content as the previous petition, but with regard to the constitutional rights specified in the new Fundamental Law.

In the enlarged competences of constitutional complaint there is definitely a higher interest for the "exceptional" type, when Constitutional Court proceedings may also be initiated by exception due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision. This competence is basically a version of abstract review and this might explain that petitioners use it more

frequently as the "real" constitutional complaint strictly linked to a concrete judicial case. Not surprisingly, despite the newly introduced competence of full constitutional complaint, a great number of requests arrived to the Court in form of normative constitutional complaint, evidently as a consequence of the twenty years of practice of abstract norm control. However, every year could be the turning point towards the higher volume of applications against unconstitutional judicial decisions. Two and a half years is quite a short period for a legal institution to be rooted, especially if there is a half year transitional period and some time also has to be counted for the takeover of the judicial procedures for the final remedy.

The constitutional complaint shall require admissibility prior to a decision. The main challenge after the introduction of a full constitutional complaint was to establish the possibility and the standards of filtering the petitions, or more precisely to decide on their admissibility. Otherwise, the Constitutional Court would have been flooded by petitions that might block the fulfillment of its function. A delicate balance has to be established regarding the admissibility criteria: not to prevent the possible widest constitutional protection, but to restrain such complaints which tend to arguing against detrimental judicial decisions on other grounds than real constitutional aspects. Many of the initiatives are trying to question the decision to reach the re-assessing of the evidence or on simple infringement of the laws, but not of the constitution. The Constitutional Court has to develop the admissibility criteria in its case law, that is not sufficient to allege harm to a right assured by the Fundamental Law, but it is also necessary that the harm affects the complainant personally, which mostly means actual, direct and real involvements. Direct or potential future harms can be admitted very exceptionally (e.g. unavoidable and close occurrence). The complaint can be presented to the Constitutional Court only after all other legal remedies have been exhausted, but sometimes – mainly in the case of challenging mandatory legal norms, when the judicial proceeding would not have led to effective remedy – the exhaustion of such legal remedies are not necessary. The admissibility procedures mainly led by the five member panels (chambers) of the Constitutional Court, but the panel itself, five judges outside the panel or the president can divert the case in every phase of the procedure to the plenary session.

The legislator later abolished the compulsory legal representation. Obviously this will not contribute to the professionalism of the requests, while on the other hand it broadens the possibility of the citizens' access to the Constitutional Court. This requires a new strategy in deciding on the admissibility. However, the overwhelming majority of the complaints is submitted by professional lawyers.

The most sensitive issue which was generated by the introduction of a full constitutional complaint is the relationship of the Constitutional Court and the ordinary courts. The possibility that the Constitutional Court might declare unconstitutional and annul a judicial decision, is understandably not welcomed by the judges, and most countries having full constitutional complaint could serve as examples for that.

It is important that the judiciary respects the decisions of the Constitutional Court. In Hungary, a special informal procedure was settled for that purpose: the President of the *Kúria* (the Supreme Court) arranges a special meeting of judges analyzing the decision of the Constitutional Court, and draw conclusions on what kind of steps should be taken by the respective court or courts to execute the judgment of the Constitutional Court. This mechanism assures the acceptance and the compliance with Constitutional Court decisions.

RECENT JURISPRUDENCE OF THE CONSTITUTIONAL COURT

The Constitutional Court has been the subject of criticism on several grounds: namely that most of the complaints were rejected, very few of them were accepted on merit, the protection of individual rights has become less strict, some decisions have been politically motivated, etc. Some critics even claim that the Court is not able to protect constitutional values anymore.

In a democratic society, no institution is above public criticism. The Constitutional Court's judgments cannot possibly please everybody. Constitutional courts do not engage in polemics with the political forces or the media, and usually do not respond to media reports at all. However, in a few cases they react to criticisms, namely when representatives of the legislative and executive branches of state power critically responded to Constitutional Court decisions. In such cases, the Court might publish a press release stressing the need for due respect of Constitutional Court decisions by the other branches of power that derives from the principle of a State governed by the rule of law.

For better transparency of its work and understanding of its social role, the Court sometimes gives interviews in the media and holds lectures about the role of the Constitutional Court in a modern society. In other words, the Court has been dealing with the pressures by educating the public, including also the professional public.

If necessary, the President of the Court and the judges may also react in public appearances, delivering keynote addresses of scholarly speeches, or respond in interviews or articles, albeit usually in the abstract.

I would like to point out some trends from the recent jurisprudence of the Court that protect citizens' rights more efficiently, and shape the legal system in a positive way.

Cases concerning the freedom of speech and press

1) Decision of the Constitutional Court No. 4/2013 (II. 21.), the so-called red star case

The Constitutional Court, in response to the relevant decisions of the Strasbourg Court, annulled *pro futuro* the provision of the Criminal Code prohibiting the use of symbols of totalitarian regimes, because it violated the requirement of legal certainty (the prohibition was not limited by sufficiently strict and precise conditions), and in this context, the freedom of expression.

2) Decision of the Constitutional Court No. 7/2014 (III. 7.) on the criticism of public figures in the Civil Code

The new Civil Code contained a condition that the protection of personality rights in case of public figures may be restricted only on the basis of "acknowledgeable public interest". The Constitutional Court held that this condition was in conflict with the Fundamental Law, therefore annulled it.

3) Decision of the Constitutional Court No. 13/2014 (IV. 18.) on libel

In order to protect the freedom of speech and the right to criticism, the Constitutional Court clarified the distinction between value judgments and factual statements in libel cases, and consequently annulled the relevant final judgment of the penal court.

4) Decision of the Constitutional Court No. 28/2014 (IX. 29.) on publishing photographs of police officers on duty

Without the consent of the police officer, it is permissible to publish the photographs taken of them on duty, as Hungary's Constitutional Court lifted a rather controversial rule in 2014.

In 2013, media industry people at a conference ahead of changes to the Civil Code said that the Hungarian regulation was unique in Europe and the closest similar practices could be found in Azerbaijan. They have tried to lobby for an amendment, without success; the Supreme Court then said that the members of the police were not public figures.

The current verdict came after an online news portal – namely the index.hu – lost a case against policemen who were featured without their consent in a 2011 report of a demonstration where their faces were recognizable. Index.hu appealed to the Constitutional Court whose verdict declared that the pictures can be published under

the conditions that they were taken in a public place, are not offensive, and depict the person in a matter-of-fact way, if it is related to a report of public interest.

"The [initial] court verdict did not take into consideration the constitutional right to freedom of press and the freedom of information, therefore the Constitutional Court annulled the verdict of the Metropolitan Court."

Several news outlets have welcomed the move saying it is a big win for press freedom.

Cases on the freedom of information

1) Decision of the Constitutional Court No. 21/2013 (VII. 19.) on the access to data of public interest

This decision underlined that the restriction of freedom of information is unjustified; if the requests for access to data of public interest are rejected on a formal ground claiming that the requested data serve as basis for decision-making. The Constitutional Court prescribed that ordinary judges shall also examine the entitlement and the motivations of the reasons, if a request for access to data of public interest was rejected.

2) Decision of the Constitutional Court No. 2/2014 (I. 21.) on the access to information at the national security services

In line with the above decision, this ruling prescribed a constitutional requirement according to which the Director General of the national security services may refuse a request for information only if its execution would harm national security interests or would prejudice the rights of third parties; furthermore, ordinary court shall verify whether the references to the above refusal grounds are justified.

CASES CONCERNING THE PROTECTION OF PRIVACY

As we can see, the Constitutional Court made significant efforts to make the State transparent; meanwhile it was also necessary to protect the privacy of citizens.

1) Decision of the Constitutional Court No. 9/2014 (III. 21.) on the annulment of continuous national security surveillance

The Constitutional Court annulled the possibility of continuous national security control of public servants. It was an amendment to the Act on National Security

that introduced continuous surveillance. The Constitutional Court first of all suspended it on a temporary basis due to insufficient time for thorough constitutional review prior to its scheduled entry into force. Then the Court annulled the provisions that rendered possible a 30-day control twice a year during the period in which the person subject to national security control has the legal status of a civil servant.

Cases on the protection of family relations:

After the private sector, we need to mention the protection of family relations, too.

1) Decision of the Constitutional Court No. 31/2012 (VI. 29.) on the Act on Protection of Families

The Act on the Protection of Families had an excessively restrictive interpretation of the notion of family when it stated that the family is based on the marriage of a man and a woman, next of kinship or adoptive guardianship. In addition, excluding registered partners from inheritance was in breach of the Civil Code to an extent that could not have been resolved through interpretation.

2) Decision of the Constitutional Court No. 43/2012 (XII. 20.) declaring the unconstitutionality of discrimination between the family and other forms of partnership

Examining the provisions of the Act on the Protection of Families, the Decision No. 43/2012 declared that if the legislature, by giving an abstract legal definition for the concept of family, chooses to prefer and to select as sample a certain way of life in community, it is still obliged to guarantee the same level of protection for the legally recognized other forms of cohabitation, resulting from the State's institutional protection obligations.

3) Decision of the Constitutional Court No. 14/2014 (V. 13.) declaring same child allowance for children whose parents live in marriage or in other forms of partnership

It could be said that the consequences of Decision No. 43/2012 (XII. 20.) were drawn in Decision No. 14/2014 (V. 13.) which declared a legislative omission because of the fact that it was not included in the regulations on family allowances that the same amount of family support is due for those children who live in the same household, but the legal status of their parents is different, so it shall be deemed irrespective whether the parents are married or live in cohabitation.

Cases concerning the freedom of religion

Several decisions were made by the Constitutional Court in which the freedom of religion was defended during the examination of the new regulations on Churches. Following the annulment of the new Act due to invalidity by public law, the most important questions were elaborated in merits, too.

1) Decision of the Constitutional Court No. 6/2013 (III. 1.) on the annulment of several provisions of the Act on Churches because of the unconstitutionality of the procedure of obtaining the legal status of Church

Allowing the Parliament to decide on the status of Churches could result in political decisions. Decisions in such cases should be taken by independent courts. The State must ensure that religious communities receive special status as 'religion' based upon objective and reasonable criteria, and in compliance with the right to freedom of religion and the requirement of fair procedure. Legal remedy against such decisions (and the requirement of the neutrality of the State as the ECHR declared in its decision on 8 April 2014 in the Case of Magyar Keresztény Mennonita Egyház and Others v. Hungary – 70945/11 et al.) must be guaranteed.

Cases concerning the criminal law and law of criminal procedure

It is always of particular importance the criminal law and the law of criminal procedure in connection with the Constitution. Besides the already mentioned "red star" case, several decisions have been made on this subject. I am convinced that these decisions are of great importance for the practice of law.

1) Decision of the Constitutional Court No. 8/2013 (III. 1.) on the preconditions of notification to defense lawyers

It is a constitutional requirement that the public defender shall be notified about the place and date of the interrogations in a verifiable manner and in due time in order to give the opportunity for him or her to exercise the rights set out in the procedural law and to attend the interrogation of the accused person. In the absence of such notification, the defendant's testimony cannot be assessed as evidence.

2) Decision of the Constitutional Court No. 36/2013 (XI. 22.) declaring unconstitutional the obligatory transfer of cases

A regulation, previously in force, which had allowed the transfer of judicial cases, was contrary to the right to fair trial under both the Fundamental Law and the

European Convention on Human Rights; in particular, the principle of the right to a lawful judge and the right to an impartial court. The regulation failed to fully define instances in which case transfer was permissible, and authorised the President of the National Office for the Judiciary to appoint the acting court at his or her discretion, and did not provide any remedy for the concerned person against the decision of the President of the National Office for Judiciary concerning the case transfer.

Cases concerning the freedom of assembly

1) Decision of the Constitutional Court No. 3/2013 (II. 14.) on notice and having taken note of an assembly

The Constitutional Court for the first time exercised its competence to overturn a court decision which was found contrary to the Fundamental Law. The ordinary court had failed to review the merits of a decision declaring lack of competence on the part of the police because of an agreement on the use of public areas with the Municipality of Budapest. Even when police authorities state the lack of their jurisdiction, judicial review is necessary on the merits, on the legality and appropriateness of the police authority's decision.

CONCLUSIONS*

The Constitutional Court, in my view, has remained the principal organ for the protection of the Fundamental Law and the two-thirds majority is still not the Principal to the Court. Its tasks are to protect the fundamental rights and to exercise constitutional control of the legislation and on the application of law. The Constitutional Court performs its tasks even if the government has a two-thirds majority. This is a relevant circumstance concerning the efficient operation, because the two-thirds majority might amend the Fundamental Law or narrow the competences of the Court, and sometimes the responses to the decisions and jurisdiction of the Constitutional Court are worrisome. Such responses which reintroduce the provisions which are found unconstitutional in slightly modified manner in the Constitution may raise doubts and should be avoided.

Nevertheless, the Constitutional Court has to enforce the constitutionality through its decisions, trying to realize what the Venice Commission has noted: "a constitutional culture which clearly separates constitutional issues from ordinary politics".

* On the newly adopted constitution of Hungary see Kovács and Tóth 183-203; Csink, Schanda and Varga Zs.

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Zoltán Szente

The Decline of Constitutional Review in Hungary – Towards a Partisan Constitutional Court?

INTRODUCTION

According to the traditional view, judges make their decisions only on the base of what the law says. As Montesquieu famously said, the judges are "only the mouth that pronounces the words of the law" (Montesquieu 487). It is quite usual to take "judicial argument seriously as one of the major, if not the sole determinant of the decisions courts make" (Robertson 21). We can easily believe that this assertion was discovered by judges, who did not want to appear to be politicians.

However, it is no longer a universally accepted thought. Today, "there are probably no political scientists who would seriously suggest that judgments of constitutional courts can be unambiguously explained by the law" (Annus 24). The presumption of the politically neutral and impartial decision-making process, in which the moral value judgments of the judges do not play a role, is strongly needed for accepting the vast and legally uncontrolled power wielded by the constitutional courts. If we do not share this belief, it is hard to approve that an aristocratic and politically non-responsible body may repeal the policy decisions of the democratically elected representatives of the people on the basis of general and frequently elusive phrases of the constitution.

The vision of the wise and unselfish judges who, putting aside their personal attitudes and feelings, always decide solely on behalf of the community, is a nice idea, as far as it seems to be from reality, at least in contemporary Hungary.

In general, constitutional law applies formal rules to legal institutions for many reasons. In case of constitutional courts, for example, procedural guarantees, incompatibility rules and other prescriptions are adopted for safeguarding the independence, impartiality and legitimacy of these bodies, protecting them from external and unauthorized interventions of, among others, politics. This formalism is often criticized by many as inadequate in a number of cases, and imperfect for attaining the goals for which they were adopted. These criticisms might sometimes be true, but the recent history of the Hungarian Constitutional Court provides an excellent example of how the destruction of these formal rules and institutional

guarantees leads to the decline of the importance of a constitutional body, and, in this way, how the level of legal protection of rights and freedoms erodes.

In this study, I examine whether political influences can be identified in the jurisprudence of the Hungarian Constitutional Court between 2010 and 2014, when the government coalition led by Viktor Orbán had a two-thirds majority in Parliament. For this purpose, I will analyse systematically the "voting behaviour" of the constitutional judges. In particular, I am primarily interested in the significance of their political orientations, as we can draw some conclusions about the political preferences, attitudes and ideologies of the individual judges, if we compare their views represented in the Court with the positions of the political camp which nominated them.

First, I describe the basic features of the Hungarian Constitutional Court as it was established at the dawn of the transition to democracy at the turn of the 1980s and 1990s. Then I will analyse the institutional changes shortly after the overwhelming election victory of the conservative right in 2010, specifying the measures which dismantled the guarantees of the organisational and political independence of the Court. Finally, I will examine the practical effects these actions have had so far on the behaviour of the judges of this Court.

THE CONSTITUTIONAL REVIEW AT THE CROSSROAD OF LAW AND POLITICS

Whether the continental (or Kelsen-) type of constitutional courts or the decentralised (or diffuse) American system of judicial review is examined, one can encounter difficulties over how to classify the nature of the classical function of constitutional review carried out by courts. The problem is that the judicial control of the constitutionality of laws is significantly different from the traditional judicial duties. It can have direct and deep impact on the legal system as a whole, and on the exercise of political power. This aspect did not create any theoretical problems for a long time. The traditional public perception was that judicial review is a normal legal function of the courts.*

> "Judicial power, as contra-distinguished from the power of the laws, has no existence. Courts are the mere instruments of the law and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, a discretion to be exer-

* For a classical formulation of this approach see Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73.1 (1959). The constitutional courts finally preserve their legal character, and do not become political institutions. Zamboni, Mauro. "'Markers' vs. 'Makers': Are Constitutional Courts Legal or Political Actors?" *On judicial* and *quasi-judicial independence*. Eds. Suzanne Comtois and Kars Jan de Graaf. The Hague: Eleven international publishers, 2013. 69-99.

> cised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature (…)"*

This view is still strong not only in the US but also in Europe. In Germany, for instance, it is a dominant point of view that the Federal Constitutional Court (*Bundesverfassungsgericht*) stands in a grey zone between law and politics, playing a bridging role between the two spheres. But this approach usually does not recognize the crucial role of the political interests and values in the decision-making process of the constitutional court. Rather, it makes a difference between "judicial politics", legitimate for the courts, and "party politics" which should be the realm of democratically elected institutions, and claims that the pure political interests do not influence the jurisprudence of the *Bundesverfassungsgericht* (Wesel 214). This opinion is confirmed by the fact that has never been a fundamental political criticism or attack against the Court, at the very least, that would call into question its legitimacy (Möllers 2014, 4, 14).

In spite of this, while the constitutional judges and the vast majority of legal scholars have always insisted that the constitutional review is a purely legal activity, others – especially the political scientists – have increasingly emphasized its political nature. Robert Dahl, for example, already in the 1950s claimed that the US Supreme Court oversteps its scope of responsibility, and makes public policy decisions from time to time when it takes a position on issues that cannot be decided on a legal basis. When the Supreme Court chooses among controversial alternatives of public policy by appealing to value judgments, it really plays a policy making role (Dahl 279-281). In general, the political nature of the activities of constitutional courts is seen when their choices cannot be justified on the basis of legal considerations, but reflect personal ideological commitments. In many countries the method of selecting constitutional judges strengthens this perception. According to experience, where political bodies (parliaments) or high officials (like heads of state) elect or appoint at least some of the judges, a kind of quota system develops among the most powerful government and opposition parties, such as in the United States, Germany, Austria, Italy or in the majority of the Central and Eastern European countries.† If the real or perceived political affiliation of the candidates is a highlighted aspect of the selection, it is reasonable to assume that politically motivated behaviour is expected from the elected (appointed) constitutional judges. In addition, in some cases, the constitutional court was set up on the basis of inherently

* *Osborn v. Bank of the United States*, 9 Wheaton 738 (1824), 866.

† See in detail: European Commission for Democracy through Law.; Peri.

political purposes,* but it is a general phenomenon that the operation of the constitutional tribunals is accompanied with heavy political battles. Many hold the judicial activism as an evidence of the politically motivated decision-making. As this argumentation says, some well-admitted methods of constitutional interpretation provides unlimited discretion for the judges who believe that the law is, what they say it is – as it is so often illustrated with some famous quotes from judges.† Similarly, according to some views, "the valid law in the [German] Federal Republic is what the BVerfGE [the Federal Constitutional Court] declares as constitutional law," since the *Bundesverfassungsgericht* has become the main source of constitutional law, and the very content of the federal Basic Law (*Grundgesetz*) depends on the interpretative method the Court applies to (Rüthers III, 32, 36). Others argue for the politicization of the constitutional courts, claiming that in the long term they will eventually represent the dominant views of the public (Mazmanyan 169).

Similar views have appeared also in Hungary, especially since 2010. According to Gábor Halmai, for example, since April 2013, when the judges were nominated unilaterally by the Government, the Government gained a majority in the Court. As a result of this the constitutional considerations have been pushed into background in favour of political aspects, which resulted in, with only a few exceptions, favourable decisions for the government majority (Halmai 2014, 56-57).

In any case, the question of whether the constitutional courts are legal or political institutions cannot be decided on a very formal base, considering only their legal status or regulation, which highlights everywhere the independence, political neutrality and impartiality of these bodies. Despite the clear legal and normative status of the constitutional courts, there may still be some reasonable doubts as to whether a body whose members are elected or appointed to decide the most important political controversies by politicians, who are their allies without any democratic accountability, really makes its decisions solely on legal/constitutional grounds.

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

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* The French Constitutional Council was explicitly established by the constitution of the Fifth Republic in 1958 to constrain and counterbalance the legislative power. Ponthoreau and Fabrice 84.

† One of them comes from the American justice Evan Hughes saying that "we are under a constitution, but the constitution is, what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution". Hughes 139. According to another frequently cited aphorism, the law is nothing else than "the prophesies of what the courts will do in fact". Holmes 460-461.

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

The conventional approach has been sharply questioned by the so-called attitudinal model which openly criticized the "myth" of the objective and impartial judging. While the well-known legal theories most often discuss normative requirements and rules, the ambition of this doctrine is to explain the motifs and background of the judicial behaviour (Friedman 258-259). This theory claims that the judicial decisions are determined mostly (or exclusively) by the personal attitudes and preferences of the judges. In fact, they follow their own policy goals (Pacelle, Curry and Marshall 35). The attitudinal model strongly relies on empirical surveys of seeking independent variables of the decisions of the individual judges.

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

Finally, it is worth referring to some new attempts to integrate the traditional approaches. Their common starting point is that although all conventional theories have some explanatory power, none of them are able to provide a comprehensive explanation for the decision-making process of constitutional tribunals. The typical method of the integrative theories is that the influencing variables are defined at various (micro, meso and macro) levels,* and they always derive the factors affecting the final decision from the concrete institutional, legal and other context.

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

In this way, it is the common feature of these approaches that they do not exclude the possibility of the recognition of any potential impacts.

In this study, I will examine the effects of only one possible external variable, the individual political orientation of the constitutional judges. However, before the presentation of the findings of the empirical research of the decision-making patterns of the members of the Hungarian Constitutional Court, it is worth outlining the broad context of the constitutional justice in this country.

THE GENESIS AND THE FIRST TWO DECADES OF THE CONSTITUTIONAL COURT

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

The distrust of the judges of the communist state-party and the political mistrust between the negotiating parties during the transition period led to establishing an independent constitutional court with wide-ranging responsibilities. Basically, the Court was established copying the pattern of the German *Bundesverfassungsgericht* (Halmai 2007, 693), establishing a "European" or "Kelsenian" model of constitutional review, which embodies a centralised system of which (Favoreau 16-31) the Constitutional Court has exclusionary power to examine the constitutionality of legal acts, through abstract judicial review.

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

The Court was established as a quasi-judicial organ; though it bore some characteristics of judicial tribunals (like the structural independence or the irremovable status of the judges), other classical judicial principles and guarantees were missing

in its procedure (there is no contradictory procedure, for example) (Sólyom and Brunner; Sólyom 114-115). The body consisted of eleven members, who were elected by a qualified majority of MPs. Parliament elected members of the Constitutional Court from among learned theoretical jurists (university professors or scholars having the doctor degree of Hungarian Academy Sciences) and lawyers with at least twenty years of professional experience. They were elected for nine years, and could be re-elected once. Although there were strict incompatibility rules, the objective of which was to keep party politics separate from the Court,* the way of selecting its members (i.e. parliamentary nomination and election) brought the body close to the party politics; actually, during its existence, only two or three judges were all-party candidates, while most justices were nominated by the government or the opposition parties.

From 1990 on, the Constitutional Court established a rich and extensive jurisprudence; virtually, it has dealt with almost all classical issues as it is usual in those western countries which have much longer constitutional traditions. Undoubtedly, the Court reached a pre-eminent position in the Hungarian constitutional system, and had great achievements in elaborating and standardizing the living constitutional law. It is a commonly shared view among scholars that the Court, in the first nine years of its operation (which period is generally called the Sólyom Court after its first president) followed a strongly "activist" practice (Halmai 2002, 189-211; Schwartz 87-108) relating both to its jurisdiction and to interpretive practice.† There is good reason to think that this activism was, to a degree, unavoidable; just as every attempt between 1990 and 2011 to make a new constitution proved to be unsuccessful, the legislature was not able to fill its gaps, and it failed also to correct or modernize those basic institutions whose regulation demanded a qualified majority in Parliament. Thus, the Court was the only institution to have enough power to solve the great constitutional (and, often, political) conflicts at a time when the institutional setting was paralyzed.‡ The Court did not hesitate to play this role; since the very beginning of its conception, the Court has made it clear that the general and abstract concepts of the Constitution are not dead letters, but real and living rules, and it is the primary task of the Court to determine and set out the

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

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

‡ It is sure, however, that the Court acted as a sovereign, quasi-lawmaker power also in legal areas where it could have been grounded on well-established and crystallized body of law. Its conceptual innovations have extended, for example, to the criminal procedure or the private law, stressing that the constitutional concepts of the property or the guarantees of the criminal law are independent from their traditional approaches. See e.g. Balogh, Zsolt. "Alapjogi tesztek az Alkotmánybíróság gyakorlatában." *A megtalált alkotmány? A magyar alapjogi bíráskodás első kilenc éve.* Ed. Halmai Gábor. Budapest: Indok, 2000. 123.

exact content of these provisions from case to case. Although the body was frequently criticized for its jurisdictional and interpretive activism, this approach soon became widely accepted, at least for two reasons. Firstly, all political actors believed that even the considerably revised constitution would only be a transitional one, as its preamble said, "in order to facilitate a peaceful political transition to a constitutional state", the Parliament established the new text of the basic law, "until the country's new constitution is adopted". Secondly, due to the growing hostility between the rightist and leftist parties, there was no real chance for putting the issue of the new constitution on the political agenda, neither was it seen as an exigent political question; the most important modifications (which were necessary for Hungary's accession to NATO in 1997 or the European Union in 2004) were adopted, and the activist jurisprudence of the Constitutional Court filled the gaps of the old constitution.

Finally, the behaviour of the Court was basically influenced by the dispute resolution approach of the constitutional review, shared by the majority of the first Court. According to this view, the Court should decide all constitutional controversies which were submitted to it, rather than escape from the responsibility of the ultimate decision. The Court tenaciously persisted in this view throughout its working. The view of *non liquet*, imported presumably from the U.S. Supreme Court and the German Federal Constitutional Court.

The Hungarian Constitutional Court regarded the Constitution as a holistic unity of principles and rules. This approach paved the way for the concept of the "invisible constitution", even if it emerged firstly in a dissenting opinion of the first president of the Court, László Sólyom.* According to this theory, the invisible constitution embraces all the background or underlying principles that are necessary to understand the written constitution, and makes a coherent body of constitutional law. It is to be noted that in the post-Sólyom era, the Court began to change its earlier activism, moving towards a self-restraining direction. This image of the moderate judicial behaviour was strengthened as the landmark decisions decreased, and the Court frequently sought middle-way solutions in the remaining hard cases. But the body, even if in a quiet way, continued its eclectic interpretive practice, and based its jurisprudence largely on the earlier decisions.

INSTITUTIONAL CHANGES AFTER 2010

The general elections of 2010 brought about a landslide victory for the conservative parties that had been in opposition for the previous eight years. The leading gov-

* Decision of the Constitutional Court No. 23/1990. (X. 31.), and Sajó, András. "Reading the Invisible Constitution: Judicial Review in Hungary." *Oxford Journal of Legal Studies* 15 (1995): 253-267.

ernment party, the FIDESZ and its satellite coalition partner, the Christian Democrats, owing to the disproportionate election system gained a two-thirds parliamentary majority. Although the question of a new constitution was not a featured issue in the election campaign, the new coalition felt that their election victory provides a proper mandate for them to reorganise the whole state, including the acceptance of a new basic law. The old constitution was replaced by a new one in the spring of 2011. But the new constitution has suffered a great and hardly remediable defect of being a partisan constitution, in a sense that the basic rules of the game were set unilaterally by the governing majority. The circumstances of the constitution-making process might raise the issue of legitimacy, even if the Fundamental Law was approved by the two-thirds majority of the National Assembly, as required by the old constitution. Nevertheless, the original constitutional function of this majority requirement, namely enforcing a compromise between the Government and Opposition of the day, could not prevail, because the government parties themselves were able to provide the formally necessary majority.*

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

Both relate to the Constitutional Court, which was for two decades the most effective and strongest counterbalance of the Executive. Just a few months after its formation, the new government, based on its two-thirds parliamentary majority, transformed the method of nomination of Constitutional Court judges, introducing practically partisan elections of the members of the Court. Until the new regulation, the parliamentary majority and minority had been forced to reach a compromise about the new members of the Court, as the composition of the parliamentary committee responsible for nominating Constitutional Court judges had been based on parity between the government and opposition parties, thus, each candidate had to gain the support of both sides. According to the new rules, candidates are proposed by a parliamentary committee composed in proportion to the members of the parties represented in Parliament and they are elected by Parliament with a qualified majority of two-thirds. In this way, the Fidesz government, since autumn of 2010 enjoying such a parliamentary majority, has been able to appoint solely its own people to the Constitutional Court. Additionally, the number

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

of constitutional judges was increased from 11 to 15. Although the explanation of this measure was to help the Court to tackle its workload, expectedly growing in parallel with its new function of constitutional complaints, it was really a "court packing", as the government majority exploited the possibility to alone choose the new judges. Thus in 2010, two new justices were appointed and, in the spring of 2011 five more justices were elected by the government party with MPs ignoring the protest of the opposition parties.* In this way, the Government managed to place its loyal supporters in the body, reaching a stable majority. As a matter of fact, all the nine new judges have been elected since 2010 were chosen by the government majority (see Table 1). This was possible, as the law on the Constitutional Court contains a "cooling period" of four years only for leading officials of political parties as well as members of the Government, before they can be elected as a judge at the Constitutional Court, but this incompatibility rule does not extend to party membership or parliamentary mandate, which means that even front-runner party politicians or backbenchers cannot be removed from the Court.

Table 1.

The division of members of the Court according to the parties nominating them, before July 2010 …

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

Table 2.

… and after July 2010

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

The members elected after July 2010 are marked by italics

* One of the reasons for the protests was that some nominees failed to comply with the qualification conditions set out by law.

The personal control of the Court was extended by the new Fundamental Law, empowering Parliament to elect the head of the Court (before that, he or she was elected by the judges themselves).* The president of the constitutional court is elected by the Parliament also in some other countries, like Germany, still, this idea was strange in the Hungarian context, where the government parties themselves may decide who will chair the body without any compulsion of compromise with the opposition.

All these changes gravely violated the independence of the Constitutional Court, as the goal of the special selection method of judges is to guarantee the political neutrality and legitimacy of the Court. In contrast, the new regulation provides a unilateral and unjustified influence on the composition of the Constitutional Court for the executive branch. From a constitutional point of view, it is a self-contradiction, as one of the main functions of the Court should be the control and counterbalance of the Executive. The only positive change was the abolishment of the possibility of re-election of Constitutional Court judges, and the simultaneous extension of the term of office of the judges from 9 to 12 years.

Besides these measures, when the Constitutional Court declared unconstitutional and annulled a law that imposed a 98 per cent tax on the extreme severance payment with retroactive effect, the governmental majority immediately curtailed its most important power of constitutional review.† Since then the Court has only been able to review and annul the budgetary laws, the acts on taxes, duties, pensions, customs or any kind of financial contributions to the state if they violate the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and the rights related to Hungarian citizenship. At first sight, this truncation of the Court's powers was only a political revenge for an unfavourable decision, but it proved to be a long-term strategy neutralizing the Court's controlling role. One of the major instruments of the financial recovery programme of the government coalition was to nationalize the private pension funds, expropriating also the savings of their members. Allegedly, if this measure was repealed as an unconstitutional one (which would have stood a chance in normal circumstances), the budgetary deficit would jump to about seven per cent instead of the three per cent that Hungary undertook to keep as an EU-member.

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

† The political pressure proved to be partly successful; after repealing two versions of the retroactive legislation introducing 98 per cent tax for earlier incomes [Decisions of the Constitutional Court No. 184/2010. (X. 28.) and No. 37/2011. (V. 10.)]. the Court finally approved of a third law, declaring the constitutionality of the retroactive taxation if it extends only to the beginning of the current tax year.

In spite of the promises that this limitation on the jurisdiction of the Court will only be a short-term solution, it was put in the new Fundamental Law as well, stipulating that this restriction of the Court's power will last as long as state debt exceeds half of the GDP. Although removing some issues from judicial review is not unprecedented in Europe (Wheare 102), the elimination of constitutional review of the public finance legislation, even only for a deemed transitional period, creates the impression that the constitutional constraints of the executive power can be put aside in economically difficult times.

Nevertheless, the Constitutional Court has been compensated for the loss of its fundamental power; the Fundamental Law, following the German example, introduces the politically neutral institution of individual constitutional complaint. It is true that the so-called *actio popularis* (i.e., everybody's right to turn to the Court for reviewing the constitutionality of a statutory act without any personal interest) was abolished, but the Court itself has proposed it for several years.

The fourth amendment of the Fundamental Law in March 2013 struck the final blow to the Court's independence invalidating all decisions of the Constitutional Court which were made before 2012. The goal of the government majority was clear: to compel the Constitutional Court to change its jurisprudence adapting it to the value order of the new majority.

AN EMPIRICAL RESEARCH ON THE POLITICAL ORIENTATIONS OF THE CONSTITUTIONAL JUDGES IN HUNGARY

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

Method

For this goal, I conducted an empirical research examining the correlation between the voting behaviour of the judges as the dependent variable, and the political view

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

I think that if the quantitative analysis shows a very strong correlation between the voting behaviour of the judges and the positions of their nominators (in the same cases), it gives enough evidence of the political orientation of the judges concerned. Nevertheless, in analysing the consistency of legal argumentation of the individual judges I carried out an additional qualitative research to identify – or, conversely, to exclude – the possible alternative explanations.

I examined the constitutional review cases between 2010 and 2014, when the Court reviewed statutes or other legal acts approved by the new governmental majority. These rulings were adopted by the Constitutional Court mainly as results of the so-called abstract constitutional review, with the exception of some cases when the Court reviewed the constitutionality of a law in course of constitutional complaints. Among these decisions, I took only those into account, which were made by the full Court (*per curiam*), and in which the final vote was divided, because only these inform us about the ideological, political or professional cleavages of the judges. Between the summer of 2010 and 2014 a total of 37 cases met these criteria of which 29 rulings were made in constitutional review cases, while eight decisions were taken in constitutional complaint procedures.

The selection of constitutional review cases has only instrumental function; the underlying presumption is that more often than not these have serious political implications. If the constitutional judges really have political preferences and policy goals, they can pursue them in these procedures. Although the political importance of the various laws can be largely different, it is undeniable that most statutes that gave rise to constitutional disputes and were brought to the Court, were highly important in these turbulent times. Between 2010 and 2014 the government majority approved a new constitution (Fundamental Law of 2011) and deeply transformed the whole legal system and the market economy. Under such circumstances, the upholding of the constitutionality of the objected or complained laws, or, con-

versely, the refusal of them, even if only in a formal sense through a constitutional review, could have demonstrated the political orientation of the judges – as long as this behaviour was permanent and consequent. In fact, the tendentious behavioural patterns are only proxy variables, as the judges – understandably – always deny the charges of their political biases. On this ground, I coded the pro-government standpoints with "1", while the opposition "votes" were indicated by "0".

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

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

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

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

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

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

Analysis

In the period under review, there were altogether 18 members of the Court.* 70 per cent of them were candidates of the conservative parties, four judges were elected after the nomination of the left-liberal parties, while only one joined the body as compromise candidate. It is to be noted that whereas until 2010 the candidates had been only loosely linked to the parties nominating them, after the change of government in that year, the new members' linkages were much more direct and undisclosed. For example, one of the new judges, István Stumpf was a minister in the first Orbán Government between 1998 and 2002, and an adviser of the Prime Minister just before his nomination in 2010, while three other new judges were earlier MPs of the conservative coalition. It occurred in 2011 the first time that a politician directly replaced his parliamentary mandate with the judicial robes (and in 2012 another one). Moreover, some of the new members of the Court were not backbenchers of their parties, but were influential and veteran party politicians who were directly involved in ideological struggles of the political sphere.

Analysing the voting behaviour of the judges, it is striking what a high proportion of those cases there are in which the judges voted in favour of the political side that had nominated them. Those judges' record who were proposed (or, after 2010, practically appointed) by the rightist parties, show that they really support the conservative government's policies which emerge in laws reviewed by the Court. It means that these members of the Court usually uphold the constitutionality of the newly adopted legislation, whatever its subject-matter is. Table 3 quantifies the extent to which the judges nominated by the rightist parties supported the govern-

* One of them, Mr László Trócsányi was a judge for such a short time that his performance cannot be evaluated.

ment's policies on a scale where "1" would mean the upholding of all new legislation, while "0" indicates the rate of denial.

Table 3.
The rate of support for the government's policies through the voting behaviour of the judges nominated by the rightist parties

István Balsai* (30)**	0,966
Béla Pokol (34)	0,911
László Salamon (20)	0,9
Mária Szívós (35)	0,885
Egon Dienes-Ohm (35)	0,828
Imre Juhász (17)	0,823
Barnabás Lenkovics (37)	0,783
Péter Szalay (33)	0,727
Elemér Balogh (37)	0,432
István Stumpf (36)	0,447
Péter Kovács (36)	0,361
Mihály Bihari (12)	0,25

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

It is clear that the newly elected judges are increasingly loyal to the government's policies, upholding the vast majority of the laws of the new government. In fact, the three former members of Parliament unconditionally supported the constitutionality of all government sponsored laws. Actually, if we take only the judges elected after the conservative political turn (with the sole exception of Mihály Bihari who had originally been a Socialist MP and constitutional judge candidate between 1999 and 2008), and presume consistent voting behaviour, there is a 81 per cent chance that the new judges (nominated by the new selection system) will support the government side, disregarding what the matter is in the particular cases.

Similar tendencies can be observed in the case of those judges who were nominated by the leftist parties as Table 4 shows. In these cases, the probability that they will vote against the constitutionality of any new legal act in the future is even higher, 85 per cent. In all likelihood, the behaviour of these members of the Court was pushed by the emergence of the new generation of conservative-rightist judges towards a steady opposition.

Table 4.
The rate of support for the government's policies through the voting behaviour of the judges nominated by the leftist parties

András Bragyova (36)	0,027
Miklós Lévay (37)	0,135
László Kiss (27)	0,222
András Holló (18)	0,222

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

Table 5.
Absolute ranking of the judges according to their voting behaviour

István Balsai	Rightist	0,966
Béla Pokol	Rightist	0,911
László Salamon	Rightist	0,9
Mária Szívós	Rightist	0,885
Egon Dienes-Ohm	Rightist	0,828
Imre Juhász	Rightist	0,823
Barnabás Lenkovics	Rightist	0,783
Péter Szalay	Rightist	0,727
István Stumpf	Rightist	0,447
Péter Paczolay	Consensual	0,432
Elemér Balogh	Rightist	0,432
Péter Kovács	Rightist	0,361
Mihály Bihari	Rightist	0,25
András Holló	Left-Liberal	0,222
László Kiss	Left-Liberal	0,222
Miklós Lévay	Left-Liberal	0,135
András Bragyova	Left-Liberal	0,027

n = 12–37

All these show that most members of the Constitutional Court follow the views of those political camps from which their seat originates.

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

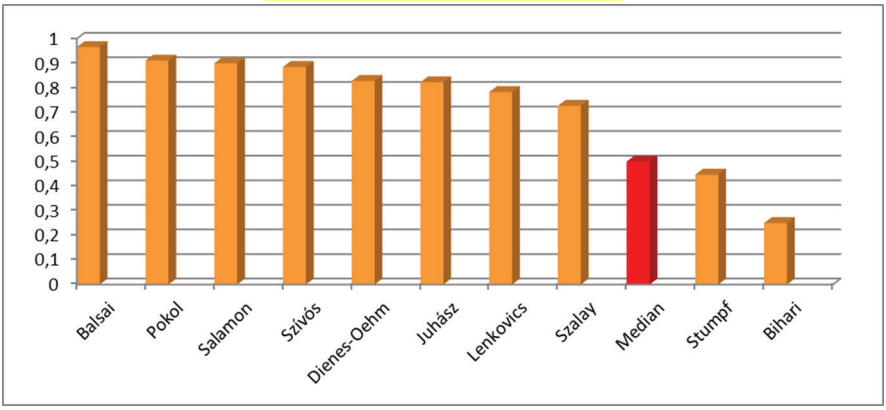
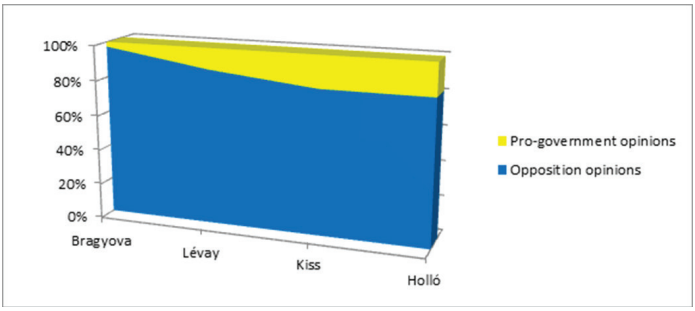


Figure 2.
The rate of pro-government and opposition opinions of judges nominated by left-liberal parties, 2010-2014

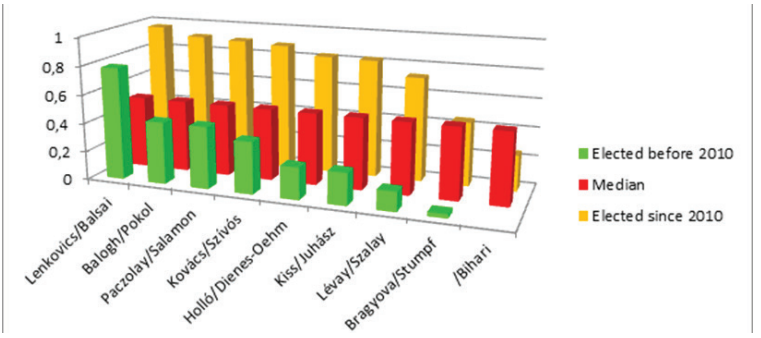


It is noteworthy, in case of some judges that there is not a strong correlation between their behaviour and the viewpoints of the political side which nominated them. It is not surprising as regards the president of the Court, Péter Paczolay, who was a consensual candidate. Two more judges, Elemér Balogh and István Stumpf also pursued a balanced behaviour, voting alternately for upholding or rejecting the constitutionality of the new laws. However, István Stumpf employed a "swing policy" supporting some emblematic laws of the conservative government and opposing some ideological issues. Furthermore, while he voted more frequently against the Fidesz-government's laws in the first two years of his mandate, since then, he has noticeably drawn closer to the pro-government judges. Even more astonishing is Péter Kovács's position, who had been nominated by the conservative parties in 2005, but he took a moderate opposition line between 2010 and 2014.

In light of the above mentioned data, it is not surprising that some strong personal "voting coalitions" developed between the same-side judges. According to the stable political orientations of the judges, there were some firm co-voting relationships on both sides. For example, András Bragyova and László Kiss took a similar position in 88.88% of cases, in which they both participated, while the strongest right-wing alliance was formed between Mária Szívós and Péter Szalay (78,78%).

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

Figure 3.
The opinions of the "old" and "new" judges (elected before and since 2010) according to the scale of the pro-government and opposition views (1,00–0,00)



In the period reviewed here, there was only very moderate collegial congruence between the constitutional judges standing on the opposing sides of political orientation. According to the data, the ideological distance between the judges nominated by the leftist or the rightist parties was so great that the chance for collegial consensus was low, and continuously decreasing. Although initially the Court was able to take some unanimous decisions, after April 2013 – when the judges appointed unilaterally by the government parties gained the majority in the body – the rate of unanimity decisions drastically waned.

In contrast, the Constitutional Court showed an extremely strong group polarization, as the opposing camps showed cohesion. This was due to steady conflict – and the likely ideological struggle – between the pro-government and the opposition judges, who mutually pushed the opposite standing constitutional judges to more extreme ideological positions.

Overall, the strong political alignment of the majority of constitutional judges is quite surprising; according to experience, most candidate judges nominated to constitutional or higher courts generally tend to be politically more moderate (as it makes it easier for such candidates to be accepted), who may therefore be more prone to compromise and to speak with one voice in order to preserve the Constitutional Court's prestige, and to ensure the implementation of the decisions of the Court (Sunstein, Schkade, Ellman and Sawicki 83-85; Wesel 216). However, after 2010 – especially from April 2013 – the situation was different in Hungary. Although it may well be argued that there was a cleavage between the "old" (consensual) and the "new" (unilaterally nominated) constitutional judges for a while, the significance of this presumed division was declining as the Court was dammed by the conservative coalition with new judges. As a result of the radical change in the composition of the Constitutional Court, and the upset of the internal balance of the body, there was simply no longer any constraint that would have led to the new majority to seeking a compromise. Thus, the collegial effect, which is so present in other constitutional courts, reduced to a minimum in Hungary, if there was any such effect at all.

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

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

Even though the aggregate data of the voting behaviour of the constitutional judges provides convincing evidence for the decisive impact of the political orientation of

the judges' opinions, it is advisable to consider whether it was really measured what was intended; that is, we need to verify that the conclusions are reliable and credible. To consider the possible doubts also provides an opportunity to carry out an in-depth analysis of the survey results.

Presumably, some scepticism might be raised against the conclusions set out above. One of them is whether the fact that there is a great coincidence between the judicial opinions of the individual judges and the political positions represented by those parties that promoted them, indeed proves that these judges strongly support political standpoints adjusting their views to those of the respective parties. Perhaps this congruence is just the result of specific judicial philosophies with which judges identify themselves. In other words, the voting behaviour of the judges, even if it is very close to the political views of the government or the opposition side, can be guided by other, non-political variables like a special set of professional values or moral convictions. The constitutional arguments are always different from political considerations, even in the case where the same subject matter is concerned (Möllers 2011, 317).

But it is not a satisfactory alternative explanation compared to the independent variable of the political background. It is worth remembering that in the case of most judges, there is an extremely strong correlation between their voting behaviour and the standpoints of the political side that nominated them. If the constitutional judges would decide solely on the basis of the constitutional text or legal considerations, it did not occur that their opinions coincide with the political viewpoints of their nominating parties to such a great extent. In reality, two-thirds of the judges used to represent almost the same positions (to a 80% ratio) as their nominating parties, no matter what the subject matter or the constitutional problem was in the individual cases. The battle lines between judges anchored along the same cleavages. No *ad hoc* coalitions developed among them, but persistent associations. Neither a coherent method of constitutional interpretation, nor any particular judicial philosophy can be recognized from their majority or minority opinions. Simply, there is no other convincing explanation for the very strong correlation between their voting behaviour and the political background of their election. The qualitative analysis of the mainstream majority and dissenting opinions does not show any strong commitment to a well-established legal method. The only detectable organising principle for these groupings was, more or less, the origin of their seat that is their political support before and when they were elected.

As to the role of the other possible factors and the strategic behaviour, including the institutional context, the dominant public opinion, the clarity of the relevant law, etc., this research cannot exclude their effects on the decision-making process of the Constitutional Court. However, even if we suppose their influence, this does not explain the very strong correlation between the judges' personal opinions and

the political interests of their nominating political sides. Perhaps some judges read their preferences into the constitutional text in good faith, but it does not make their choices less politically biased.

Actually, only the political orientation of the judges has a real explanatory power to understand why the constitutional judges support the political parties that nominated them. The explanation is simple: the members of the Court occupy identical positions with the parties that nominated them, because their political orientation is linked to those parties or to their ideology. This gives us a plausibly explanation as to why the political parties, in the past, held the nomination process of constitutional judges as being so important.

Another question is whether the judges represent party interests, or their voting behaviour is determined by their personal preferences. Probably these motivations cannot be separated from each other, but it is not necessary, either: the point is that the judicial behaviour is determined by political reasons, rather than legal considerations. For this conclusion, it is enough to prove that the political orientations of the judges have a decisive role in the judicial decision-making, and it does not really matter why the judges behave in the way that that they do.

Whatever the reason is, the great majority of judges adjust their views to those of their nominating political sides to a large extent. Nevertheless, there might be an alternative explanation of behaviour of the opposition judges. It can be said that they really do not adapt their opinions to their own political sympathy, but they merely resisted the demolition of the rule of law. This approach is reliant upon the assumption that the new government, exploiting its overwhelming majority, transformed the whole constitutional system and downgraded the constitutional democracy.* This kind of argumentation can be strengthened by the fact that a number of laws that have been reviewed by the Constitutional Court, which were often criticized by international human rights organisations and the institutions of the European Union and the Council of Europe, claiming that they did not conform with the values and principles of the modern European constitutionalism. Even if this argument can be true to a certain degree, it does not explain the strong correlation of the voting behaviour of the "opposition judges" and the views of the left-liberal parties which nominated them. Additionally, the international actors do not develop their own judgments on the basis of the Hungarian Fundamental Law (as the Hungarian constitutional judges do), so their similar stance in many

* For a more detailed description of this process in English, see Kriszta and Tóth 183-203; Jakab and Sonnevend 102-138; Bánkuti, Halmai and Scheppele. Disabling the Constitution, 138-146; Pogány 341-367.; Müller 5-11; Bánkuti, Halmai and Scheppele. From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions 237-268. For an apologetic presentation of the new Fundamental Law, see Csink, Schanda and Varga Zs.

debated issues is not a compelling argument for the political neutrality of these members of the Court.

CONCLUSION

It is remarkable that in the period of a two-thirds parliamentary majority, between 2010 and 2014, when the conservative political camp was able to prepare and approve a new constitution and to change the composition of the Constitutional Court, the judicial behaviour of the most constitutional judges was favourable for those political parties that had nominated them. Their votes coincided to a great extent with the political views of their nominators, regardless of the particular constitutional problem or the subject matter of the case under investigation by the Court. There were only three judges of the 17, who voted alternately for and against the constitutionality of the laws adopted by the new government majority after the spring of 2010. Consequently, the personal attitudes and the political orientation played a decisive role in the judicial behaviour of all judges nominated by the leftist or liberal parties, and almost all former conservative candidates. This is the only convincing and plausible explanation for the strong correlation described above. Accordingly, the constitutional judges vote more or less consistently for their nominating (left-liberal or conservative) political side, because they tend to agree with their policy goals and/or ideology. It does not exclude, but rather, in an indirect way, it confirms that in addition to the personal political orientation and preferences of the judges, there are some other factors and circumstances that influence their judicial behaviour. However, this empirical research was not able to identify these factors and to assess their real impact on the decision-making of the Constitutional Court.

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

Perhaps we could say ironically that a partisan constitution deserves a partisan guardian that is a constitutional court with politically biased members, but it would be as sad as it is ironic. Recent trends in Hungarian constitutional development, the step-by-step limitation of the power of the Constitutional Court, the openly political selection of its members, and, most of all, the recent trends towards the politically motivated jurisprudence can legitimately raise the question what the role of this kind of constitutional review should be in the future, or, to put it even more clearly, whether it is worth preserving the Constitutional Court, or we should accept that this institution proved to be unsuccessful in Hungary.

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Cesare Pinelli

Populism and Illiberal Democracies: The Case of Hungary

INTRODUCTION

My study is centered on whether the 2011 Hungarian Constitution should be counted among the democratic constitutions of our time. The term "democratic" is usually referred to those constitutions that reflect, and, at the same time, tend to ensure, the 'government by the people' rule together with the rule of law, including judicial independence and, strictly related, the protection of citizens' fundamental rights against infringements or abuses committed by public powers. While that opinion appears sufficiently consolidated, it should be added that the worldwide diffusion (from Russia to Iran, and from Turkey to Venezuela) of constitutions that provide for the holding of free elections without granting citizens' fundamental rights tends to blur the divide between democracy and totalitarianism that characterized the 20th century. These regimes, sometimes depicted as "illiberal democracies", should not be confused with dictatorships, but neither should they be counted with constitutional democracies, given their failure to comply with the standards of the rule of law.

It is against such a background that the Hungarian Constitution deserves attention. Given the fact that, until its approval, all the EU's member states were reputed as being constitutional democracies, an inquiry is firstly needed into how the Hungarian case appeared in European public opinion and in the EU. Then the main controversial questions concerning the Constitution's compliance with the rule of law will be examined through the lens of Hungarian scholars. After that, an account will follow of the legislative measures aimed at limiting the Constitutional Court's independence on structural grounds, and of the Court's reaction. Finally, the Hungarian case will be compared with the difficulties affecting democracy in other EU Member States.

THE HUNGARIAN CASE IN EUROPEAN PUBLIC OPINION AND IN THE EU

The Hungarian case appeared in European public opinion as a consequence of the approval, on 18 April 2011, of Hungary's new constitution, officially called Fundamental Law. This law, which entered into force on 1 January 2012, superseded the 1989 constitution that comprehensively amended the first written Constitution of

Hungary (Law No. XX of 1949) in the course of the 1989-90 regime change, in keeping with the principles of democratic constitutionalism.

The drafting of the new constitution was effectively done with the sole participation of representatives of Hungary's governing political parties, without any scientific or social debate. Concerns were promptly expressed by the Council of Europe's Venice Commission in an opinion issued on 18 June 2011, about a document drawn up in a process that excluded the political opposition and professional and other civil organisations.

Two years later, a European Parliament Resolution noted that its <Titre>adoption "was conducted in the exceptionally short time frame of one month, thus restricting the possibility for a thorough and substantial debate with the opposition parties and civil society on the draft text", and that "the comprehensive and systematic constitutional and institutional reforms (a root-and-branch revision of the legal system), which the new Hungarian government has carried out in an exceptionally short time-frame is unprecedented, and explains why so many European institutions and organizations (the European Union, Council of Europe, OSCE) as well as the U.S. Administration have deemed it necessary to assess the impact of some reforms carried out in Hungary" (Draft Report).

In the meanwhile, the Venice Commission released further opinions concerning alleged violations of the rule of law emerging from the Hungarian Constitution, particularly with respect to the restrictions of the independence of the Constitutional Court and the exercise of certain fundamental rights. The European Commission did not seek to directly challenge the constitutional reform and the new cardinal laws adopted in Hungary, adopting a rather fragmented approach (Dawson and Muir).

At any rate, the Hungarian government resisted to objections of all these bodies, without causing further reactions in spite of the provisions contained in the EU legal framework.

In this respect, Art. 7, para 1, TEU establishes that, in cases of "a clear risk of a serious breach by a Member State" of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, mentioned in Art. 6 TEU, the Council may "address appropriate recommendations to that State", and "regularly verify that the grounds on which such a determination was made continue to apply" (so called "alert procedure"). Art. 7, para 2, TEU, in cases of a "serious and persistent breach" by a Member State of those principles, establishes a procedure aimed at suspending "certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the

representative of the government of that Member State in the Council" (so called "nuclear option").

These provisions reflect partly the recommendations of an independent body, which following the "Haider case", was instituted in 2000 by the EU Presidency with the task of seeking remedies against violations of fundamental rights committed within EU Member States. Haider was the leader of the *Freiheitlichen Partei Österreichs* (FPÖ), an Austrian right-wing party, whose declarations against immigrants and about the Nazi regime caused great concern, particularly when the FPÖ joined the parliamentary majority of that country. Haider's mere declarations sufficed at that time to force the EU to find a solution for future risks of breach of fundamental rights by a Member State.

On the contrary, a decade later the approval of a constitution such as the Hungarian which, according to the EU institutions, was likely to have an enduring effect on the democratic life of the country concerned, was met with far weaker reactions. After the Hungarian government's refusal to heed to the warnings of the European Parliament (EP) and the European Commission, the European institutions were in a position to activate the mechanisms of Art. 7 TEU against Hungary. But, apart from a single threat from the EP in 2012 (Dawson and Muir), the European institutions avoided to use such mechanisms, given the reluctance of the European People's Party, to which FIDESZ (Hungary's majority party) belongs.

A bitter paradox thus emerged *vis-à-vis* the treatment of the Haider case from the EU, challenging the European claim to occupy place at the core of democratic constitutionalism. And, as was noted, "If the EU does not resort to these measures now, no one will take them seriously in the future, and the EU will descend back to its lamentable double standards: tough on applicant states, toothless with regard to members" (Sadurski).

However, the fact that the political unwillingness even to start Art. 7 TEU procedures was stronger than concern for risks of serious breaches of Art. 6 para 1 TEU principles (Mueller) needs to be explained in the light of Art. 7 TEU itself. While presuming that "a clear risk of a serious breach", or "the existence of a serious and persistent breach", from a Member State of "the principles on which the Union is founded"*, endangers its very adhesion to the EU Treaty, such provision confers the related powers exclusively to political institutions, resting upon the premise that highly political considerations and actions are required.

* Accordingly the Court of Justice of the European Union (CJEU) identified "the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6 (1) TEU" as "a foundation of the Union" (Joined Cases C-402/05 and C-415/05), with respect to the validity of an EU act.

THE MAIN CONTROVERSIAL QUESTIONS CONCERNING THE CONSTITUTION'S COMPLIANCE WITH THE RULE OF LAW

The alleged fears of breaches of the rule of law by the Hungarian Constitution need however to be scrutinized on legal grounds, also with respect to the Hungarian constitutional tradition and not only the standards of the rule of law as intended in the EU. An account is thus required of the opinions of Hungarian constitutionalists.

Attention will firstly be drawn to Art. 37 para 1 of the Fundamental Law, according to which the Constitutional Court can review financial laws only from the perspective of certain rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship), as long as the state debt exceeds half of what is referred to in the Hungarian text as "entire domestic product".

With respect to this provision, the Venice Commission's Opinion of March 2011 clearly affirmed that "a sufficiently large scale of competences is essential to ensure that the court oversees the constitutionality of the most important principles and settings of the society, including all constitutionally guaranteed fundamental rights. Therefore, restricting the Court's competence in such a way that it would review certain state Acts only with regard to a limited part of the Constitution runs counter to the obvious aim of the constitutional legislature in the Hungarian parliament 'to enhance the protection of fundamental rights in Hungary" (Art. 54).

This opinion is shared by certain scholars, arguing that, under Art. 37 para 1, the constitutional review of financial laws is referred to rights that they typically cannot breach, with the effect that this provision does not fulfill the requirement that the constitution should be a fundamental law, and that it should be binding on everyone, and breaches the guarantees set out in Title 2 of the TFEU relating to respect for human dignity, freedom, equality and the respect of human rights (Halmai).

Other scholars, while admitting that Art. 37 para 4 has created "an unacceptable gap in constitutional review", namely that "the constitution may be violated without any sanction if justified by economic or budgetary considerations", assert that its "practical relevance is probably low, since certain fundamental rights can still be referred to, the right to human dignity in particular, which has been defined by the practice of the Court as a 'mother right" (Jakab and Sonnevend 116).

A further point of dissent concerns the fact that the Fundamnetal Law abolished the *actio popularis*, one of the peculiarities of the Hungarian regime change in 1989, according to which a petition appealing for an *ex post* control of a norm may be submitted by anybody, regardless of their personal involvement or injury.

Over the past two decades, it is affirmed, "this unique institution has provided not only private individuals, but also non-governmental organizations and advocacy groups with the opportunity to contest in the Constitutional Court, for the public good, legal provisions that they regard as unconstitutional. While other democratic states have of course been able to survive without this institution, it has nevertheless contributed substantially to ensuring a level of protection of fundamental rights which is now diminishing". And, given the balance of power in the current parliament, the fact that abstract *ex post* norm control may in future only be initiated by the government, a quarter of the votes of members of parliament, or the Commissioner for Fundamental Rights, might render any such petitions highly unlikely (Halmai).

Other scholars rely instead on the Venice Commission's advice that the suppression of the *actio popularis*'s is not contrary to the European constitutional traditions, although recognizing that the restriction to the above mentioned institutions of the *locus standi* before the Constitutional Court "gives the impression that the right to make a petition is tailored to the voting proportions of the present legislative cycle, so the constitutive majority can impede the submission of petitions" (Jakab and Sonnevend 120).

These different opinions reflect a deeper division on the Fundamental Law's principles and goals. While the former amount to the conviction that it is at odds with the rule of law, paving the way to an 'illiberal democracy', the latter seek to demonstrate that it "provides no grounds for an 'emerging dictatorship', even though some of its provisions raise valid concerns" (Jakab and Sonnevend 103): a smooth picture of the Fundamental Law is presented here, with the aim both of emphasizing its continuity with the previous constitution, unless the text's contradictions with the rule of law appear undeniable, and of converting these contradictions into mere "deficiencies".

Viewed from the outside, any constitutional dispute of that sort requires caution, since only scholars of the country concerned are in the position to duly evaluate the relationship between continuity and change that results from a constitution's approval.

Two points might however be made. Attention should firstly be driven on a constitutional amendment adopted on March 11, 2013. Responding directly to a series of rulings of the Constitutional Court which struck down problematic laws introduced since 2011 this amendment prevented inter alia the Court from referring to its own rulings prior to January 1, 2012, when the new Constitution came into force. The amendment's drafters treated the Constitutional Court as if it were non-existent before 2012, in spite of Constitutional case-law of over two decades of democratic development. This phony restriction is likely to negate the assumption of the

regime's continuity with the past, at least on the crucial ground of constitutional interpretation.

On the other hand, a shared vision is required of what is really at stake, irrespective of the divergences about the new constitution. As long as free elections are still held in the country, and the opposition parties are in the position of playing some role, it seems quite clear that Hungary is not experimenting a new form of dictatorship. What should be rather examined is whether checks are put in place against possible abuses of political power, including the principle of independence of the judiciary, and the Constitutional Court in particular. The above mentioned constitutional restrictions to the Court's interpretative powers suffice to demonstrate that its functions have been seriously curtailed. It remains to be seen how the Court's structural features have also been affected since the entry into force of the Fundamental Law.

THE LIMITS OF THE CONSTITUTIONAL COURT'S INDEPENDENCE

The chapter written by Zoltan Szente gives an exhaustive account both of the activist jurisprudence that characterized the first two decades of the Hungarian Constitutional Court, described as "the most effective and strongest counterbalance of the Executive", and of the reactions of the government that was elected in the 2010 elections (Szente). The most significant among these concerned the composition of the parliamentary committee responsible for appointing the Court's members. The previous criterion of equal representation between the government and the opposition parties was substituted with that of proportional representation, that, together with the rule establishing that judges are elected with a qualified majority of two-thirds of MPs, correspondent to that enjoyed by the government since autumn 2010, laid down the premises for a full control by the latter of appointments of judges.

With the increase of the number of judges from nine to fifteen, a "court packing" followed, with the result that the loyal supporters of the government reached a stable majority in the Court. According to Szente's empirical research of the recent case-law, most judges "follow the view of the political camps from which their seat originates" (Szente).

A different picture is afforded by Justice Peter Paczolay, elected on a consensual basis by Parliament and the then President of the Constitutional Court, in his paper. In spite of the already mentioned amendments and of the "worrisome political responses" to the Court's decisions, he denies that "the legislator has become the principal to the court", which still remains the main organ for protecting the fundamental rights and for exercising constitutional control on the legislation and on

the application of the law. On the other hand, he notices, two and a half year is too short a period for an institution to strike root (Paczolay).

Once again, it is difficult to evaluate the situation from the outside, and particularly the Court's attempts to maintain its function of safeguarding fundamental rights in these difficult circumstances. What appears instead clear is that the government in office has done its best in transforming Hungary into an illiberal democracy. And that it has been greatly encouraged to do so from the weak opposition that it has met, both at the national level, given the divisions and the very little credibility of the opposition parties, and in the EU, where contingent political considerations prevailed over the EU's maintenance of the rule of law within Member States as provided by the TEU.

COMPARISON BETWEEN HUNGARY AND THE OTHER EU MEMBER STATES

Whether the features of an illiberal democracy will be permanent in Hungary, it goes beyond the scope of this inquiry. What should rather be added is that, while serious doubts of compliance with the rule of law emerge from its Constitution, Hungary is far from being an insulated exception among the EU Member States as far as effective breaches of this rule are concerned.

The list includes attacks on media freedom and pluralism, removal of EU citizens of Roma origin from the national territory of a EU Member State, single legislative or constitutional provisions allowing undue governmental influence both on the functions and on the composition of independent authorities as well as of courts, gerrymandering in the electoral process in order to entrench the ruling party, approval of emergency decrees with a view to avoid parliamentary debates, suspension or dismissal from the executive of the highest State's authorities. These increasing violations of Art. 6 TEU principles committed by Member States within their territories, met with very little or no reaction, by the EU by 2012 (Kumm). And the rise of populist and anti-European parties in a great number of national constituencies in the EP 2014 elections renders now even more remote the chance of EU reactions against such abuses.

It remains to be seen how, at the national level, if constitutional democracies are able to maintain themselves over time, to the extent that they are founded on principles and institutions that correspond to diverse modes of legitimacy, namely the popular election of political representatives and the rule of law, respectively designed as the "democratic" and the "liberal" pillar of these democracies. These potentially conflicting principles and institutions are combined by continuous reciprocal adjustments, that are open themselves to diverse interpretations and further conflicts.

Because of these adjustments, constitutional democracies have frequently proved to be sufficiently flexible for absorbing even deconstructive tensions. But such flexibility should not be taken for granted, nor should it be excluded that a structural unbalance might result between the democratic and the liberal pillar, with the effect of bringing to an end to a constitutional democracy.

The action of populist parties of our time follows that direction. While challenging their own opponents on the ground that they have lost contact with "the people", these parties do not question the representative system as such. To the contrary, whenever they obtain the majority of seats, they claim that Parliament is the sole legitimate authority to be obeyed in a democracy. Populist parties attack instead the very legitimacy of non-majoritarian institutions, departing from the courts, with the aim of controlling them, or of rendering irrelevant their role (Pinelli 15). This strategy was experimented in countries such as Italy and Hungary, regardless of whether or not it has been successful. Mueller argues correctly that in Italy, *vis-à-vis* a parliamentary majority led by populist parties in the past decade, "there were reasonable grounds for thinking that the situation would over time self-correct through internal political (and legal) struggles" (Mueller).

From the perspective of constitutionalism, however, the establishment of populist regimes, or of illiberal democracies, does not amount to a prevalence of the democratic pillar of constitutional democracies over their liberal pillar. These two do differ as to their modes of legitimacy, but complement each other on the ground of the exercise of citizens' fundamental rights. In particular, to the extent that rights such as freedom of expression and freedom of association are not sufficiently enforced by independent courts, the free exercise of the right to vote is also at risk. In this perspective, attempts of opposing the "aristocratic" side of constitutional democracies to their "popular" side misconceive the meaning of democracy as experimented in Europe and elsewhere in the past decades. Such a perspective may be helpful for an understanding of what is at stake in the difficult times that, not only in Hungary, are before us.

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The Fundamental Law in a European and International Context

Nóra Chronowski

The Fundamental Law within the network of multi-level European constitutionalism

*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

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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.* 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.† 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.‡

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

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* 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.

† See for example Vörös, Imre: The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law; Zeller, Judit: Nichts ist so beständig… Die jüngsten Novellen des Grundgesetzes Ungarns im Kontext der Entscheidungen des Verfassungsgerichts; Vincze, Attila: Wrestling with Constitutionalism: the supermajority and the Hungarian Constitutional Court.

‡ 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).

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 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 ex-

pected 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* 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

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* For the concepts of interpretative, applicative and abrogative priorities and primacies see Blutman, László: A nemzetközi jog érvényesülése a magyar belső jogban: két előkérdés [The functioning of international law in Hungarian internal law: two preliminary questions]

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.)].*

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*.† 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.‡ 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.

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* Interpretation by the Constitutional Court of the conventions of the Council of Europe on the protection of minorities became necessary in this case.

† "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]).

‡ 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.

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 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]).* 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,†(paras [22] and [24]) resulting

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* "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])

† "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 per-

in a certain level of supra-constitutionality regarding the specific limitation of review in the Fundamental Law.* 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.† 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).‡

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

cent 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]).

* 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.)].

† 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.)

‡ 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.).

relevant recommendations of the Council of Europe* appeared to provide suitable support, although it was known that the CJEU was also dealing with the case as 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.†

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,‡ 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.§

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

* 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.).

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

‡ 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.

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

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 [Decision of the Constitutional Court No. 36/2013. (XII.5.)].* 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]).† 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]).

* Upon normative appeal, with eight dissenting opinions.

† 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.* Protection of acquired rights or protection of legitimate expectations (*Vertrauensschutz*) are completely disappearing.†

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

* 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.

† 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.

only fundamental principles but very specific and detailed rules are adopted in cardinal laws as well, then the principle of democracy itself shall become threatened as well."* 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."†

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.‡

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

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

‡ 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

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.*

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.

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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 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)".

* 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.

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

* 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."

standards only exceptionally.* The Court has not clarified its 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.†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.‡ 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.§ 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.¶

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

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* 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.

† 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.

‡ 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.

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

¶ "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.).

Fundamental Law in a political environment in which rejection of an otherwise 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.

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Pál Sonnevend

The Role of International Law in Preserving Constitutional Values in Hungary – the case of Hungarian Fundamental Law and international law

INTRODUCTION

Constitutional democracies are based on the supremacy of the national constitution. European Union Law has somewhat relativized this truism, but did not make it obsolete. Cases of Constitutional crisis in Europe,* however, raise the question whether international and European guarantees can substitute national ones or help overcome constitutional blackouts.

The constitutional developments of the last few years in Hungary have been marked by three crisis symptoms: permanent constitution-making, a gradual deterioration of the guarantees of fundamental rights, and a lack of effective checks and balances.

After the 2010 elections and before the Fundamental Law entered into force on 1 January 2012, the 1989 Constitution was amended no less than eight times. The Fundamental Law, the product of unilateral constitution-making by the governing parties, went through five amendments by the very same parties in less than two years. The amendments served everyday political needs, either by reacting to Constitutional Court decisions or by neutralizing possible constitutional concerns relating to specific legislative projects. Thus, the constitution of Hungary has lacked the stability and reliability that is necessary for a constitution to fulfill its role as the paramount law of the land.

This is not to say that guarantees of fundamental rights in the Fundamental Law are in general missing or insufficient. The Fundamental Law as adopted in 2011 was in line with mainstream European constitutionalism. Yet the specific exceptions to fundamental rights, first in the Transitional Provisions and later in more amendments to the Fundamental Law, especially in the Fourth Amendment, led to the gradual deterioration of the level of protection of fundamental rights. Freedom of religion relating to the recognition of churches, free speech relating to the protection of personality rights and political campaigning, and the right to property in relation to retroactive taxation are all examples of fundamental rights where the

* See Bogdandy and Sonnevend.

previous level of protection was lowered, sometimes below the obligatory minimum of the ECHR.

This negative process is a result of a lack of effective checks and balances. I do not argue that the judiciary is no longer independent in Hungary. In fact, in spite of the problematic organizational changes in the administration of the courts, the independence of the judiciary is the area where negative changes (i.e. the forced retirement of judges and the reallocation of cases) could mostly be reversed. Yet in a parliamentary democracy, the single most important counterweight to Parliament is the constitutional court, and the Hungarian Constitutional Court is seriously impaired. Limitations to the competence of the Court, changes to the composition and the election of judges, and, most of all, the permanent constitution-making, made it extraordinarily difficult for the Court to maintain the general European ideals of constitutionalism.

In this sense, the question arises whether in a system of multilevel constitutionalism a new division of power arises, in which national branches of government are counterbalanced by institutions outside of the national jurisdiction. In the European context, two such institutions are obvious: the European Union and the Council of Europe with its most powerful institution, the European Court of Human Rights. These institutions have an impact on national processes in two different ways: the law of the EU and the European Convention of Human Rights are in some ways applicable within the domestic legal order and can be invoked by the citizens and by the different institutions. We can call this the domestic legal impact of these legal orders, to distinguish it from the impact of the enforcement of the law of the EU and of the Convention through the organs of the respective supranational or international institutions. Obviously, neither the domestic legal impact of international law and EU law, nor the enforcement of these through supranational or international institutions can replace an effective national constitutional adjudication with firm constitutional foundations. The domestic legal impact is influenced by competence and procedural rules of national courts, which are in turn controlled by the national legislative branch of government or the constitution making power. The supranational or international enforcement of norms of constitutional significance is negatively affected by competence issues, and also the structural relationship between international law and domestic law.

This paper will focus on the domestic legal impact of international law. It will argue that the Fundamental Law of Hungary is surprisingly friendly towards international law. After outlining the dualist elements of the Hungarian constitutional system (1) the paper submits that international law, especially the European Convention on Human Rights, can play many different roles in ensuring respect for constitutional values: it may serve as a stand-alone standard of review of national legislation (2), it may influence the interpretation of the provisions of the Funda-

mental Law (3), it may provide for additional protection going beyond the guarantees of the Fundamental Law (4) and it may even serve as a standard of review of constitutional amendments (5).

1 International treaties in the domestic legal order under the 1989 Constitution and the Fundamental Law

Under the 1989 Constitution, the status of international law was governed by Art. 7. para 1 and the rules pertaining to its application. Art. 7. para 1 stipulated that "[t]he legal system of the Republic of Hungary accepts the generally recognized rules of international law, and shall ensure the harmony between domestic law and obligations assumed under international law." This language – in many respects similar to Art. 10. para 1 of the Italian Constitution – has been consistently interpreted by the Constitutional Court as establishing a clear dualist relationship between international law and domestic law. Customary international law was deemed to be transformed in its entirety into the Hungarian Legal order by Art. 7. para 1 of the Constitution [Decision of the Constitutional Court No. 53/1993.(X. 13.)], whereas international treaties only became part of the Hungarian legal order if they are included in a statute of Parliament or other piece of national legislation. Without such transposition, no international treaty can create rights or obligations for individuals [Decision of the Constitutional Court No. 7/2005. (III. 31.)].

Since 2005, the transposition of international treaties has been governed by Act No. L of 2005, and this Act envisages a mechanism comparable to Art. 59 II of the German *Grundgesetz* (Basic Law).* The binding force of international treaties can be accepted either by the President of the Republic or the Foreign Minister. This, however, presupposes an authorization by Parliament or the Government, respectively. The authorization is given in an Act of Parliament or a Government decree, which also promulgates the international treaty in the national legal order.

Despite its strict dualist approach the Hungarian legal order has been rather friendly towards international treaties once they are duly promulgated by domestic legislation. Although the Constitution was silent on questions of hierarchy between domestic law and international treaties, this friendly approach followed from the Constitutional Court Act that in effect offered supremacy to international treaties promulgated by statute† over conflicting national legislation. The Constitutional Court was entitled under Art. 1 point c) of the Constitutional Court Act to review the conflict of a national piece of legislation with an international treaty promulgated in the Hungarian legal order. Should a treaty promulgated by statute conflict

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* Art. 59 para 2 of the Basic Law of Germany: „Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis."

† Art. 7 para 3 of Act No. L. of 2005 defines international treaties that require promulgation by Act of Parliament, and a closer look reveals that there remains hardly any room for promulgation by Government decree.

with a domestic statute or a lower ranking norm, the Constitutional Court was obliged by virtue of Act. 45 para 1 of the Act to declare the domestic law null and void. Even international treaties promulgated by government decree could be granted supremacy over statutes, should the Court so decide under Art. 46 para 1 of the Act. This generous approach only applied to international treaties in conformity with the Constitution: the constitutionality of treaties could be reviewed, before their conclusion, by the Court,* and domestic laws promulgating international treaties could also subject to *ex post facto* norm-control [Decision of the Constitutional Court No. 4/1997. (I. 22.)]. Therefore, international treaties had to conform to the Constitution, but in most cases they took precedence over national legislation (Molnár 375).†

The heart of the problem relating to international treaties under the Constitution seemed to be the fact that conflicts with international treaties were not regarded to be a direct constitutional question, since the precedence of treaties was only expressed in the Constitutional Court Act, and even there in a blurred way. Naturally, the Constitutional Court Act could not provide for such precedence, should that not follow from Art. 7 of the Constitution itself. Yet neither legal scholarship, nor judicial practice ever established that link. Under these circumstances, ordinary courts could regard Article 7 of the Constitution as irrelevant for their procedure and so would not transform the question of conformity with the Convention into a constitutional question.

This situation has changed with the entry into force of the new Fundamental Law on 1 January 2012. The Fundamental Law seems to be friendlier towards international law than the previous Constitution. Whereas Art. 7. of the Constitution only required harmony between international obligations and the Hungarian legal order‡ the new Art. Q seems to grant expressly precedence to international law over conflicting Hungarian laws. Art. Q para 2 provides that "Hungary shall ensure harmony between international law and Hungarian law in order to fulfill its obligations under international law."

On the face of it, this language does not do more than declare explicitly what has previously followed from Art. 7 of the Constitution. Nevertheless the express language of Art. Q para 2 will now make it clear for both ordinary courts and the Constitutional Court that precedence of international treaties over conflicting national statutes is a constitutional rule.

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* .Art. 1 point a) of the Constitutional Court Act.

† See also Molnár; Sulyok.

‡ For the language of Art. 7 of the Constitution see above, II.

This precedence also applies to the European Convention on Human Rights. The Convention was promulgated in the Hungarian legal order by Act No. XXXI. of 1993, and therefore it can be invoked by individuals. As regards the judgments of the European Court of Human Rights, the picture is somewhat blurred. The above mentioned Act No. L of 2005 on the procedure applicable to international treaties foresees in its Art. 13 para 4 the promulgation of judgments of international courts. The language of Art. 13 para 4, however, only refers to judgments made in an inter–state procedure, which is a fairly rare case in the practice of the European Court of Human Rights. Further, in view of Art. 13 para 4 of the Act only such judgments shall be promulgated where Hungary was a party to the case.

Consequently, judgments of the European Court of Human Rights in individual complaint procedures where Hungary was not a party can only be referred to as interpreting the provisions of the Convention. The picture is somewhat different with regard to the parties of a case decided by the European Court of Human Rights, at least in criminal cases. The Code of Criminal Procedure (Art. 416 para 1 point g) and para 3) makes it possible to reopen a case should a human rights body established by international treaty find that the criminal procedure or the binding judgment in the case violated one of the provisions of said treaty, provided the Republic of Hungary accepted the jurisdiction of the international human rights body in question. Reopening of the case is, however, not possible if the international human rights body has established a violation of the requirement of deciding the case within a reasonable time. These provisions are framed broadly to be able to cover other human rights institutions – like the Human Rights Commission of the UN – but they clearly apply to the European Court of Human Rights. It is rather unfortunate, however, that the Code of Civil Procedure does not provide for a similar opportunity. This is especially problematic since administrative court procedures are also governed by this Code, and so the judgments of European Court of Human Rights cannot ultimately lead to the annulment of unlawful acts of public administration. Because of this, an important area of possible human rights violations by the state enjoys less effective protection.

INTERNATIONAL LAW AS A STAND-ALONE STANDARD OF REVIEW BY THE CONSTITUTIONAL COURT

As can be seen above, the Hungarian legal order is rather friendly towards international treaties, and this naturally applies to the European Convention on Human Rights as well. Should it come to specific cases, however, individuals may find it difficult to enforce the Convention against conflicting statutes.

As indicated above, the Constitutional Court can review the conformity of Hungarian laws with international treaties, and as such, also with the Convention. This

opportunity is, however, not open directly for individuals seeking protection on the basis of the Convention. The Constitutional Court Act only opens the right to petition such a review to ordinary courts. Thus it appears that the only way to enforce the Convention is through ordinary courts which have power to hear a petition to exercise concrete, incidental norm-control of a national law that seemingly contradicts the Convention.

Concrete, incidental norm-control is open for the review of the constitutionality of laws under Art. 33 para 2 of the Constitutional Court Act, which provides that "judges shall suspend judicial proceedings and initiate Constitutional Court proceedings if, in the course of the adjudication of a concrete case, they are bound to apply a legal regulation that they perceive to be contrary to an international treaty."

As a result, ordinary courts are not only bound to apply the applicable Hungarian laws and interpret them in conformity with the Convention as far as possible. Such a harmonious interpretation is, additionally, a constitutional mandate repeatedly confirmed by the Constitutional Court (Decisions No. 53/1993. (X. 13.) and No. 4/1997. (I. 22.).

Should, however, a harmonious interpretation not be possible because of the express language of the Hungarian law in question, courts are entitled to call upon the Constitutional Court and ask for a review of the Hungarian piece of legislation on the basis of international treaties, notably the European Convention on Human Rights.

Ironically, the decision to go down this way is completely in the hands of the judge. Should he decide not to ask for a concrete norm-control, the parties in the case cannot seek remedy in a constitutional complaint. Constitutional complaints are limited to matters of constitutional law, a conflict of a Hungarian law with an international treaty cannot be subject to any of the types of constitutional complaint outlined above. This follows from the fact that the examination of conflicts with international treaties may be requested under Art. 33 para 2 of the Constitutional Court Act only by judges, or in the abstract by one quarter of Members of Parliament, the Government, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights. Individuals are not listed here, and thus are barred from relying on international treaties and also the Convention in a constitutional complaint procedure. Further, even if the Constitutional Court may examine the conflict of a Hungarian piece of legislation with international treaties ex officio, it is not obliged to do so. At the end, the individual is at the mercy of either the judge in the case or the Constitutional Court, and cannot enforce a review on the basis of the Convention.

To conclude, the European Convention on Human Rights formally enjoys a high rank in the Hungarian legal order: it can be invoked by individuals in court proceedings and theoretically it takes precedence over conflicting national statutes. Yet such precedence is hard to enforce in the specific case.

THE CONVENTION AS PART OF CONSTITUTIONAL STANDARDS

Hungarian legal scholarship has paid little attention to the possibility of enforcing the Convention and its jurisprudence in ordinary court procedures (Sonnevend 393, 397; Blutman 301, 309; Molnár 379; Vincze 1134). Whenever the effect of the Convention upon the domestic legal system is addressed, the central question is whether or not the Convention shall be considered as a binding standard of interpretation of constitutional rights, whereas in this context no clear distinction is made between the text of the Convention itself and the practice of the European Court of Human Rights.

For a long time, it seemed unclear whether, from the perspective of the Hungarian constitutional order, the role of the jurisprudence of the Court is merely of non–binding, inspiring character*, or whether the case law of the Court should deemed to be defining the scope and content of the respective rights, and as such has a binding force.†

At first, the question so put was answered almost unanimously in the negative. Representative of this was the view of the first President of the Constitutional Court, who argued that reference to the Strasbourg case law is merely of auxiliary nature besides the reasoning of the Constitutional Court, and such reference might also emphasize the importance of a specific rule of the Constitution (Sólyom and Brunner 1317). This view was relevant, because for two decades the Hungarian Court never went so far as to infer binding constitutional standards from the Convention. Only once has the Constitutional Court found that the understanding of the freedom of expression by the European Court of Human Rights is "forming and binding the Hungarian jurisprudence" [Decision of the Constitutional Court No. 18/2004. (V. 25.)]. Yet this statement had no consequences in later decisions and the Court continued to refer to the practice of the ECHR without holding it to be binding in the interpretation of the Constitution.

An analysis published in 2009 attempted to vest the jurisprudence of the European Court of Human Rights with a certain binding force for constitutional interpreta-

* This seems to be the traditional understanding (Grabenwarter 98 with further references).

† This approach seems to follow from the Commentaries attached to the Charter of Fundamental Rights. The comments on Art. 52. para 3 [2007] OJ C 303/33.

tion (Blutman 301). It was argued that the Constitutional Court actually accepted this jurisprudence, in its above cited Decision No. 18/2004, as guidance for the interpretation of the Constitution. It was also noted, however, that such a binding force cannot be attached to singular judgments of the European Court of Human Rights, but rather to the interpretation of the different rights of the Convention (Blutman 310).

It appears that these views at that time overestimated the importance of a single sentence in a Constitutional Court ruling that did not have consequences in case law.

This picture seems to gradually change by decisions of the Court that actually give effect to a judgment of the European Court of Human Rights. The first instance of this was a consequence of the Judgment Bukta and others v. Hungary.* Here the European Court of Human Rights ruled that the subjection of public assemblies to a prior authorisation procedure does not normally encroach upon the essence of Art. 11 of the Convention (para 35). But when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly (para 36). Shortly after this judgment the Constitutional Court decided on the constitutionality of the Act No. III of 1989 on the right of assembly in its Decision No. 75/2008 (V. 29.). This Decision actually comes to the same conclusion as Strasbourg. Yet the Hungarian Court merely refers to the Bukta judgment in a brief paragraph, and the same paragraph also quotes the jurisprudence of the German Bundesverfassungsgericht (Federal Constitutional Court). The substantive argument is solely based on Art. 62 para 1 of the Constitution. It appears that the Court did not want to tie its hands for the future, even if it was ready to follow the path of interpretation drawn by the European Court of Human Rights [Decision of the Constitutional Court No. 75/2008. (V. 29.)], even if the Constitutional Court was deciding about a statute the application of which was reviewed by the European Court of Human Rights.

The breakthrough came with Decision No. 61/2011 of the Constitutional Court.† Here the Court declared clearly that it is under an obligation to follow the case law of the Convention in its decisions interpreting the Constitution as long as the language of both corresponds. In the words of the Court: "In the case of certain fundamental rights the Constitution sets out the essential content of the fundamental right in the same fashion as an international treaty (i.e. the International Covenant

* ECtHR, Bukta and others v. Hungary,Application No. 25691/04, judgment of 17 July 2007.

† See Kovács, Péter. "Az Emberi Jogok Európai Bírósága ítéletére való hivatkozás újabb formulái és technikái a magyar Alkotmánybíróság valamint néhány más európai alkotmánybíróság mai gyakorlatában."

on Civil and Political Rights and the European Convention on Human Rights). In these cases the level of protection for fundamental rights provided by the Constitutional Court may under no circumstances be lower than the level of international protection (typically set by the European Court of Human Rights). Therefore following from the principle of pacta sunt servanda (Art. 7. para 1 Constitution, Art. Q paras 2-3 Fundamental Law) the Constitutional Court has to follow the Strasbourg case law and the level of fundamental rights protection defined therein even if this is not necessitated by its previous "precedents" [Decision of the Constitutional Court No. 61/2011. (VII. 13.)]. This statement was later referred to in Decision No. 166/2011. (XII. 20.) and after the entry into force of the Fundamental Law, in Decision No. 43/2012. (XII. 20.). Therefore, the rights of the Convention as interpreted by the European Court of Human Rights are obligatory standards of interpretation of the rights of the Fundamental Law, at least to the extent that they provide for a minimum of protection.*

INTERNATIONAL LAW SUPPLEMENTING NATIONAL CONSTITUTIONAL PRINCIPLES

Besides interpreting national constitutional rights in conformity with the Convention, the Constitutional Court seems to derive additional protection for certain rights from international treaties. This is best demonstrated by Decision No. 14/2013. (VI. 17.) of the Constitutional Court. In this case, the Commissioner for Fundamental Rights filed a petition with the Constitutional Court claiming that, inter alia, Art. 4 of the Arbitration Act and Art. 17 para 3 ANA are in violation of international law and of the principle of rule of law enshrined in Art. B para 1 of the Fundamental Law.

In its Decision No. 14/2013. (VI. 17.) the Constitutional Court pointed out that Art. 4 of the Arbitration Act was framed in order to correspond to Art. 17 para 3 ANA, and the two are closely interrelated (Decision of the Constitutional Court No. 14/2013. (VI. 17.), para 24) both aiming at preventing arbitration proceedings relating to national assets. The Court also found that constitutional concerns may arise in the following situation: i) there is an already existing investment, works or other contracting relating to the national asset; ii) this contract contains an arbitration clause iii) and affects directly or indirectly the scope of a Bilateral Investment Treaty, the New York Convention, the European Convention on International Commercial Arbitration signed in Geneva on 21 April 1961 ("1961 Geneva Convention") or the 1965 ICSID Convention (Decision of the Constitutional Court No. 14/2013. (VI. 17.), para 23).

* In this sense Kovács 76.

In view of the Constitutional Court, the exclusion of investor-state arbitration by Art. 4 of the Arbitration Act and Art. 17 para 3 ANA would be a breach of Bilateral Investment Treaties (Decision of the Constitutional Court No. 14/2013. (VI. 17.), para 51), the 1961 Geneva Convention (Decision of the Constitutional Court No. 14/2013. (VI. 17.), para 63), and the New York Convention (Decision of the Constitutional Court No. 14/2013. (VI. 17.), para 79), if such exclusion would apply to already existing contracts. This would amount to a violation of Art. B and of Art. Q para 2 of the Fundamental Law, the latter requiring harmony between the international obligations of Hungary and Hungarian domestic law (Decision of the Constitutional Court No. 14/2013. (VI. 17.), para 85). In other words, the principle of the rule of law in combination with the constitutional obligation to respect the international obligations of Hungary make it mandatory not to block international arbitration foreseen by already existing private law contracts.

Nevertheless, the Court did not find it necessary to strike down Art. 4 of the Arbitration Act and Art. 17 para 3 ANA. Instead, it pronounced mandatory requirements for the interpretation of Art. 4 of the Arbitration Act and Art. 17 para 3 ANA. For that, it also considered Art. 17 para 1 ANA, according to which "rights acquired lawfully and in good faith before the entry into force of this Act are not affected by the provisions of this Act." This language was used by the Constitutional Court to pronounce that Art. 4 of the Arbitration Act and Art. 17 para 3 ANA must be interpreted and applied in harmony with Art. 17 para 1 ANA (Decision of the Constitutional Court No. 14/2013. (VI. 17.), para 1, and 2 of the Operative Part of the Decision). The Court also stated that this requirement applies to contracts of investment or works in force on 1 January 2012, between a legal entity of another state and the Hungarian state.

In practical terms this mandatory interpretation of Art. 4 of the Arbitration Act and Art. 17 para 3 ANA means that arbitration clauses in private law contracts in force on and since 1 January 2012, which have a direct or indirect link to an international treaty are exempt from the prohibition of objective arbitration provisions of these Articles.

This decision puts a special emphasis on the respect for the international obligations of Hungary. It goes as far as to state that existing contractual rights (arbitration clauses in a private law contract) that affect directly or indirectly, *inter alia*, a bilateral investment treaty binding on Hungary shall be immune from restrictions following from the ANA (Decision of the Constitutional Court No. 14/2013. (VI. 17.), para 23).

This is remarkable because such contractual rights would not enjoy absolute protection solely under Art. B para 1 of the Fundamental Law. Rights acquired and exercised lawfully and in good faith enjoy protection as acquired rights under Art.

B para 1 of the Fundamental Law. According to the case-law of the Constitutional Court, a law can be deemed as retroactive, if it formally applies to the future, but negatively affects rights that were acquired before the entry into force of the legislation. This doctrine of acquired rights applies to such rights that the bearer of the right acquired by financial investment or by decisions of significant financial consequences on the basis of the laws relevant at the time of the acquisition of the right.*

Acquired rights are not absolute: they may be restricted provided there is a relevant public interest justifying the restriction and the restriction is not disproportionate. The burden of proof, however, rests with the state. If it fails to demonstrate that acquired rights were limited or taken away without a reason weighty enough to justify the limitation, the Constitutional Court would find a violation of Art. B para 1 of the Fundamental Law.

It follows that the contractual rights addressed by Decision of the Constitutional Court No. 14/2013. (VI. 17.) may qualify as acquired rights, but acquired rights may be subject to limitation, provided this limitation is justified by sufficiently serious reasons. In other words, in those situations where the limitation of existing contractual rights may lead to a violation of international obligations of Hungary, the constitutional protection granted to these rights is stronger than solely on the basis of the principle of rule of law.

INTERNATIONAL LAW AS A STANDARD OF REVIEW OF CONSTITUTIONAL PROVISIONS

The concept of an unconstitutional constitutional amendment is equally fascinating and controversial, especially if the substantive limits to constitutional change are implied (Jacobsohn 460-487) and are not explicitly stated by the constitution in question.† Declaring a constitutional amendment to be unconstitutional by the constitutional court is not only a blunt interference with popular sovereignty, but also comes dangerously close to judicial arbitrariness. It is therefore tempting for a constitutional court to seek objective and relevant criteria in European or international law. This temptation is not without dangers if it comes to questions of legitimacy, but it can at least help to overcome accusations that the respective constitutional court is inventing standards that do not exist.

The Hungarian Constitutional Court provides an unprecedented example of yielding to the temptations of international law, since already two of its decisions rely

* See Salát and Sonnevend 189.

† As is the case in Germany under Art. 79 para 3 of the German Basic Law. For the problematic use of this clause in the EU context see Vranes 75.

on international *ius cogens* to define the eternal core of the constitution of Hungary. Both decisions were made in the context of a controversial constitutional amendment, yet none of them actually found a violation of international i*us cogens*.

Decision of the Constitutional Court No. 61/2011. (VII.13.)

The Decision of the Constitutional Court No. 61/2011. (VII. 13.) was made under the 1989 Constitution in a battle between Parliament and the Constitutional Court over a rather ludicrous tax legislation. On 22 July 2010, the Hungarian Parliament adopted several economic and financial Acts. These Acts, inter alia, introduced a new punitive tax on certain payments for employees of the public sector (civil servants, public servants, etc) whose employment was terminated. Accordingly, severance payments and other payments related to the termination of the employment exceeding HUF two million became subject to a 98 per cent tax. Income tax and social security contributions already paid could be deducted from the punitive tax. The proposal of the Act in question justified the punitive tax by reference to the need of society to do justice. Although the Act entered into force on 1 October 2010, the punitive tax was to be applied to the relevant incomes starting from 1 January 2010. In order to ensure the constitutionality of this Act, Parliament also amended Art. 70/I. of the 1989 Constitution by including a new paragraph 2 in the article that allowed for special taxes using the following language:

> „In respect of any remuneration received against the good morals from public funds, or from bodies entrusted to manage state assets and state property, including bodies under majority state ownership or control, tax liabilities of a special extent may be introduced on the strength of law, beginning with the given tax year."

The punitive tax was challenged before the Constitutional Court within the framework of an *actio popularis*, and the Court found the relevant provisions of the Act to be unconstitutional in its Decision No. 184/2010 (X. 28) (para 900). According to the Court, incomes gathered solely on the basis of relevant statutory provisions cannot be regarded as being against good morals, and therefore the new Art. 70/I para 2 of the Constitution did not cover the retroactive 98 per cent tax. As a result, the Court annulled the relevant provisions retroactively effective from the day of the entry into force of the law.

In response, Parliament reintroduced the 98 per cent tax with certain modifications. The new rules entered into force on 30 December 2010. At the same time, Parliament modified Art. 70/I. para 2 of the Constitution allowing for retroactive taxation going back five years from the actual tax year. To prevent the Constitutional Court from reviewing the legislation, a limitation was also introduced in Art. 32/A. paras 2 and 3 of the Constitution. The language of Art. 32/A. para 2 of the Constitution

was basically identical to Art. 37. para 4 of the Fundamental Law today, which reads as follows:

> "As long as the level of state debt exceeds half of the Gross Domestic Product,* the Constitutional Court may, within its competence pursuant to points b) to e) of paragraph (2) of Article 24, review the Acts on the central budget, on the implementation of the budget, on central taxes, on duties and on contributions, on customs duties, and on the central conditions for local taxes as to their conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or in connection with the rights related to Hungarian citizenship, and it may only annul these Acts for the violation of these rights. The Constitutional Court shall have the right to annul without restriction Acts governing the above matters if the procedural requirements laid down in the Fundamental Law for the making and publication of such Acts have not been observed."

The Constitutional Court was confronted with this limitation on its powers in Decision No. 61/2011. (VII. 13.). Here several petitioners challenged the constitutional amendments that made the new Art. 32/A. para 2 and Art. 70/I. para 2 part of the Constitution. The Constitutional Court was not ready to find these amendments unconstitutional, but indicated that it might be ready to review constitutional amendments on the basis of international law. The Decision stated that "norms, principles and fundamental values of *ius cogens* together form a standard which all subsequent constitutional amendments and the Constitution must comply with" [Decision of the Constitutional Court No. 61/2011. (VII. 13.)].

Decision of the Constitutional Court No. 45/2012. (XII. 29.)

In spite of this clear language Decision No. 61/2011. (VII. 13.) AB did not clearly rule that the Constitutional Court would possess the power to enforce these standards against the constitution-making power. This came only after the entry into force of the Fundamental Law in No. Decision 45/2012. (XII. 29.) of the Constitutional Court. This Decision concerned the Transitional Provisions of the Fundamental Law.

The Transitional Provisions were a special product of the 2011 Constitution-making in Hungary. This is because the Fundamental Law applied a unique technique, inasmuch as it provided specifically for the adoption of separate Transitional Provisions, which, according to Point 3 of the Final Provisions of the Fundamental

* The limitation based on temporary austerity is a new one, yet it will not affect the limitation of powers in the near future. Currently, the Hungarian state debt accounts for 80 per cent of GDP, and, according to the most optimistic views, may get below 50 per cent in 20 years.

Law, were to be adopted by Parliament according to the rules of the previous Constitution on constitutional amendments. Since these provisions were also the legal basis of the Fundamental Law itself, it seemed reasonable to suppose that the constitution-maker intended to attribute to the Transitional Provisions a rank similar to that of the Fundamental Law itself (I shall come back to this issue below).

The Transitional Provisions were challenged by the ombudsman, who argued that several provisions gravely violated the rule of law, and that this might cause problems of interpretation and endanger the unity and operation of the legal system. He also argued that the Transitional Provisions contained, in many instances, rules that were obviously not of a transitional character. According to the ombudsman, there were numerous articles of the Transitional Provisions that did not comply with the requirement of transitionality.

As the Parliament adopted the First Amendment to the Fundamental Law declaring the Transitional Provisions to be part of the Fundamental Law, the Constitutional Court asked the Commissioner if he maintained his petition against the new constitutional background. Somewhat surprisingly, the ombudsman replied that the First Amendment to the Fundamental Law had not answered all the questions on the basis of which he challenged the Transitional Provisions. The Commissioner argued that only provisions of the Transitional Provisions that were necessary for the transition from the former Constitution to the new one were part of the Fundamental Law.

In its Decision No. 45/2012. (XII. 29.) the Constitutional Court found the ombudsman's petition well-founded (para 347). The core of the Court's argument was that Parliament had overstepped its constitutional authority when it implemented regulations in the Transitional Provisions which had no transitional character.

Interestingly, the Court made efforts to conceal the fact that it had actually declared norms to be unconstitutional which seemed to be covered by Point 5 of the Final Provisions of the Fundamental Law. As already mentioned point 5 of the Final Provisions was inserted by the First Amendment and declared the Transitional Provisions to be part of the Fundamental Law. Hence the reasoning of the Decision is somewhat blurred and not completely free of contradictions. The Court reaffirmed its previous case law claiming that it does not have the power to review the Constitution, now the Fundamental Law, but it is entitled to ensure that procedural rules are respected in the course of adopting norms of constitutional rank (Decision of the Constitutional Court No. 45/2012. (XII. 29.) para 380). It then went on to state that Point 3 of the Final Provisions of the Fundamental Law is an authorization for Parliament to adopt transitional provisions in order to ensure the transition from the old legal regime to the new one (paras 347, 388). In the view of the Court, this authorization can be deemed a procedural rule, the violation of

which results in the nullity of the piece of legislation adopted, even if Parliament acted as a constitution-making power (paras 347, 397). According to the Court, the authorization in point 3 of the Transitional Provisions was overstepped by Parliament because large parts of the Transitional Provisions were not provisional in nature, and this was not changed by the insertion of Point 5 into the Final Provisions by the First Amendment (paras 347, 400). As a result, the Decision annulled several provisions of the Transitional Provisions, as well as its Preamble.

It was probably in order to reduce confrontation with Parliament that the Constitutional Court cautiously framed its ruling as the enforcement of formal rules and emphasized that it did not review the merits of the Transitional Provisions. In fact, this claim was wrong, since Decision No. 45/2012 (XII.29) of the Constitutional Court did carry out a review of the merits, otherwise it would have not been possible to distinguish 'real' transitory provisions from non-transitory ones. Nevertheless, the Court explicitly referred to the possibility of including the annulled provisions in the Fundamental Law, thereby implying that such inclusion would make constitutional review impossible (paras 347, 403). Still, the Decision also seems to establish the power for itself to review the constitutionality of constitutional amendments in its paragraph 118, which reads as follows:

> "Constitutional legality has substantive criteria besides the procedural, formal, public law ones. [These are] [t]he constitutional requirements of the democratic state under the rule of law, constitutional values and principles acknowledged by democratic communities under the rule of law and enshrined in international agreements, as well the so-called ius cogens, which partly overlaps with these. Under certain circumstances the Constitutional Court is empowered to review whether the substantive constitutional requirements, guarantees and values of a democratic state under the rule of law are consistently respected and included in the constitution" (paras 347, 403).

It is remarkable that the Court here not only reiterated its findings on the role of international *ius cogens* as a standard of review of the constitutional amendments, but also claimed the power to carry out a substantive review of norms formally incorporated into the Constitution (Fundamental Law).

CONCLUSIONS

The Fundamental Law of Hungary has been much criticized in the past two years. However we may view these critiques, it is undeniable that the system of checks and balances is seriously flawed by a permanent constitution making. In the light of this, it is remarkable how strong a role international law in general, and the European Convention on Human Rights in particular, can play in ensuring constitu-

tional values in Hungary. But despite this optimistic finding, some caution is warranted here: the provisions and dicta referred to in this paper had little effect in practice. But they continue to express the lingering desire for perennial constitutional values of a legal community.

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The Fundamental Law of Hungary in the European context

ARTICULATING THE PROBLEM: "LEGAL" INTEGRATION AND INTEGRATION "BY VALUES". THE COMPLEXITY OF RELATIONSHIPS BETWEEN INTERNAL AND EXTERNAL SOURCES OF LAW

The topic "Fundamental Law of Hungary in the European context" can be read from different points of view of which two are of particular significance. The first component is in relation to the homogeneity of the Fundamental Law with the principles and values of the so called "common European constitutional traditions". The second is the rather technical problem of the relationship between national and international/European sources of law. Consequently it is the adaptability of the constitutional law to the process of European integration.

These two components though distinct are in fact two sides of the same coin. At the time of the collapse of the communist regime, all the countries of Central and Eastern Europe faced the same problems of trying to adapt their legal systems to the requirements of European conditionality. This was done at the level of principles and values on the one hand and of legal and technical standards on the other. The specific problems of European integration (in the broadest sense, within both the Council of Europe and the European Union), viewed at that time in a more romanticised way than today, caused an adaptation at various different levels thanks also to the legal support of different European institutions.

In addition to the fulfillment of the Copenhagen criteria, the issue of national sovereignty (Kellermann, De Zwaan and Czuczai; Cremona; Albi, Kellermann, Czuczai et al.; Chronowski 2009) should not be forgotten, as it was highly emphasized in the Constitution of these countries, as a reaction to the previous situation, in which sovereignty was either limited or completely absent. However, although there were fears of "protectionist" attitudes, especially from the Baltic States, the constitutional and political practice avoided this danger. In fact, we have not seen any more barriers than in the old member States of the Union. After all, new Constitutions were equipped from the outset or through subsequent amendments to cope with the impact of external law by providing specific clauses for the transfer or delegation of sovereign powers with commensurate safeguard clauses (see Di Gregorio 2067-2093; Albi). Constitutional amendments arose from a desire to avoid constitutional and jurisprudential conflicts, mindful of the experience of the old member States. The contribution of the Constitutional Courts of the new members

to the debate on national sovereignty and limits to the penetration of European law (in Italian called "counter-limits"*) raised interesting discussions. However, one can detect a real paradox in the desire of some Courts to defend fundamental constitutional values of their legal order when the entry into the Union was seen as a guarantee of democratic choice, as Sadurski correctly emphasises (Sadurski 208-209).

The integration into the two main European organizations (Council of Europe and European Union) should be considered as an unique phenomenon. Not so much from the point of view of sources of law, since the impact of EU law on the legal order of the member States is not comparable with that of the ECHR, but rather because today, as 25 years ago, we no longer talk of a simple technical or economic integration. Instead we talk about a "common understanding" even in areas that do not fall within the competence of the Union. In short, the issue of democratic homogeneity is always present, as we see in recent European documents dealing with just these issues.†

The route taken in this regard by countries of the former communist empire was both difficult and burdensome but essentially successful. For some of them it was faster and more stable, thanks to the recall of previous democratic traditions or experiences of political pluralism that facilitated the transition from communism (Di Gregorio 2014).

What is the position of the Hungarian Constitution within this framework?

Given that the 2012 Fundamental Law was not adopted at the point of rupture or constitutional transition and that there is today a strong continuity with the previ-

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* The term *controlimiti* has been coined by the famous Italian constitutionalist Paolo Barile at the beginning of the '70s (Barile 45; Barile 2416; Di Gregorio 1-15).

† This is clearly underlined in the Resolution of the European Parliament of July, 3 2013 *On the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)*: "I. whereas the scope of Art. 2 TEU is not restricted by the limitation of Art. 51 para 1 of the Charter, whereas the scope of Art. 7 TEU is not limited to the policy areas covered by EU law, and whereas as a consequence the EU can also act in the event of a breach of, or a clear risk of a breach of, the common values in areas falling under Member States' competences". The same is true for the follow-up of the conditionality: "E. whereas the obligations incumbent on candidate countries under the Copenhagen criteria continue to apply to the Member States after joining the EU by virtue of Art. 2 TEU and the principle of sincere cooperation, and whereas all Member States should therefore be assessed on a regular basis in order to verify their continued compliance with the EU's common values". Also: a member State can refer to the Art. 4 para 2 TEU (that recognizes the national identity and the different legal traditions of the member States, including constitutional structure) "only in so far as a Member State respects the values enshrined in Art. 2 TEU" (M). The same document at point 2 of the Assessment firmly reiterates that, "while the drafting and adoption of a new constitution fall within the scope of Member States' competences, the Member States and the EU have a responsibility to ensure that the constitutional processes and the content of constitutions comply with the commitments entered into by every Member State under the EU Accession Treaties, that is to say, with the common values of the Union, the Charter and the ECHR".

ous text, its homogeneity or integration in the European context can be evaluated in a positive way. The concerns seem to involve not so much the text in general, but some of its individual points and especially its subsequent implementation. As some have already noted, a final judgment on the Fundamental Law consistency with the European constitutional traditions can only be made with time (and thus far insufficient time has passed for such judgements to be made even after a series of important decisions of the Constitutional Court). Therefore the scientific "vivisection" of the constitutional text is of limited utility (Fröhlich and Csink; Chronowski 142). The constitutional culture of the country is also very important, and it certainly has not been lost*, even if sticking points are undeniable. Probably one of the most problematic issues is the limited availability of documents (especially decisions of the Constitutional Court) in English or in other European languages and the quality of the translations that creates the possibility of misunderstandings and obscurities.

As regards the technical side of the relationship between domestic and external sources of law, the constitutional debates following the 1989 transition in Hungary have gradually addressed the question of European integration culminating in a model ready for entry into EU with the constitutional amendments of 17 December 2002.

Aside from the conflicts that have occurred on individual issues about which the Commission has appealed to the Court of Justice, both the old and the new constitutional texts are open to the European and international dimension, even more than in other States in the region. Hungary expressly mentions the European Union while other countries such as Poland or the Czech Republic refer in general to international organizations†. Notwithstanding the criticism of some Hungarian scholars (Chronowski's paper), it seems to me that the Hungarian Constitutional Court has been particularly eurofriendly compared with other Courts of the region.

As for international law, since the commencement of its activity in 1990 the Court has made reference to it in order to repeal the particularly hateful institutions resulting from the communist past such as the death penalty [Decision of the Con-

* We have to reconcile the "real" Constitution with the "ideal" one, as Sólyom said (Sólyom 2012).

† As in the case of Latvia, Estonia and Slovakia, the constitutional amendments introduced in Hungary with the law of 17 December 2002 refer both to the "European Communities" and to the "European Union". However, among the various proposals put forward, it was decided to introduce the minor adjustments needed to join the EU, deliberately leaving the solution of future and potential conflicts to the Constitutional Court. The main question is that of the superiority of Community/European law, given the clearly dualistic nature of the Hungarian legal system. Hungary has also embraced the theory of the "common exercise" of State sovereignty, as in some Constitutions of the old member States of the Union.

stitutional Court No. 23/1990. (X. 31.) (Mazza 144).* There was also a reference to the notion of crimes against humanity under international law to penalize those responsible for the repression that followed the 1956 uprising [Decision of the Constitutional Court No. 53/1993. (X. 13.)].

In respect of Community/European law, a favorable attitude by the Constitutional Court preceded the entry into the Union† and continued after that event,‡ even if there have been a few controversial decisions such as that on the sugar quota and others.§ The Court seems to have maintained this attitude following the adoption

* "The case law developed by the Court of Budapest has been a privileged channel for the circulation of legal models, concepts and practices in the renewed euro-Western democratic and pluralistic system of Hungary" (Di Gregorio 2001).

† In its Decision No. 4/1997. (I. 22.) the Court points out that if a contradiction is found between an international treaty signed by Hungary and the domestic law and where the differences are such as to make an attempt to fundamental rights of the citizens guaranteed by the Constitution, the Hungarian State has to comply with the obligation imposed by the Art. 7 para 1 of the Constitution, that is it must "harmonize domestic law with the obligations assumed under international law". In that judgment, the Court has referred to several decisions of the German Constitutional Court, including the Maastricht one, noting that, "as told by the German Constitutional Court, you can not give up the aim of protecting the Constitution and this principle should also apply to the Treaty on European Union" (See Harmathy 315-326).

‡ See for example Decisions No. 143/2010. (VII. 14.) (on the Lisbon Treaty) and No. 22/2012. (V. 11.) (on the Treaty on Stability, Coordination and Governance). In the first case the Constitutional Court rejected the petition filed by a number of citizens to assess the constitutionality of the Act of Promulgation of the Lisbon Treaty (Law No. CLXVIII of 2007). We must remember that both the old and the new Constitution do not contain specific provisions enabling the Court to check the constitutionality of an international treaty after its promulgation. However, the Court can examine the enactment Act, as already stated in the Decision of the Constitutional Court No. 4/1997. (I. 22.). If it is declared unconstitutional, this Act has no effect on the international obligations of the State and therefore the Parliament must modify, if necessary, the Constitution. As the Court stated in the Decision No. 143/2010 (VII. 14.) "[t]he Constitutional Court pointed out that in the framework of the *a posteriori* review of norms, due attention should be paid to the fact that Hungary is a member State of the European Union…In such a case, the legislator should find a solution whereby EU commitments could be executed without violating the Constitution". The Constitutional Court also emphasised that, in the case of treaties of such high importance, the competent authorities should always request, in due time, *a priori* constitutional review. As for the content, it was evident that the petitioner's arguments were a result of imperfect and inadequate reading and understanding of the Lisbon Treaty. But according to the Court, "the so-called European clause (Art. 2/A of the Constitution) cannot be interpreted in a way that would deprive the clauses on sovereignty and rule of law of their substance". The Court concluded that, although the reforms of the Lisbon Treaty were of paramount importance, they did not alter the fact that Hungary maintains and enjoys her independence, her status in terms of rule of law and sovereignty. In the Decision No. 22/2012 (V. 11.) the Constitutional compared the European clauses of the former Constitution (Art. 2/A and 6) to the European clauses of the Fundamental Law (Art. Q paras 2 and 3, E). In that way it recognized their equivalence: "In the current case, the content of the relevant texts of the former Constitution and the FL are identical. If that is the case, the Constitutional Court, as the principal organ for the protection of the FL, can use those arguments of its previous decisions based on the former Constitution, which are relevant to deciding on a constitutional matter and do not contradict the FL provisions and interpretative rules. Consequently, in the instant case, the previous Decision of the Constitutional Court No. 143/2010 (VII. 14.) was the starting point…".

§ As for the Decision on the sugar quota (May, 25 2004) here the Hungarian Act which introduced two EU regulations into national law was declared unconstitutional. The Act violated the principle of non-retroactivity of tax obligations; moreover certain matters should be regulated by a law and not by government decrees. Therefore, the Court reiterated its previous case-law on the principle of legality (Albi, 52-53).

of Fundamental Law, in spite of the fact that it generally tries to avoid dealing with the issue of the conflict between European and national legal sources*. But it is precisely such behaviour that could be perceived as an "attitude of favour".

The Fundamental Law does not substantially change the framework of the European clauses and the relationship between sources of law.† Certainly, there are some inaccuracies or overly generalised points compared to the previous text (to that we must add the fact that the current Constitution like the previous one states that "judges are subject only to the law"). But in general in the Hungarian case we did not see the problems that have arisen in countries that have shown "protectionist" tendencies especially in constitutional jurisprudence following their entry into the Union. I am referring to a series of decisions by the Czech and Polish Constitutional Courts.

Several pre-existing controversial aspects have been maintained. For example, the "safeguard clauses" (counter-limits) are very ambigous. The Constitutional Court's behaviour towards this problem is also ambivalent: although the Court informally introduced these clauses in the Lisbon Treaty Decision, it generally tries to ignore them.

Another complex issue regards the fact that the Hungarian legal system, considering the constitutional text and the constitutional jurisprudence, technically has a two-tier and not a three-tier structure as for example in Italy and in the majority of other members States of the Union. In it, the European law is considered equivalent to the national law (for the purposes of the constitutional review), leaving international law in another dimension. This construction, however, does not fully explain the relationship between the different sources of national law and the different sources of European law, considering that in Europe different models exist. In particular, the question of the supremacy of the European law in the event of conflict with the internal one, it is not dealt with the right approach.‡

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* "The Court is very cautious in dealing with EU law, seeming to be reluctant to plunge into the deep water of doctrinal difficulties manifesting themselves in the contact zone between EU law and domestic law" (Blutman and Chronowski 348).

† Arato, Halmai and Kis stated the new European clause is expressly contrary to a federal evolution of the European Union and much more restrictive than the previsous one: "The original rule permitted the Hungarian State to delegate certain powers to EU bodies in which it has no joint decision-making rights – the Fundamental Law does not allow this. It makes it possible to declare as unconstitutional the delegation of any competence to a EU institution if this results in termination of the nation State's consensual decision-making right. The current constitutional rule was made so as not to stand in the way of the EU's continued development along federal lines – the new underlying intent is to obstruct federalisation" (Arato, Halmai and Kis 37).

‡ The Art. E (the European clause), does not clarify that the domestic legal act conflicting with an EU legal act is not applicable. The duty of the courts of law to ensure the compliance of domestic and Union law still stems from EU Treaties and not from the Constitution itself. The principle of harmony does not apply also to the European law (Chronowski, 123-124; Chronowki and Csatlós).

Many other questions – mainly of a technical nature – that were obscure under the old constitutional text and the previous constitutional jurisprudence remain open and unclear, as much for want of accurate translation as of lack of documentation. The majority of uncertainties regard the relationship between the different sources of law, which the Constitutional Court for the time being seems to want to avoid*. For example, the distinction between customary international law and *jus cogens*,† between ratified and non-ratified treaties as well as between the various instruments of ratification. Among all these categories there are complex relationships, also of hierarchical nature. As for the generally recognized rules of the international law (customary international law), the Fundamental Law introduces the monistic principle. For the other sources of the international law (treaties, judgments) it retains the dualistic approach. To ensure the harmony between the sources of law, the Constitutional Court continues to examine the conflict between domestic law and international treaties (Art. 24 c 2 f) FL), but despite the clarifications introduced by the new Act on the Court, a number of issues remain unclear. First, the fact that the Court should not necessarily repeal the law in conflict with an international treaty (Art. 42 of the Act on the Constitutional Court of 2011 is more ambiguous than the corresponding article of the old Act of 1989) (Blutman and Chronowski).

The constitutional jurisprudence following the Fundamental Law did not incorporate all the previous arguments. The Decision No. 22/2012. (V. 11.) was delivered after the entry into force of the Fundamental Law but before the Fourth Amendment, which canceled the earlier constitutional jurisprudence. In Decision No. 12/2013. (V. 24.) the Court, while refusing to examine the substance of the Fourth Amendment, stressed the importance of international and European constitutional goals and then specified, in Decision No. 13/2013. (VI. 17.), that even after the Fourth Amendment it could cite some previous decisions in certain circumstances.‡

* Chronowski and Blutman wrote, "The post-accession decisions of the Constitutional Court reflect uncertainty with respect to the relationship between National and Union law; the role of the Constitutional Court in reviewing that relationship" (Chronowski and Blutman 332).

† Following Chronowski and Csatlós since the Fundamental Law has maintained a monist relationship between "generally recognized rules of international law" (which indicates, however, different things) and the Constitution, then "customary international law, *jus cogens* and general principles of law recognized by civilized nations" (as stated in the Decision of the Constitutional Court No. 30/1998. (VI. 25.) have at least a constitutional rank in the hierarchy of sources of law. In fact, these rules can be considered part of the Constitution or even (*jus cogens*) above the Constitution [Decision of the Constitutional Court No. 45/2012. (XII. 29.)].

‡ "The use of the arguments in the decisions dated before the Fundamental Law shall be reasoned with sufficient detail. Ignoring the principles from the previous decisions is possible even if the content of certain provisions of the previous Constitution and the Fundamental Law is the same. However, the way that domestic and European constitutional development has done so far, the regularity of constitutional law affects the interpretation of the Fundamental Law as well".

CONSTITUTIONAL SYSTEM AND THE POST-COMMUNIST TRANSITION, FROM THE POINT OF VIEW OF VALUES

Much more complex is the problem of "common values", given the significant criticism expressed by European institutions after the new Fundamental Law and the first four amendments came into force.* The issues are well known and I will not reply them. I just want to add some reflections comparing the Hungarian constitutional development with that of other member States of the Union, with a focus on constitutional models. This comparison may help to both mitigate the criticism as well as provide a context.

No Constitution today emerges from a vacuum. The new Hungarian Constitution is essentially based on continuity with the previous constitutional text to the extent that many parts are identical. Moreover, the reference to the continuity and traditions is present both in the constitutional text as well as in the statements of political leaders and constitutional judges even though from different perspectives. Those who criticize the concept of "historical Constitution" argue that it would replace the "invisible constitution", namely the Constitution built after the transition mainly thanks to the activism of the Constitutional Court in the absence of a single consistent and coherent constitutional text (Sajó).

The Hungarian transition was the most peaceful, gradual and unfractured in the whole communist bloc, in addition to being the first genuine transition of the area, more so even than the Polish one (where the first elections of 1989 were only semi-free) and carried out thanks to the communist reformers. This is an important consideration to point out, along with the fact that the introduction of Western-style principles and institutions was made early in this country (Ganino). The form of State (the regime system) changed with the constitutional amendments of 1989-1990 resulting in large part from the agreements of the Round Table. On that occasion, in a completely non-formalized way, the constituent power had taken shape. Although it is a new text from the documental standpoint, the Constitution of

* Criticism concerns also a series of Acts, some even preceding the Fundamental Law. The European Parliament has adopted several Resolutions between 2011 and 2013 (on the media law, on the constitutional amendments, on the recent political developments in Hungary). The Venice Commission has also delivered several opinions (on the Fundamental Law and its amendments, on the electoral law, on the laws on judges, on the Constitutional Court, on the status of churches,). So far the decisions of the European Court of Justice have been two: the Decision of 6 November 2012 stated that the radical lowering of the retirement ages of judges, notaries and prosecutors from 70 to 62 years was an unjustified discrimination based on age; in the 8 April 2014 Decision, the European Court stated that with the early termination of the mandate of the Commissioner for Personal Data Protection Hungary violated its obligations under Directive 95/46. We should also mention the Decision of 27 May 2014 of the Strasbourg Court in the Baka case (the President of the Supreme Court sacked from his post with three and a half years early) that is particularly severe. The Court has recognized both the violation of Art. 6 of ECHR for the lack of remedies capable to protect the right to trial and of Art. 10, because in the government's actions there was a clear intent of persecution against those who had expressed criticism of the justice reforms in place.

2011-2013 is not new from the point of view of the regime system. It is therefore necessary to clarify the misunderstandings that usually follow reflections on concepts such as constituent power, transition, form of State, total revision of the Constitution and new Constitution. The Round Table between the ruling party and the opposition was a constituent "moment"*. The constitutional choices made between 1989 and 2009 were perfectly in line with the European constitutional traditions (See Körösényi).

The Hungarian Constitutional Court has been the most authoritative and balanced in the region and has enabled a smooth transition without vengeance in the name of continuity (the transition was so gradual and peaceful that the Court did not use this term but *rendeszerváltás,* that is "system change"†). Morevoer, ever since the Middle Ages the sense of continuity within the Hungarian legal system has been very strong due to the customary substratum of constitutional law (the first written Constitution is that of 1949). So there are two peculiarities to emphasize in the Hungarian constitutional history: a customary substratum and a gradualist approach without violent schisms. In the light of this continuity the need to adopt an entirely new constitutional text can be explained by a desire for symbolic rather than a formal amendment (also required). At the same time we must be careful in underpinning the principle of continuity in the constitutional law. The sense of continuity must be combined with a very powerful constitutional text, though not necessarily rigid (but the flexibility of the Hungarian Constitution is not unique in a comparative perspective).

It appears that the most serious regression could be considered the repealing of the constitutional jurisprudence of the last twenty years‡ and the weakening of the autonomy of the Constitutional Court§. But it is difficult to agree with those who dispute the inability of the Court to assess the content of the constitutional amendments. Few Constitutional Courts perform such control (for example in France, Romania, Ukraine) and the same Hungarian Constitutional Court previously avoided the possibility of substantive constitutional review [Decision of the Constitutional Court No. 1260/B/1997.; the complete reversal of that position was the

* Salvetti thinks that the Hungarian case can be an important point of observation to study the birth and development of the constituent power, with a special focus on the European conditionality. Nevertheless, we have to be careful because the European conditionality has operated since 1989 and the Hungarian Fundamental Law did not give birth to a real constituent power.

† Ganino states "They have moved in line with the decision not to provoke breakage of the formal Constitution. This was at the beginning, in 1989, when the government of the Socialist Party-guidance was still in office, and in 1990, after the elections that gave the majority to the forces of the opposition. Hungarians are proud of this attitude, citing the historical precedent of 1848, when without violence against members of the former regime all the liberal forces had joined for the construction of a new order. At the same time they emphasize the violent break made instead in Romania in the same end of 1989" (Ganino 386).

‡ The Resolution of the European Parliament of 3 July 2013 is concerned about such a reset of the constitutional jurisprudence, especially in relation to European matters (see points 19 and 20 of the Assessment).

§ De Simone talks about "a loss of counter-majoritarian role of the Court".

Decision No. 45/2012. (XII. 29.)]. With regard to the role of the Constitutional Court we must also consider that it was really very powerful, much more than other Constitutional Courts in Europe and this was often a heavy burden for the Hungarian Court. Perhaps the new model of constitutional review (with regard to competences and access to the Court) is more similar to the European ones, but obviously the feeling of limitation and reduction of power compared to the previous situation is very frustrating. Also, it is unlikely that there will be a total reset of the previous constitutional jurisprudence, thanks to the "recovery" carried out by the Constitutional Court itself. We may recall, for example, what the Court stated after the entry into force of the Constitution, in its Decision No. 45/2012. (XII. 29.).* Particularly important is the Decision No. 22/2012. (V. 11.) in which the Court comments on continuity and discontinuity, and others adopted in 2013.†

Another important element of the new Constitution is the vengeful anti-communist attitude which emerges in several places, especially after the Fourth Amendment. This attitude recalls the severity of the Czechoslovak, and then Czech, legislator (but this occurred in the first years following the transition from communism) (Di Gregorio 2013). So the new FL arises in a logic of rupture and continuity. This may seem paradoxical without a careful analysis of Hungarian history, the characteristics of transition from communism and evolution after that important event. Taking into account the spirit of revenge against the former communists and their social-

* "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. In democratic States under the rule of law, Constitutions have constant substantial and procedural standards and requirements. The substantial and procedural constitutional requirements shall not be set lower in the era of the Fundamental Law than they were at the time of the Constitution (Act). (…) The level of the values, principles and guarantees once adopted in a constitutional State under the rule of law may not be lessened, and they shall be required to be enforced just as severely as before".

† "The Constitutional Court can apply in new cases arguments connected to the questions of constitutional law judged upon in the past and contained in its decisions adopted before the Fundamental Law was put into force, provided that it is possible on the basis of the concrete provisions – having the same or similar content as that of the previous Constitution – and of the rules of interpretation of the Fundamental Law (…) The Constitutional Court's statements made on the fundamental values, human rights and freedoms and on the constitutional institutions that have not been changed fundamentally by the Fundamental Law remain valid (…) However, the statements made in the decisions based on the previous Constitution cannot be superceded automatically without any examination; the provisions of the previous Constitution and of the Fundamental Law have to be compared and carefully weighed. If the comparison results in establishing that the constitutional regulation has not been changed or it is essentially similar to the previous one, then the interpretation can be transposed". In its Decision No. 13/2013. (VI. 17.) the Court stated that "The use of the arguments in the decisions dated before the Fundamental Law shall be reasoned with sufficient detail. Ignoring the principles from the previous decisions is possible even if the content of certain provisions of the previous Constitution and the Fundamental Law is the same. However, the way that domestic and European constitutional development has taken place so far, the regularity of constitutional law affects the interpretation of the Fundamental Law as well". Yet in the Decision No. 13/2013. (VI. 17.): "The obligations of Hungary that arise from the international treaties, the EU membership and the generally recognised rules of international law, and the fundamental principles and values compose such a coherent system that cannot be left out of consideration during the constitution-making process, legislation and constitutional examination of the Constitutional Court".

ists heirs (a "fury" which the Court in the past had blocked from being exercised on several occasions) certain parts of the FL just seem to be dictated by a desire to challenge the methods and the results of the 1989 transition but to do this today means to hold an anachronistic position. We no longer see today the consensus and the spirit of reconciliation that characterized the Hungarian transition.

A distinctive feature of the transitions in this part of Europe was also the length of the process, which gave rise to a real "law of transition" as well as to disputes about the results of the transition even several years later. What happened in 1989 has left an indelible aftermath in certain political forces, both at the level of "management" of the communist past and as a challenge to the chosen path to overcome the socialist form of State. This occurred especially in Poland and Hungary, countries that have experienced – not surprisingly – the more concerted transitions in that area. Thus, there are clear historical roots to current constitutional developments in Hungary, which are the symbol of a political season underway since 2010 and which could continue for a long time (*Hungary's new constitutional order and "European unity"* 871-884). The emergence of this new political and constitutional season has many sources, some quite remote. We have to consider the deprivations that Hungary has suffered in history and the peculiarities of the transition. Recently, the economic crisis has been exacerbated by the political crisis and the internal division of the Socialists, whom a good portion of the electorate has apparently not forgiven being "heirs" of the Single Party.*

For many reasons, not all the critical remarks made by scholars are convincing. Some have for example highlighted that the Fundamental Law wants to strengthen the connection between the executive and the parliamentary majority at the expense of the judiciary, especially the Constitutional Court, to put an official end to the activism of the transition period (Pecorario). However the Court, notwithstanding its wide potential for intervention, had always taken a balanced approach and had never showed (unlike its Czech counterpart) a punitive intent against the former communists. In its Decision No. 60/1994. (XII. 24.) on the lustration law the Court had considered the transition as concluded†. Earlier, in the Decision No. 11/1992. (III. 5.) on the statute of limitations, the Court had unequivocally refused to suspend the constitutional requirements on the basis of the exceptional nature of the

* It should be remembered that in the 1994-1998 legislature the Socialists and their allies had in parliament a two-thirds majority necessary to approve a new Constitution. The project was prepared and widely debated by all political forces but eventually the government majority did not want to approve a text on which there were still several political doubts (including their own). A. Arato considers a serious mistake the failure to approve the text at that time because notwithstanding its limits there was a braod support and participation of all political forces and the civil society. In addiction, that text introduced a really harder process for constitutional amendments (Arato 2012).

† "It has applied the standards of a normal democratic society rather than the extraordinary circumstances of the transition" (Di Gregorio 253).

circumstances that would have justified the Act, according to its authors (Di Gregorio 418).

With regard to the criticisms relating to the reduction of the guarantees of rights compared to the previous text and also in relation to European standards we must observe that the elimination of the *actio popularis* was supported or at least welcomed by the same Constitutional Court, and that it was replaced by the direct action of citizens. The *actio popularis* exists in very few places in Europe, mainly in the countries of former Yugoslavia, and derives from an institution typical of the socialist State (notwithstanding the limited precedent of Bavaria) (Di Gregorio 257-281). The reduction of the four parliamentary commissioners to one is not necessarily a bad thing and seems to be a rationalizing initiative.

At this point one may wonder on what grounds, and on the basis of which parameters, is the "constitutional homogeneity" of the Fundamental Law being discussed in Europe. What are the main concerns? Obviously there is the fear of a "majority oppression". This danger is ever-present in contemporary parliamentary systems of government where the executive (and its majority) clearly prevails. We try to correct this "tyranny" in various ways: With the strengthening of popular participation, with forms of checks and balances, with the increased influence and number of the guarantees. The tyranny of the majority in the Hungarian case may also indicate the tyranny of the "majority nation".

The concerns, however, are mutual: Hungary is worried about its constitutional sovereignty in the European context, and Europe is concerned about the lack of homogeneity of values, not so much in terms of the constitutional text itself as for its implementation by cardinal legislation (on this point the current constitutional text is not radically different from the previous one, expanding the already numerous references to this kind of legislation). But on what basis can Europe rule on whether the so-called "European democratic standards" are respected by the Fundamental Law of Hungary? On the basis of a continuation of conditionality (Iadicicco)? Be that as it may, it is naive to have too many illusions on the applicability of Art. 7 TEU, in relation to the vagueness of Art. 2. If the procedures laid down in the Treaty were easy to activate, the European Parliament would not have alerted the Commission and the Council to seek stronger mechanisms of "preventive" intervention. As is it clear from the Resolution of the European Parliament of 3 July 2013, Hungarian constitutional development should serve as a warning against other European countries going down the same path. It is necessary to continuously monitor, through the creation of a control mechanism, a sort of "commission of Copenhagen", to overcome the so-called "Copenhagen dilemma".

These concerns are certainly legitimate but possibly dangerous at the same time. For example, an important point on which it is worth reflecting is the constitu-

tional homogeneity between European countries. The European constitutionalism has not a single matrix and it should be read in a pluralistic manner with reciprocity*. Perhaps it is taken for granted, but the content of this common European constitutional law would require a deep analysis of its components. For example, there are different models of separation of powers between the legislative and executive (different forms of government) and also different models of separation between political and judicial power (different types of self-government of the judges, etc.).† So, the principle of the rule of law has different expressions in Europe, depending on legal traditions (Heuschling), although the Commission – in order to apply a lowest common denominator – refers to the jurisprudence of the Courts in Strasbourg and Luxembourg, as well as to documents produced by the Venice Commission.

CONCLUSIONS: LIGHTS AND SHADOWS IN THE EVOLUTION OF THE HUNGARIAN CONSTITUTIONAL LAW AND THE ROLE OF THE EUROPEAN INSTITUTIONS

The still existing concerns about the non-compliance of certain Hungarian political reforms with the common European constitutional heritage can be mitigated if we consider the attempts to make amends (the V constitutional amendment; the partial implementation of the Court of Justice rulings, etc.).‡ We must also consider the behavior of the Constitutional Court which certainly retains the means to defend itself (even if we are waiting for confirmation of many important previous holdings). The achievements of the post-communist Hungarian constitutionalism

* Art. 4 c. 2 TEU, the clause of respect for constitutional traditions of each member State, which goes along with the national constitutional provisions on "counter-limits".

† In the Resolution of 3July 2013 the European Parliament refers to a series of common institutions and values which are subjected to different interpretations and implementation: "respect for legality, including a transparent, accountable and democratic process of enacting laws; legal certainty; a strong system of representative democracy based on free elections and respecting the rights of the opposition; effective control of the conformity of legislation with the constitution; an effective, transparent, participatory and accountable government and administration; an independent and impartial judiciary; independent media; and respect for fundamental rights".

‡ On 2 July 2012 the Hungarian Parliament amended the 2011 Laws No. CLXI on the organization and administration of courts and CLXII on the legal status and remuneration of judges, partially accepting the Venice Commission opinions. The European Court of Justice Decision of November 2012 has been implemented through Law No. XX of March 2013, in which the retirement age for judges, notaries and public prosecutors has been gradually decreased from 70 to 65 with the final transition to the new threshold from 1 January 2023. The law provides a plan for reinstatement of judges previously dismissed with three possibilities (real reinstatement, placement in "expection" lists, compensation of damage). The European Commission decided to close, on 20 November 2013, the infringement procedure against Hungary recalling that there is another pending infringement procedure on the replacement of the Commissioner for Data Protection.

will be maintained thanks also to the concept of "historical Constitution",* despite the contradictions that still exist but considering the fact that the Fundamental Law is only a part of the Constitution in the broad sense.

The major weaknesses of the Fundamental Law, in essence, are those which already existed before. Among these, the extreme facility with which it can be amended (closely linked to the characteristics of the electoral law) and the wide use of the two-third majority laws, today called cardinal. This undermines constitutional stability which is a fundamental requirement of contemporary constitutionalism.

With regard to its values' characteristics, there is no doubt that the Fundamental Law has a nationalist content. It is an ideological Constitution with a collectivist footprint at odds with liberal individualism. But, as already said, much will depend on its concrete application. As Chronowski wrote, the new provisions are neither fully consistent nor utterly conflicting with European legislation (she refers to the Charter of Fundamental Rights). Some of its provisions could, depending on interpretation, be in conflict with European values. For this reason, the author appeals to what she calls the "constitutional tolerance" (Chronowski 142). Other authors, especially Italians, defend instead the conservative choice of Hungarian legislator considering it to be fully legitimate.†

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* For the moment applied only in the Decision No. 33/2012.(VII. 17.) in which the Constitutional Court rejected the lowering of the retirement age of the judges: "It is a duty of the Constitutional Court to determine on the basis of the Fundamental Law which elements of the historical constitution should be regarded as achievements (…) Therefore when the Fundamental Law "opens a window" on the historical dimensions of our public law, it makes us focus on the precedents of institutional history, without which our public law environment of today and our legal culture in general would be rootless. In this situation the responsibility of the Constitutional Court is exceptional, or indeed historical: in the course of examining concrete cases, it has to include in its critical horizon the relevant resources of the history of legal institutions." Fröhlich and Csink argue that "the future of the historical Constitution in the new constitutional system will depend on the Constitutional Court's jurisprudence" (Fröhlich and Csink 434).

† Pecorario is clearly favorable to the defense of constitutional sovereignty understood as cultural sovereignty. (See also Puppinck and Pecorario). The author considers acceptable in the European pluralistic context the value choices of the Fundamental Law of Hungary, though he defines it a "conservative and anti-modern text". Nothing exceptional even in the strenghtening of the executive-legislative relationship at the expense of the judiciary, considering the context of transition in which Constitutional Courts have played a very important historical role, now needing a reduction. Other European countries would share the Hungarian Christian conservatism watching with interest the events in Hungary (in a process of reverse circulation of models, compared to traditional West-East direction). Very critical of the Pecorario position is Benvenuti. Also prof. Bognetti, in the speech at the conference held in the Bocconi University (29 November 2012), has defended the Hungarian constitutional text believing that it respects all the canons of constitutionalism while emphasizing a conservative version of it. In reference to the reduction of Constitutional Court competences, Bognetti believes that, considering the ease with which it was previously possible to appeal to the Court, it was a precautionary measure. But he thinks that when the human dignity is violated the Court may act, as it has already done. At the same meeting prof. Di Giovine has strongly criticized the "familistic" dimension of human dignity, the identity nature of the national avowal, the confessionalism and the fact that the judiciary is all appointed by parliament that became the central body of the system.

As mentioned above, the Hungarian case raised broad questions of principle. We come back to discussing a mechanism to ensure the compliance with the values of EU Treaties. This confirms that constitutional law becomes increasingly part of European integration. There is a fear that with the disappearance of the conditionality mechanisms the status of the rule of law and human rights could worsen, especially in areas more distant from European policies.* In fact, democratic conditionality has clear boundaries, which lie mainly in the lack of precise mechanisms of follow-up after the entry of the candidate countries in the European organizations. It should also be taken into account that in certain matters the compliance requirements were vague, being expressed by broad and generic models, in the form of "minimum conditions" rather than specific institutional designs to be introduced.†

However, we do not share the opinion of those who believe in a democratic fragility of the former communist countries (Iadicicco). Such concerns cannot be applied to the countries of Central Europe and the Baltic, which have shown themselves to be established democracies. In many respects these countries have been "the best in the class" (last generation's rights in their Constitutions; a privileged role for the international law among the sources of law; the explicit mention of European law with specific adaptation clauses; the strong role of the Constitutional Courts, etc.). Moreover, as Albi and Sadurski argue, new members States have encouraged a greater democratization of European institutions, thus demonstrating that the circulation of models can be bidirectional.‡

Despite the political fragility of some countries we have not observed a general decay of democratic standards. This is because several support mechanisms are in action, although not always visible. Apart from the soft law of the Council of Europe and the jurisprudence of the Strasbourg Court, and without considering the extreme case of the mechanisms under Art. 7 TEU (which was included in the Treaty for fear of authoritarian resurgence in the new members;§ see also the penalties pro-

* De Witte mentions for example the children's rights, the prison conditions, the protection of minorities (De Witte 240).

† In some areas, where the compliance requirements were more specific, such as the civil service, the adaptation has been easier. Some authors are very critical about the vagueness of the Copenhagen criteria (Kochenov).

‡ According to Sadurski reforms made by these countries in the field of protection of rights place them at the forefront at the point that they can provide strong arguments to the European institutions still searching for an optimal model for the rights protection (Sadurski 139-141). Albi thinks that according to which for a variety of reasons "judges in Central and Eastern Europe are perhaps uniquely placed to teach the EU a lesson in the rule of law".

§ Following Sadurski the application and then the admission to the EU of countries of Central and Eastern Europe has sparked a circular process of mutual influences pushing the EU towards a greater "constitutionalisation". Conditionality based on democratic requirements has allowed to consider EU not only as a community of interests, but also of values. It is a circular process of conditioning and synergies, which involves the Courts, both national and European. The same observation applies to the Council of Europe and the Strasbourg Court which has gradually become a real European Constitutional Court (the practice of "pilot"

vided for by Art. 258 TFEU*), there are several levers available to the European institutions (Sedelmeier). Firstly, there is the obligation to comply with EU legislation in the fields of competence of the Union. Then there is the power of the Court of Justice, which in terms of respect for fundamental rights is not limited only to those areas in which member States are implementing EU law. There are the reports of the European Parliament on the respect of fundamental rights within the EU, seen as a form of control and soft monitoring. In general, the desire for emulation of and integration with the nations of Europe from the point of view of democratic standards continue. Finally, there are the economic levers such as financial incentives and sanctions that can be used against countries which fail to respect fundamental principles, some of which are already successfully tested.

The so-called "democratic conditionality" has been developed in response to the inclusion in the EU of Central and Eastern European countries (Cerruti), calling for a general reflection on the conditions for access into the Union, which until then remained in an embryonic state. The process of their applications to join was much more complex than in previous cases and raised several problems of democratic compatibility.

Politicians and scholars continue to debate the role of this democratic conditionality, considered today an essential element not only for future candidates but also for third countries (for example within the European Neighbourhood Policy). These debates† acquire a significant weight not only in rethinking, several years later, the dynamics of democratic transition, but also in the light of what happened following entry into the Union, regarding the continuous adjustment to the standards so severely imposed in the application process.

There is an ongoing concern of the European institutions on these issues, as evidenced by the adoption of documents on the rule of law and by constant reference to the European constitutional heritage. Democracy and human rights have a fundamental relevance for the process of European unification irrespective of its economic dimension. Recently new mechanisms of action have been developed in response to the possible weaknesses of democracy. For example the mechanism described in the Communication from the Commission to the European Parliament and the Council of 11 March 2014 (*A new EU Framework to strenghten the*

judgments was inaugurated just after the entrance of the countries of Central and Eastern Europe and the Balkans) (See Pollicino; Sadurski).

* The infringement procedure initiated by the Commission, which may lead to one or more judgments of the Court of Justice, is considered a softer way to approach the problems of non-compliance, because it acts on individual violations. Instead, the European Parliament with its resolutions actually performs political evaluations which could be hazardous (De Capitani; Fabbrini).

† Similar to those developed in the past at national level, on the subject of the "counter-limits" and the relationship between the Courts: then the national Constitutional courts pushed the European institutions to a greater respect for fundamental rights.

Rule of Law).* It cannot be excluded that in the future stronger mechanisms will be included into treaties in this area. Nevertheless, the search for an optimal solution on the legal level cannot hide the great political difficulties of introducing such mechanisms.

* The Commission may activate a three-stage process with the support of a number of bodies of the EU and the Council of Europe: "assessment" (sending of a rule of law opinion), "recommendation" (sending a rule of law recommendation), "follow-up" to the recommendation of the Commission. If there is no satisfactory finding within the time fixed it would be possible to activate the mechanisms provided for by art 7 TEU.

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THE FUNDAMENTAL LAW OF HUNGARY

Consolidated text as on 15 December 2014, incorporating:

– the First Amendment to the Fundamental Law,

– the Second Amendment to the Fundamental Law,

– the Third Amendment to the Fundamental Law,

– the Fourth Amendment to the Fundamental Law,

– the Fifth Amendment to the Fundamental Law

THE FUNDAMENTAL LAW OF HUNGARY*
(25 APRIL 2011)

*God bless the Hungarians***

NATIONAL AVOWAL†

WE, THE MEMBERS OF THE HUNGARIAN NATION, at the beginning of the new millennium, with a sense of responsibility for every Hungarian, hereby proclaim the following:

We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago.

We are proud of our forebears who fought for the survival, freedom and independence of our country.

We are proud of the outstanding intellectual achievements of the Hungarian people.

We are proud that our people has over the centuries defended Europe in a series of struggles and enriched Europe's common values with its talent and diligence.

We recognise the role of Christianity in preserving nationhood. We value the various religious traditions of our country.

We promise to preserve the intellectual and spiritual unity of our nation torn apart in the storms of the last century.

We proclaim that the nationalities living with us form part of the Hungarian political community and are constituent parts of the State.

We commit to promoting and safeguarding our heritage, our unique language, Hungarian culture, the languages and cultures of nationalities living in Hungary, along with all man-made and natural assets of the Carpathian Basin. We bear responsibility for our descendants; therefore we shall protect the living conditions of

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* The Fundamental Law of Hungary was adopted on 18 April 2011 by the National Assembly. *Translation of the consolidated version of the Fundamental Law as on 1 October 2013. **The first line of the national anthem of Hungary, the poem *Himnusz* by Kölcsey Ferenc.

† Amended by Art. 21 para 1 a) of the Fourth Amendment to the Fundamental Law (25 March 2013).

future generations by making prudent use of our material, intellectual and natural resources.

We believe that our national culture is a rich contribution to the diversity of European unity.

We respect the freedom and culture of other nations, and shall strive to cooperate with every nation of the world.

We hold that human existence is based on human dignity.

We hold that individual freedom can only be complete in cooperation with others.

We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love.

We hold that the strength of community and the honour of each man are based on labour, an achievement of the human mind.

We hold that we have a general duty to help the vulnerable and the poor.

We hold that the common goal of citizens and the State is to achieve the highest possible measure of well-being, safety, order, justice and liberty.

We hold that democracy is only possible where the State serves its citizens and administers their affairs in an equitable manner, without prejudice or abuse.

We honour the achievements of our historical constitution and we honour the Holy

Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation.

We do not recognise the suspension of our historical constitution due to foreign occupations. We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship.

We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid.

We agree with the Members of the first free National Assembly, which proclaimed as its first decision that our current liberty was born of our 1956 Revolution.

We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed. We shall consider this date to be the beginning of our country's new democracy and constitutional order.

We hold that after the decades of the twentieth century which led to a state of moral decay, we have an abiding need for spiritual and intellectual renewal.

We trust in a jointly-shaped future and the commitment of younger generations. We believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength.

Our Fundamental Law shall be the basis of our legal order, it shall be an alliance among Hungarians of the past, present and future. It is a living framework which expresses the nation's will and the form in which we want to live.

We, the citizens of Hungary, are ready to found the order of our country upon the common endeavours of the nation.

FOUNDATION

Article A

The name of OUR COUNTRY shall be Hungary.

Article B

(1) Hungary shall be an independent, democratic rule-of-law State.

(2) The form of government of Hungary shall be a republic.

(3) The source of public power shall be the people.

(4) The power shall be exercised by the people through elected representatives or, in exceptional cases, directly.

Article C

(1) The functioning of the Hungarian State shall be based on the principle of division of powers.

(2) No one shall act with the aim of acquiring or exercising power by force, or of exclusively possessing it. Everyone shall have the right and obligation to resist such attempts in a lawful way.

(3) The State shall have the right to use coercion in order to enforce the Fundamental Law and legal regulations.

Article D

Bearing in mind that there is one single Hungarian nation that belongs together, Hungary shall bear responsibility for the fate of Hungarians living beyond its borders, shall facilitate the survival and development of their communities, shall support their efforts to preserve their Hungarian identity, the effective use of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary.

Article E

(1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.

(2) With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences set out in the Fundamental Law jointly with other Member States, through the institutions of the European Union.

(3) The law of the European Union may, within the framework set out in Paragraph (2), lay down generally binding rules of conduct.

(4) For the authorisation to recognise the binding force of an international treaty referred to in Paragraph (2), the votes of two-thirds of the Members of the National Assembly shall be required.

Article F

(1) The capital of Hungary shall be Budapest.

(2)* The territory of Hungary shall consist of the capital, counties, cities and towns, as well as villages. The capital, as well as the cities and towns may be divided into districts.

Article G

(1) The child of a Hungarian citizen shall be a Hungarian citizen by birth. A cardinal Act may specify other cases of the origin or acquisition of Hungarian citizenship.

(2) Hungary shall protect its citizens.

(3) No one shall be deprived of Hungarian citizenship established by birth or acquired in a lawful manner.

(4) The detailed rules for citizenship shall be laid down in a cardinal Act.

Article H

(1) In Hungary the official language shall be Hungarian.

(2) Hungary shall protect the Hungarian language.

(3) Hungary shall protect Hungarian Sign Language as a part of the Hungarian culture.

Article I

(1) The coat of arms of Hungary shall be a vertically divided shield with a pointed base. The left field shall contain eight horizontal bars of red and silver. The right field shall have a red background and shall depict a base of three green hills with a golden crown atop the higher central hill from which rises a silver patriarchal cross. The Holy Crown shall rest on top of the shield.

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* Amended by Article 21(1)b) of the Fourth Amendment to the Fundamental Law (25 March 2013).

(2) The flag of Hungary shall feature three horizontal bands of equal width coloured red, white and green from top to bottom as the symbols of strength, fidelity and hope, respectively.

(3) The anthem of Hungary shall be the poem *Himnusz* by KÖLCSEY Ferenc set to music by ERKEL Ferenc.

(4) The coat of arms and the flag may also be used in other historically developed forms. The detailed rules for the use of the coat of arms and the flag, as well as the state decorations shall be laid down in a cardinal Act.

Article J

(1) The national holidays of Hungary shall be:

a) the 15th day of March, in memory of the 1848–49 Revolution and War of Independence;

b) the 20th day of August, in memory of the foundation of the State and King Saint Stephen the State Founder;

c) the 23rd day of October, in memory of the 1956 Revolution and War of Independence.

(2) The official state holiday shall be the 20th day of August.

Article K

The official currency of Hungary shall be the forint.

Article L

(1)* Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage and/or the relationship between parents and children.

(2) Hungary shall encourage the commitment to have children.

(3) The protection of families shall be regulated by a cardinal Act.

Article M

(1) The economy of Hungary shall be based on work which creates value, and on freedom of enterprise.

(2) Hungary shall ensure the conditions of fair economic competition. Hungary shall act against any abuse of a dominant position, and shall protect the rights of consumers.

Article N

(1) Hungary shall observe the principle of balanced, transparent and sustainable budget management.

(2) The National Assembly and the Government shall have primary responsibility for the observance of the principle referred to in Paragraph (1).

(3) In performing their duties, the Constitutional Court, courts, local governments and other state organs shall be obliged to respect the principle referred to in Paragraph (1).

* Supplemented by Article 1 of the Fourth Amendment to the Fundamental Law (25 March 2013).

Article O

Everyone shall be responsible for him- or herself, and shall be obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities.

Article P*

(1) Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations.

(2)† The limits and conditions for acquisition of ownership and for use of arable land and forests necessary for achieving the objectives referred to in Paragraph (1), as well as the rules concerning the organisation of integrated agricultural production and concerning family farms and other agricultural holdings shall be laid down in a cardinal Act.

Article Q

(1) In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.

(2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.

(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations.

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* Supplemented by Article 1 of the Third Amendment to the Fundamental Law (21 December 2012).

† Amended by Article 21(1)c) of the Fourth Amendment to the Fundamental Law (25 March 2013).

Article R

(1) The Fundamental Law shall be the foundation of the legal system of Hungary.

(2) The Fundamental Law and legal regulations shall be binding on everyone.

(3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution.

Article S

(1) A proposal for the adoption of a new Fundamental Law or for the amendment of the Fundamental Law may be submitted by the President of the Republic, the Government, any parliamentary committee or any Member of the National Assembly.

(2) For the adoption of a new Fundamental Law or the amendment of the Fundamental Law, the votes of two-thirds of the Members of the National Assembly shall be required.

(3)* The Speaker of the National Assembly shall sign the adopted Fundamental Law or the adopted amendment of the Fundamental Law within five days and shall send it to the President of the Republic. The President of the Republic shall sign the Fundamental Law or the amendment of the Fundamental Law sent to him within five days of receipt and shall order its promulgation in the official gazette. If the President of the Republic finds that any procedural requirement laid down in the Fundamental Law with respect to adoption of the Fundamental Law or the amendment of the Fundamental Law has not been met, he or she shall request the Constitutional Court to examine the issue. Should the examination by the Constitutional Court not verify the violation of such requirements, the President of the Republic shall immediately sign the Fundamental Law or the amendment of the Fundamental Law, and shall order its promulgation in the official gazette.

(4) The designation of the amendment of the Fundamental Law in its promulgation shall include the title, the serial number of the amendment and the day of promulgation.

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* Supplemented by Article 2 of the Fourth Amendment to the Fundamental Law (25 March 2013).

Article T

(1)* Generally binding rules of conduct may be laid down in the Fundamental Law or in legal regulations adopted by an organ having legislative competence and specified in the Fundamental Law that are promulgated in the official gazette. A cardinal Act may lay down different rules for the promulgation of local government decrees, and of legal regulations adopted during a special legal order.

(2) Legal regulations shall be the Acts, the government decrees, the prime ministerial decrees, the ministerial decrees, the decrees of the Governor of the National Bank of Hungary, the decrees of the heads of autonomous regulatory organs and local government decrees. In addition, decrees of the National Defence Council adopted during a state of national crisis and decrees of the President of the Republic adopted during a state of emergency shall also be legal regulations.

(3) No legal regulation shall conflict with the Fundamental Law.

(4) Cardinal Acts shall be Acts, for the adoption or amendment of which the votes of two-thirds of the Members of the National Assembly present shall be required.

Article U†

(1) The form of government based on the rule of law, established in accordance with the will of the nation through the first free elections held in 1990, and the previous communist dictatorship are incompatible. The Hungarian Socialist Workers' Party and its legal predecessors and the other political organisations established to serve them in the spirit of communist ideology were criminal organisations, and their leaders have responsibility without statute of limitations for:

a) maintaining and directing an oppressive regime, violating the law and betraying the nation;

b) thwarting with Soviet military assistance the democratic attempt built on a multi-party system in the years after World War II;

c) establishing a legal order built on the exclusive exercise of power and unlawfulness;

* Amended by Article 21(1)d) of the Fourth Amendment to the Fundamental Law (25 March 2013).

† Supplemented by Article 3 of the Fourth Amendment to the Fundamental Law (25 March 2013).

d) putting an end to the economy based on the freedom of property and indebting the country;

e) submitting Hungary's economy, national defence, diplomacy and human resources to foreign interests;

f) systematically devastating the traditional values of European civilisation;

g) depriving citizens and certain groups of citizens of their fundamental human rights or seriously restricting such rights, in particular for murdering people, delivering them to foreign power, unlawfully imprisoning them, deporting them to forced labour camps, torturing them and subjecting them to inhuman treatment; arbitrarily depriving citizens of their assets, restricting their rights to property; totally depriving citizens of their liberties, submitting the expression of political opinion and will to coercion by the State; discriminating against people on the grounds of origin, world view or political belief, impeding their advancement and success based on knowledge, diligence and talent; setting up and operating a secret police to unlawfully observe and influence the private lives of people;

h) suppressing with bloodshed, in cooperation with Soviet occupying forces, the Revolution and War of Independence, which broke out on 23 October 1956, the ensuing reign of terror and retaliation, and the forced flight of two hundred thousand Hungarian people from their native country;

i) all ordinary criminal offences committed for political motives and left unprosecuted by the justice system for political motives.

Political organisations having gained legal recognition during the democratic transition as legal successors of the Hungarian Socialist Workers' Party continue to share the responsibility of their predecessors as beneficiaries of their unlawfully accumulated assets.

(2) With regard to Paragraph (1), the operation of the communist dictatorship shall be realistically revealed and society's sense of justice shall be ensured in accordance with

Paragraphs (3) to (10).

(3) In order for the State to preserve the memory of the communist dictatorship, a Committee of National Memory shall operate. The Committee of National Memory shall reveal the operation of the communist dictatorship in terms of power and the role of individuals and organisations that held communist power,

and shall publish the results of its activity in a comprehensive report and other documents.

(4) The holders of power under the communist dictatorship shall be obliged to tolerate statements of facts about their roles and acts related to the operation of the dictatorship, with the exception of deliberate statements that are untrue in essence; their personal data related to such roles and acts may be disclosed to the public.

(5) The pensions or any other benefits provided by the State under legal regulations to leaders of the communist dictatorship specified in an Act may be reduced to the extent specified in an Act; the arising revenues shall be used to mitigate the injuries caused by the communist dictatorship and to keep alive the memory of victims as provided for by an Act.

(6) Serious criminal offences laid down in an Act which were committed against Hungary or persons under the communist dictatorship in the name or in the interest of, or in agreement with the party-state and which were left unprosecuted for political reasons by ignoring the Act on criminal law in force at the time of commission, shall not be considered as time-barred.

(7) The criminal offences referred to in Paragraph (6) shall become time-barred on the expiry of the period determined in the Act on criminal law in force at the time of commission, to be calculated as of the day of the entry into force of the Fundamental Law, provided that they would have become time-barred by 1 May 1990 under the Act on criminal law in force at the time of commission.

(8) The criminal offences referred to in Paragraph (6) shall become time-barred on the expiry of the period between the date of commission and 1 May 1990, to be calculated as of the day of the entry into force of the Fundamental Law, provided that they would have become time- barred between 2 May 1990 and 31 December 2011 under the Act on criminal law in force at the time of commission and that the perpetrator was not prosecuted for the criminal offence.

(9) No legal regulation may establish new legal grounds for compensation providing financial or any other pecuniary payment to individuals who were unlawfully deprived of their lives or freedom for political reasons and who suffered undue property damage by the State, before 2 May 1990.

(10) The documents of the communist state party, of the civil society organisations and youth organisations established with the contribution of or influenced directly by the communist state party, and of trade unions, created during the

communist dictatorship shall be property of the State and shall be deposited in public archives in the same way as the files of organs performing public duties.

FREEDOM AND RESPONSIBILITY

Article I

(1) The inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights.

(2) Hungary shall recognise the fundamental individual and collective rights of man.

(3) The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right.

(4) Fundamental rights and obligations which by their nature apply not only to man shall be guaranteed also for legal entities established by an Act.

Article II

Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.

Article III

(1) No one shall be subject to torture, inhuman or degrading treatment or punishment, or held in servitude. Trafficking in human beings shall be prohibited.

(2) It shall be prohibited to perform medical or scientific experiment on human beings without their informed and voluntary consent.

(3) Practices aimed at eugenics, the use of the human body or its parts for financial gain, as well as human cloning shall be prohibited.

Article IV

(1) Everyone shall have the right to liberty and security of the person.

(2) No one shall be deprived of liberty except for reasons specified in an Act and in accordance with the procedure laid down in an Act. Life imprisonment without parole may only be imposed for the commission of intentional and violent criminal offences.

(3) Any person suspected of having committed a criminal offence and taken into detention shall, as soon as possible, be released or brought before a court. The court shall be obliged to hear the person brought before it and shall forthwith take a decision with a written reasoning to release or to arrest that person.

(4) Everyone shall have the right to compensation, whose liberty has been restricted without a well-founded reason or unlawfully.

Article V

Everyone shall have the right to repel any unlawful attack against his or her person or property, or one that poses a direct threat to the same, as provided for by an Act.

Article VI

(1) Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected.

(2) Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest.

(3) The application of the right to the protection of personal data and to access data of public interest shall be supervised by an independent authority established by a cardinal Act.

Article VII

(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include the freedom to choose or change one's religion or other belief, and the freedom of everyone to manifest, abstain from manifesting, practise or teach his or her religion or other belief through religious acts, rites

or otherwise, either individually or jointly with others, either in public or in private life.

(2)* People sharing the same principles of faith may, for the practice of their religion, establish religious communities operating in the organisational form specified in a cardinal Act.

(3)† The State and religious communities shall operate separately. Religious communities shall be autonomous.

(4)‡ The State and religious communities may cooperate to achieve community goals. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfilment of tasks that serve to achieve community goals.

(5)§ The common rules relating to religious communities, as well as the conditions of cooperation, the established churches and the detailed rules relating to established churches shall be laid down in a cardinal Act.

Article VIII

(1) Everyone shall have the right to peaceful assembly.

(2) Everyone shall have the right to establish and join organisations.

(3) Political parties may be formed and may operate freely on the basis of the right to association. Political parties shall participate in the formation and expression of the will of the people. Political parties shall not exercise public power directly.

(4) The detailed rules for the operation and management of political parties shall be laid down in a cardinal Act.

(5) Trade unions and other interest representation organisations may be formed and may operate freely on the basis of the right to association.

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* Supplemented by Article 1(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).

† Supplemented by Article 1(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).

‡ Supplemented by Article 4(2) of the Fourth Amendment to the Fundamental Law (25 March 2013), amended by Article 1(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).

§ Supplemented by Article 1(2) of the Fifth Amendment to the Fundamental Law (26 September 2013).

Article IX

(1) Everyone shall have the right to freedom of speech.

(2) Hungary shall recognise and protect the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion.

(3)* In the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements may only be published in media services free of charge, under conditions guaranteeing equal opportunities, laid down in a cardinal Act.

(4)† The right to freedom of speech may not be exercised with the aim of violating the human dignity of others.

(5)‡ The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates the community, invoking the violation of their human dignity, as provided for by an Act.

(6)§ The detailed rules relating to the freedom of the press and the organ supervising media services, press products and the communications market shall be laid down in a cardinal Act.

Article X

(1) Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge, and, within the framework laid down in an Act, the freedom of teaching.

(2) The State shall have no right to decide on questions of scientific truth; only scientists shall have the right to evaluate scientific research.

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* Supplemented by Article 2 of the Fifth Amendment to the Fundamental Law (26 September 2013).
† Supplemented by Article 5(2) of the Fourth Amendment to the Fundamental Law (25 March 2013).
‡ Supplemented by Article 5(2) of the Fourth Amendment to the Fundamental Law (25 March 2013).
§ Supplemented by Article 5(2) of the Fourth Amendment to the Fundamental Law (25 March 2013).

(3)* Hungary shall protect the scientific and artistic freedom of the Hungarian Academy of Sciences and the Hungarian Academy of Arts. Higher education institutions shall be autonomous in terms of the content and the methods of research and teaching; their organisation shall be regulated by an Act. The Government shall, within the framework of an Act, lay down the rules governing the management of public higher education institutions and shall supervise their management.

Article XI

(1) Every Hungarian citizen shall have the right to education.

(2) Hungary shall ensure this right by extending and generalising public education, by providing free and compulsory primary education, free and generally accessible secondary education, and higher education accessible to everyone according to his or her abilities, and by providing financial support as provided for by an Act to those receiving education.

(3)† An Act may provide that financial support of higher education studies shall be subject to participation for a definite period in employment or to exercising for a definite period of entrepreneurial activities, regulated by Hungarian law.

Article XII

(1) Everyone shall have the right to freely choose his or her work, occupation and to engage in entrepreneurial activities. Everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and possibilities.

(2) Hungary shall strive to create the conditions ensuring that everyone who is able and willing to work has the opportunity to do so.

Article XIII

(1) Everyone shall have the right to property and inheritance. Property shall entail social responsibility.

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* Supplemented by Article 6 of the Fourth Amendment to the Fundamental Law (25 March 2013).

† Supplemented by Article 7 of the Fourth Amendment to the Fundamental Law (25 March 2013).

(2) Property may only be expropriated exceptionally, in the public interest and in the cases and ways provided for by an Act, subject to full, unconditional and immediate compensation.

Article XIV

(1) Hungarian citizens shall not be expelled from the territory of Hungary and may return from abroad at any time. Foreigners staying in the territory of Hungary may only be expelled under a lawful decision. Collective expulsion shall be prohibited.

(2) No one shall be expelled or extradited to a State where he or she would be in danger of being sentenced to death, being tortured or being subjected to other inhuman treatment or punishment.

(3) Hungary shall, upon request, grant asylum to non-Hungarian citizens being persecuted or having a well-founded fear of persecution in their native country or in the country of their usual residence for reasons of race, nationality, membership of a particular social group, religious or political belief, if they do not receive protection from their country of origin or from any other country.

Article XV

(1) Everyone shall be equal before the law. Every human being shall have legal capacity.

(2) Hungary shall guarantee the fundamental rights to everyone without discrimination and in particular without discrimination on grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.

(3) Women and men shall have equal rights.

(4)* By means of separate measures, Hungary shall promote the achievement of equality of opportunity and social inclusion.

(5)† By means of separate measures, Hungary shall protect families, children, women, the elderly and persons living with disabilities.

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* Amended by Article 21(1)e) of the Fourth Amendment to the Fundamental Law (25 March 2013).

† Amended by Article 21(1)f) of the Fourth Amendment to the Fundamental Law (25 March 2013).

Article XVI

(1) Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development.

(2) Parents shall have the right to choose the upbringing to be given to their children.

(3) Parents shall be obliged to take care of their minor children. This obligation shall include the provision of schooling for their children.

(4) Adult children shall be obliged to take care of their parents if they are in need.

Article XVII

(1) Employees and employers shall cooperate with each other with a view to ensuring jobs and the sustainability of the national economy, and to other community goals.

(2)* Employees, employers and their organisations shall have the right, as provided for by an Act, to negotiate with each other and conclude collective agreements, and to take collective action to defend their interests, including the right of workers to discontinue work.

(3) Every employee shall have the right to working conditions which respect his or her health, safety and dignity.

(4) Every employee shall have the right to daily and weekly rest periods and to an annual period of paid leave.

Article XVIII

(1) The employment of children shall be prohibited, except for cases specified in an Act where there is no risk to their physical, mental or moral development.

(2) By means of separate measures, Hungary shall ensure the protection of young people and parents at work.

* Amended by Article 21(1)g) of the Fourth Amendment to the Fundamental Law (25 March 2013).

Article XIX

(1)* Hungary shall strive to provide social security to all of its citizens. Every Hungarian citizen shall be entitled to assistance in the case of maternity, illness, disability, handicap, widowhood, orphanage and unemployment for reasons outside of his or her control, as provided for by an Act.

(2) Hungary shall implement social security for the persons referred to in Paragraph (1) and for other persons in need through a system of social institutions and measures.

(3) The nature and extent of social measures may be determined in an Act in accordance with the usefulness to the community of the beneficiary's activity.

(4) Hungary shall contribute to ensuring the livelihood for the elderly by maintaining a general state pension system based on social solidarity and by allowing for the operation of voluntarily established social institutions. The conditions of entitlement to state pension may be laid down in an Act with regard to the requirement for stronger protection for women.

Article XX

(1) Everyone shall have the right to physical and mental health.

(2) Hungary shall promote the effective application of the right referred to in Paragraph (1) by an agriculture free of genetically modified organisms, by ensuring access to healthy food and drinking water, by organising safety at work and healthcare provision, by supporting sports and regular physical exercise, as well as by ensuring the protection of the environment.

Article XXI

(1) Hungary shall recognise and give effect to the right of everyone to a healthy environment.

(2) Anyone who causes damage to the environment shall be obliged to restore it or to bear the costs of restoration, as provided for by an Act.

* Amended by Article 21(1)h) of the Fourth Amendment to the Fundamental Law (25 March 2013).

(3) The introduction of pollutant waste into the territory of Hungary for the purpose of disposal shall be prohibited.

Article XXII*

(1) Hungary shall strive to ensure decent housing conditions and access to public services for everyone.

(2) The State and local governments shall also contribute to creating decent housing conditions by striving to ensure accommodation for all persons without a dwelling.

(3) In order to protect public order, public security, public health and cultural values, an Act or a local government decree may, with respect to a specific part of public space, provide that staying in public space as a habitual dwelling shall be illegal.

Article XXIII

(1) Every adult Hungarian citizen shall have the right to vote and to be voted for in elections of Members of the National Assembly, local government representatives and mayors, and of Members of the European Parliament.

Every adult citizen of another Member State of the European Union with residence in Hungary shall have the right to vote and to be voted for in elections of local government representatives and mayors, and of Members of the European Parliament.

(2) Every adult person recognised as a refugee, immigrant or resident in Hungary shall have the right to vote in elections of local government representatives and mayors.

(3) A cardinal Act may provide that the right to vote and to be voted for, or its completeness shall be subject to residence in Hungary, and the eligibility to be voted for shall be subject to additional criteria.

(4) In elections of local government representatives and mayors voters may vote at their place of residence or registered place of stay. Voters may exercise their right to vote at their place of residence or registered place of stay.

* Supplemented by Article 8 of the Fourth Amendment to the Fundamental Law (25 March 2013).

(5) Those disenfranchised by a court for a criminal offence or limited mental capacity shall not have the right to vote and to be voted for. Citizens of another Member State of the European Union with residence in Hungary shall not have the right to be voted for if they have been excluded from the exercise of this right in their country pursuant to a legal regulation, a court decision or an authority decision of their State of citizenship.

(6) Everyone having the right to vote in elections of Members of the National Assembly shall have the right to participate in national referendums. Everyone having the right to vote in elections of local government representatives and mayors shall have the right to participate in local referendums.

(7) Every Hungarian citizen shall have the right to hold public office according to his or her aptitude, qualifications and professional competence. Public offices that may not be held by members or officials of political parties shall be specified in an Act.

Article XXIV

(1) Everyone shall have the right to have his or her affairs handled impartially, fairly and within a reasonable time by the authorities . Authorities shall be obliged to give reasons for their decisions, as provided for by an Act.

(2) Everyone shall have the right to compensation for any damage unlawfully caused to him or her by the authorities in the performance of their duties, as provided for by an Act.

Article XXV

Everyone shall have the right to submit, either individually or jointly with others, written applications, complaints or proposals to any organ exercising public power.

Article XXVI

The State shall strive to use the latest technical solutions and the achievements of science to make its operation efficient, raise the standard of public services, improve the transparency of public affairs, and promote equality of opportunity.

Article XXVII

(1) Everyone staying lawfully in the territory of Hungary shall have the right to move freely and to freely choose his or her place of stay.

(2) Every Hungarian citizen shall have the right to enjoy the protection of Hungary during his or her stay abroad.

Article XXVIII

(1) Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.

(2) No one shall be considered guilty until his or her criminal liability has been established by the final decision of a court.

(3) Persons subject to criminal proceedings shall have the right to defence at all stages of the proceedings. Defence counsels shall not be held liable for their opinion expressed while providing legal defence.

(4) No one shall be held guilty of or be punished for an act which at the time when it was committed did not constitute a criminal offence under Hungarian law or, within the scope specified in an international treaty or a legal act of the European Union, under the law of another State.

(5) Paragraph (4) shall not prejudice the prosecution or conviction of any person for any act which, at the time when it was committed, was a criminal offence according to the generally recognised rules of international law.

(6) With the exception of extraordinary cases of legal remedy laid down in an Act, no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted in Hungary or, within the scope specified in an international treaty or a legal act of the European Union, in another State, as provided for by an Act.

(7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.

Article XXIX

(1) Nationalities living in Hungary shall be constituent parts of the State. Every Hungarian citizen belonging to a nationality shall have the right to freely express and preserve his or her identity. Nationalities living in Hungary shall have the right to use their mother tongue, to use names in their own languages individually and collectively, to nurture their own cultures, and to receive education in their mother tongues.

(2) Nationalities living in Hungary shall have the right to establish their self-government at both local and national level.

(3)* The detailed rules relating to the rights of nationalities living in Hungary, the nationalities, the requirements for recognition as a nationality, and the rules for the election of the self-governments of nationalities at local and national level shall be laid down in a cardinal Act. A cardinal Act may provide that recognition as a nationality shall be subject to a certain length of time of presence and to the initiative of a certain number of persons declaring to be members of the nationality concerned.

Article XXX

(1) Everyone shall contribute to covering common needs according to his or her capabilities and to his or her participation in the economy.

(2) For persons raising children, the extent of contribution to covering common needs shall be determined by taking into consideration the costs of raising children.

Article XXXI

(1) All Hungarian citizens shall be obliged to defend the country.

(2) Hungary shall maintain a volunteer reserve system for national defence purposes.

(3) During a state of national crisis, or if the National Assembly decides so in a state of preventive defence, adult male Hungarian citizens with residence in Hungary shall perform military service. If military service involving the use

* Supplemented by Article 9 of the Fourth Amendment to the Fundamental Law (25 March 2013).

of arms cannot be reconciled with the conscientious belief of the person obliged to perform military service, he shall perform unarmed service. The forms and detailed rules of the performance of military service shall be laid down in a cardinal Act.

(4) For the duration of a state of national crisis, adult Hungarian citizens with residence in Hungary may be ordered to perform work for national defence purposes, as provided for by a cardinal Act.

(5) For adult Hungarian citizens with residence in Hungary civil protection obligation may be introduced in the interest of performing national defence and disaster management tasks, as provided for by a cardinal Act.

(6) In the interest of performing national defence and disaster management tasks everyone may be ordered to provide economic and material services, as provided for by a cardinal Act.

THE STATE

The National Assembly

Article 1

(1) HUNGARY's supreme organ of popular representation shall be the National Assembly.

(2) The National Assembly:

a) shall adopt and amend the Fundamental Law of Hungary;

b) shall adopt Acts;

c) shall adopt the central budget and approve its implementation;

d) shall authorise the expression of consent to be bound by international treaties falling within its functions and powers;

e)* shall elect the President of the Republic, the members and the President of the Constitutional Court, the President of the Kúria, the President of the

* Amended by Article 21(1)i) of the Fourth Amendment to the Fundamental Law (25 March 2013).

National Office for the Judiciary, the Prosecutor General, the Commissioner for Fundamental Rights and his or her deputies, and the President of the State Audit Office;

f) shall elect the Prime Minister, decide on any matter of confidence related to the Government;

g) shall dissolve representative bodies the operation of which is in conflict with the Fundamental Law;

h) shall decide to declare a state of war and to conclude peace;

i) shall take decisions concerning a special legal order or related to the participation in military operations;

j) shall grant general pardons;

k) shall exercise further functions and powers laid down in the Fundamental Law or in an Act.

Article 2

(1) Members of the National Assembly shall be elected by universal and equal suffrage in a direct and secret ballot, in elections which guarantee the free expression of the will of the voters, in a manner laid down in a cardinal Act.

(2) The participation of the nationalities living in Hungary in the work of the National Assembly shall be regulated by a cardinal Act.

(3) The general elections of the Members of the National Assembly shall be held in the month of April or May of the fourth year following the election of the previous National Assembly, except for elections held due to the National Assembly dissolving itself or to it being dissolved.

Article 3

(1) The mandate of the National Assembly shall commence with its constitutive sitting, and shall last until the constitutive sitting of the next National Assembly. The constitutive sitting shall be convened by the President of the Republic within thirty days of the elections.

(2) The National Assembly may declare its own dissolution.

(3) The President of the Republic, while simultaneously setting a date for new elections, may dissolve the National Assembly if:

a) the National Assembly, when the mandate of the Government terminates, fails to elect the person proposed for Prime Minister by the President of the Republic within forty days of presentation of the first proposal, or

b) the National Assembly fails to adopt the central budget for the year in question by 31 March.

(4) Before dissolving the National Assembly, the President of the Republic shall be obliged to obtain the opinion of the Prime Minister, the Speaker of the National Assembly, and the leaders of the parliamentary groups.

(5) The President of the Republic may exercise his or her right set out in Paragraph (3)a) until the National Assembly elects the Prime Minister. The President of the Republic may exercise his or her right set out in Paragraph (3)b) until the National Assembly adopts the central budget.

(6) The new National Assembly shall be elected within ninety days of the National Assembly dissolving itself or of it being dissolved.

Article 4

(1) Members of the National Assembly shall have equal rights and obligations, they shall perform their activities in the public interest, and they shall not be given instructions in that respect.

(2) Members of the National Assembly shall be entitled to immunity and to remuneration ensuring their independence. A cardinal Act shall specify the public offices which may not be held by Members of the National Assembly, and may lay down other cases of conflict of interests.

(3) The mandate of a Member of the National Assembly shall terminate:

a) upon the termination of the mandate of the National Assembly;

b) upon his or her death;

c) upon the declaration of a conflict of interests;

d) upon his or her resignation;

e) if the conditions required for his or her election no longer exist;

f) if he or she has failed to participate in the National Assembly's work for one year.

(4) The National Assembly shall decide with the votes of two-thirds of the Members of the National Assembly present on the establishment of the absence of the conditions required for the election of a Member of the National Assembly, on the declaration of a conflict of interests, as well as on the establishment of a Member of the National Assembly's failure to participate in the National Assembly's work for one year.

(5) The detailed rules relating to the legal status and the remuneration of Members of the National Assembly shall be laid down in a cardinal Act.

Article 5

(1) The sittings of the National Assembly shall be public. At the request of the Government or of any Member of the National Assembly, and with the votes of two-thirds of the Members of the National Assembly, the National Assembly may decide to hold a sitting *in-camera*.

(2) The National Assembly shall elect the Speaker of the National Assembly, Deputy Speakers and parliamentary notaries from among its members.

(3) The National Assembly shall establish standing committees consisting of Members of the National Assembly.

(4)* In order to coordinate their activities, Members of the National Assembly may establish parliamentary groups in accordance with the conditions laid down in the provisions of the Rules of Procedure.

(5) The National Assembly shall have a quorum if more than half of its Members are present at the sitting.

* Amended by Article 21(1)j) of the Fourth Amendment to the Fundamental Law (25 March 2013).

(6)* Unless otherwise provided in the Fundamental Law, the National Assembly shall take its decisions with the votes of more than half of the Members of the National Assembly present. The provisions of the Rules of Procedure may provide that for certain decisions to be taken, qualified majority shall be required.

(7)† The National Assembly shall establish the rules of its operation and the order of its debates in the provisions of the Rules of Procedure adopted with the votes of two-thirds of the Members of the National Assembly present. In order to ensure undisturbed operation of the National Assembly and to preserve its dignity, the Speaker of the National Assembly shall exercise policing and disciplinary powers laid down in the provisions of the Rules of Procedure.

(8) The provisions ensuring regular sittings of the National Assembly shall be laid down in a cardinal Act.

(9)‡ The security of the National Assembly shall be provided by a Parliamentary Guard. The Parliamentary Guard shall operate under the authority of the Speaker of the National Assembly.

Article 6

(1) The President of the Republic, the Government, any parliamentary committee or any Member of the National Assembly may initiate Acts.

(2) The National Assembly may, upon the motion submitted before the final vote by the initiator of the Act, by the Government or by the Speaker of the National Assembly, send the adopted Act to the Constitutional Court for an examination of its conformity with the Fundamental Law. The National Assembly shall decide on the motion after the final vote. If the motion is adopted, the Speaker of the National Assembly shall forthwith send the adopted Act to the Constitutional Court for an examination of its conformity with the Fundamental Law.

(3) The Speaker of the National Assembly shall within five days sign the adopted Act and send it to the President of the Republic. The President of the Republic shall within five days sign the Act sent to him or her and order its promulga-

* Amended by Article 21(1)k) of the Fourth Amendment to the Fundamental Law (25 March 2013) and by Article 6(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).

† Supplemented by Article 10(1) of the Fourth Amendment to the Fundamental Law (25 March 2013). 30Supplemented by Article 10(2) of the Fourth Amendment to the Fundamental Law (25 March 2013).

‡ Supplemented by Article 10(2) of the Fourth Amendment to the Fundamental Law (25 March 2013).

tion. If the National Assembly has sent the Act to the Constitutional Court for an examination of its conformity with the Fundamental Law under Paragraph (2), the Speaker of the National Assembly may only sign and send it to the President of the Republic if the Constitutional Court has not found any conflict with the Fundamental Law.

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

(5) If the President of the Republic disagrees with the Act or any of its provisions and has not exercised his or her right under Paragraph (4), prior to signing the Act he or she may return it once, along with his or her comments, to the National Assembly for reconsideration. The National Assembly shall hold a new debate on the Act and decide on its adoption again. The President of the Republic may also exercise this right if no conflict with the Fundamental Law has been established by the Constitutional Court in the examination conducted under the National Assembly's decision.

(6) The Constitutional Court shall decide on the motion under Paragraph (2) or (4) with priority but within thirty days at the latest. If the Constitutional Court establishes a conflict with the Fundamental Law, the National Assembly shall hold a new debate on the Act in order to eliminate the conflict.

(7) If the Constitutional Court does not establish any conflict with the Fundamental Law in the examination initiated by the President of the Republic, the President of the Republic shall forthwith sign the Act and order its promulgation.

(8) The Constitutional Court may be requested to conduct another examination, under Paragraph (2) or (4), of the conformity with the Fundamental Law of the Act debated and adopted by the National Assembly in accordance with Paragraph (6). The Constitutional Court shall decide on the repeated motion with priority but within ten days at the latest.

(9) If the National Assembly amends the Act returned due to disagreement of the President of the Republic, the examination of its conformity with the Fundamental Law under Paragraph (2) or (4) may be requested only in relation to the amended provisions or on the grounds of failure to meet the procedural requirements laid down in the Fundamental Law for the making of that Act. If the National Assembly adopts the Act returned due to disagreement of the President of the Republic with the text unamended, the President of the Re-

public may request the examination of its conformity with the Fundamental Law on the grounds of failure to meet the procedural requirements laid down in the Fundamental Law for the making of that Act.

Article 7

(1) Members of the National Assembly may address questions to the Commissioner for Fundamental Rights, the President of the State Audit Office, the Prosecutor General, or the Governor of the National Bank of Hungary about any matter within their functions.

(2) Members of the National Assembly may address interpellations or questions to the Government or any of its members about any matter within their functions.

(3) The inquiry activities of parliamentary committees and the obligation to appear before such committees shall be regulated by a cardinal Act.

NATIONAL REFERENDUMS

Article 8

(1) The National Assembly shall order a national referendum at the initiative of at least two hundred thousand voters. The National Assembly may order a national referendum at the initiative of the President of the Republic, the Government or one hundred thousand voters. The decision taken on a valid and conclusive referendum shall be binding on the National Assembly.

(2) National referendums may be held about any matter falling within the functions and powers of the National Assembly.

(3) No national referendum may be held on:

a) any matter aimed at the amendment of the Fundamental Law;

b) the contents of the Acts on the central budget, the implementation of the central budget, central taxes, duties, contributions, customs duties or the central conditions for local taxes;

c) the contents of the Acts on the elections of Members of the National Assembly, local government representatives and mayors, or Members of the European Parliament;

d) any obligation arising from international treaties;

e) personal matters and matters concerning the establishment of organisations within the competence of the National Assembly;

f) the dissolution of the National Assembly;

g) the dissolution of a representative body;

h) he declaration of a state of war, state of national crisis or state of emergency, furthermore on the declaration or extension of a state of preventive defence;

i) any matter related to participation in military operations;

j) the granting of general pardons.

(4) A national referendum shall be valid if more than half of all voters have cast valid votes, and it shall be conclusive if more than half of those voting validly have given the same answer to a question.

THE PRESIDENT OF THE REPUBLIC

Article 9

(1) The Head of State of Hungary shall be the President of the Republic, who shall embody the unity of the nation and be the guardian of the democratic functioning of the state organisation.

(2) The President of the Republic shall be the Commander in Chief of the Hungarian Defence Forces.

(3) The President of the Republic:

a) shall represent Hungary;

b) may attend and address the sittings of the National Assembly;

c) may initiate Acts;

d) may initiate national referendums;

e) shall set the date for general elections of Members of the National Assembly, local government representatives and mayors, furthermore for European Parliament elections and national referendums;

f) shall take decisions concerning a special legal order;

g) shall convene the constitutive sitting of the National Assembly;

h) may dissolve the National Assembly;

i)* may send the adopted Fundamental Law or the amendment of the Fundamental Law to the Constitutional Court for an examination of its conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption, and may send adopted Acts to the Constitutional Court for an examination of their conformity with the Fundamental Law or may return them to the National Assembly for reconsideration;

j)† shall propose persons for the offices of the Prime Minister, the President of the Kúria, the President of the National Office for the Judiciary, the Prosecutor General and the Commissioner for Fundamental Rights;

k) shall appoint professional judges and the President of the Budget Council;

l)‡ shall confirm the President of the Hungarian Academy of Sciences and the President of the Hungarian Academy of Arts in his or her office;

m) shall form the organisation of his or her office.

(4) The President of the Republic:

a) shall, on the basis of authorisation by the National Assembly, express consent to be bound by international treaties;

b) shall accredit and receive ambassadors and envoys;

* Supplemented by Article 11 of the Fourth Amendment to the Fundamental Law (25 March 2013).
† Amended by Article 21(1)l) of the Fourth Amendment to the Fundamental Law (25 March 2013).
‡ Amended by Article 21(1)m) of the Fourth Amendment to the Fundamental Law (25 March 2013).

c) shall appoint Ministers, the Governor and Deputy Governors of the National Bank of Hungary, the heads of autonomous regulatory organs and university professors;

d) shall assign university rectors;

e) shall appoint and promote generals;

f) shall award decorations, prizes and titles specified in an Act, and authorise the use of foreign state decorations;

g) shall exercise the right to grant individual pardons;

h) shall decide on matters of territorial organisation falling within his or her functions and powers;

i) shall decide on matters related to the acquisition or termination of citizenship;

j) shall decide on all matters within the powers conferred on him or her by an Act.

(5) The counter-signature of a Member of the Government shall be required for all actions and decisions of the President of the Republic under Paragraph (4). An Act may provide that for decisions taken within the powers conferred on the President of the Republic by an Act, no counter-signature shall be required.

(6) The President of the Republic shall refuse to act in accordance with the provisions set out in Paragraphs (4)b) to e) if the conditions required by legal regulations are not met or if he or she has well-grounded reasons to conclude that it would lead to a serious disorder in the democratic functioning of the state organisation.

(7) The President of the Republic shall refuse to act in accordance with the provisions set out in Paragraph (4)f), if it would violate the values enshrined in the Fundamental Law.

Article 10

(1) The President of the Republic shall be elected for five years by the National Assembly.

(2) Any Hungarian citizen who has reached the age of thirty-five years may be elected President of the Republic.

(3) The President of the Republic may be re-elected only once.

Article 11

(1) The President of the Republic shall be elected no sooner than sixty but no later than thirty days before expiry of the mandate of the previous President of the Republic, or if his or her mandate terminated prematurely, within thirty days of the termination. The date for the election of the President of the Republic shall be set by the Speaker of the National Assembly. The National Assembly shall elect the President of the Republic by secret ballot.

(2) The election of the President of the Republic shall be preceded by nomination. For a nomination to be valid, the written recommendation of at least one-fifth of the Members of the National Assembly shall be required. Nominations shall be submitted to the Speaker of the National Assembly before the vote is ordered. Every Member of the National Assembly may recommend one candidate. If a Member of the National Assembly recommends more than one candidate, all recommendations of that Member shall be invalid.

(3) President of the Republic elected in the first round of voting shall be the candidate who receives the votes of two-thirds of the Members of the National Assembly.

(4) If the first round of voting is inconclusive, a second round shall be held. In the second round of voting, votes may be cast for the two candidates receiving the highest and second highest numbers of votes in the first round. In the event of a tie for first place in the first round of voting, votes may be cast for those candidates who have received the highest number of votes. In the event of a tie only for second place in the first round of voting, votes may be cast for those candidates who have received the highest and second highest numbers of votes. President of the Republic elected in the second round of voting shall be the candidate who – regardless of the number of those participating in the vote – receives the highest number of valid votes. Should the second round of voting also be inconclusive, a new election shall be held on the basis of repeated nomination.

(5) The voting procedure shall be completed within no more than two consecutive days.

(6) The President-elect of the Republic shall take office upon expiry of the mandate of the previous President of the Republic, or if his or her mandate terminated prematurely, on the eighth day after the announcement of the result of the election; prior to taking office the President-elect of the Republic shall take an oath before the National Assembly.

Article 12

(1) The person of the President of the Republic shall be inviolable.

(2) The office of the President of the Republic shall be incompatible with any other state, social, economic or political office, or assignment. The President of the Republic may not pursue any other gainful occupation, and may not receive a pay for any other activity, except for activities falling under copyright protection.

(3) The mandate of the President of the Republic shall terminate:

a) upon the expiry of his or her term of office;

b) upon his or her death;

c) if he or she is incapable of performing his or her functions for over ninety days;

d) if the conditions required for his or her election no longer exist;

e) upon the declaration of a conflict of interests;

f) upon his or her resignation;

g) upon his or her removal from the office of the President of the Republic.

(4) The National Assembly shall decide with the votes of two-thirds of the Members of the National Assembly present on the establishment of any condition of the President of the Republic preventing him or her of performing his or her functions for over ninety days, or of the absence of the conditions required for his or her election, or on the declaration of a conflict of interests.

(5)* The detailed rules for the legal status of the President of the Republic and the previous Presidents of the Republic, and their remuneration shall be laid down in a cardinal Act.

Article 13

(1) Criminal proceedings against the President of the Republic may be instituted only after the termination of his or her mandate.

(2)† If the President of the Republic wilfully violates the Fundamental Law or, in connection with performing his or her office, any Act, or if he or she commits a wilful criminal offence, one-fifth of the Members of the National Assembly may propose his or her removal from office.

(3) For the impeachment procedure to be instituted, the votes of two-thirds of the Members of the National Assembly shall be required. Voting shall be held by secret ballot.

(4) As from the adoption of the decision of the National Assembly, the President of the Republic may not exercise his or her powers until the impeachment procedure is concluded.

(5) The Constitutional Court shall have the power to conduct the impeachment procedure.

(6) If, as a result of the procedure, the Constitutional Court establishes the responsibility of the President of the Republic under public law, it may remove the President of the Republic from office.

Article 14

(1) If the President of the Republic is temporarily prevented from acting, or if the mandate of the President of the Republic terminates, the Speaker of the National Assembly shall exercise the functions and powers of the President of the Republic until he or she is no longer prevented from acting, or until the new President of the Republic takes office, respectively.

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* Amended by Article 1(2) of the First Amendment to the Fundamental Law (18 June 2012).

† Amended by Article 21(1)n) of the Fourth Amendment to the Fundamental Law (25 March 2013). Since the modification is purely of linguistic nature, it does not concern the English translation.

(2) The fact that the President of the Republic is temporarily prevented from acting shall be established by the National Assembly at the initiative of the President of the Republic, the Government or any Member of the National Assembly.

(3) While substituting for the President of the Republic, the Speaker of the National Assembly may not exercise his or her rights as a Member of the National Assembly, and his or her duties as Speaker of the National Assembly shall be performed by the Deputy Speaker of the National Assembly designated by the National Assembly.

THE GOVERNMENT

Article 15

(1) The Government shall be the general organ of executive power, it shall exercise all the functions and powers which are not expressly conferred by the Fundamental Law or a legal regulation on another organ. The Government shall be accountable to the National Assembly.

(2) The Government shall be the principal organ of public administration, it may establish organs of state administration, as provided for by an Act.

(3) Acting within its functions, the Government shall adopt decrees in matters not regulated by an Act, or on the basis of authorisation by an Act.

(4) No government decree shall conflict with any Act.

Article 16

(1) The Members of the Government shall be the Prime Minister and the Ministers.

(2) By means of a decree, the Prime Minister shall designate one or more Deputy Prime Minister(s) from among the Ministers.

(3) The Prime Minister shall be elected by the National Assembly on the proposal of the President of the Republic.

(4) The Prime Minister shall be elected with the votes of more than half of the Members of the National Assembly. The Prime Minister shall take office upon his or her election.

(5) The President of the Republic shall present his or her proposal referred to in Paragraph (3):

a) at the constitutive sitting of the new National Assembly, if the Prime Minister's mandate has terminated upon the formation of the newly-elected National Assembly;

b) within fifteen days of the termination of the Prime Minister's mandate, if the Prime Minister's mandate has terminated upon his or her resignation, his or her death, the declaration of a conflict of interests, due to the absence of the conditions required for his or her election or because the National Assembly has expressed its lack of confidence in the Prime Minister in a confidence vote.

(6) If the National Assembly fails to elect the person proposed for Prime Minister in accordance with Paragraph (5), the President of the Republic shall present a new proposal within fifteen days.

(7) Ministers shall be appointed by the President of the Republic on the proposal of the Prime Minister. Ministers shall take office on the date designated in the deed of appointment or, in the absence thereof, upon their appointment.

(8) The Government shall be established when Ministers are appointed.

(9) The Members of the Government shall take an oath before the National Assembly.

Article 17

(1) The ministries shall be listed in an Act.

(2) Ministers without portfolio may be appointed to perform the functions determined by the Government.

(3) The capital or county government offices shall be the territorial state administration organs of the Government with general competence.

(4) Provisions of a cardinal Act regarding the designation of ministries, Ministers or organs of the public administration may be amended by an Act.

(5) The legal status of government officials shall be regulated by an Act.

Article 18

(1) The Prime Minister shall define the general policy of the Government.

(2) Ministers shall, within the framework of the general policy of the Government, autonomously control the sectors of state administration within their functions and the subordinated organs, and shall perform the tasks determined by the Government or the Prime Minister.

(3) Acting on the basis of authorisation by an Act or a government decree, and within their functions, Members of the Government shall adopt decrees, either autonomously or in agreement with other Ministers; no such decree shall conflict with any Act, government decree or decree of the Governor of the National Bank of Hungary.

(4) Members of the Government shall be accountable to the National Assembly for their actions, and Ministers shall be accountable to the Prime Minister. Members of the Government may attend and address the sittings of the National Assembly. The National Assembly or a parliamentary committee may oblige Members of the Government to attend their sitting.

(5) The detailed rules for the legal status of Members of the Government, their remuneration, as well as the rules regarding the substitution of Ministers shall be laid down in an Act.

Article 19

The National Assembly may request information from the Government on the government position to be represented in the decision-making procedures of the intergovernmental institutions of the European Union, and may take a position on the draft placed on the agenda in the procedure. In the course of the decision-making of the European Union, the Government shall act on the basis of the position taken by the National Assembly.

Article 20

(1) Upon the termination of the Prime Minister's mandate, the mandate of the Government shall terminate.

(2) The Prime Minister's mandate shall terminate:

a) upon the formation of the newly-elected National Assembly;

b) if the National Assembly expresses its lack of confidence in the Prime Minister and elects a new Prime Minister;

c) if the National Assembly expresses its lack of confidence in the Prime Minister in a confidence vote initiated by the Prime Minister;

d) upon his or her resignation;

e) upon his or her death;

f) upon the declaration of a conflict of interests;

g) if the conditions required for his or her election no longer exist.

(3) A Minister's mandate shall terminate:

a) upon the termination of the Prime Minister's mandate;

b) upon his or her resignation;

c) upon his or her dismissal;

d) upon his or her death.

(4) The National Assembly shall decide with the votes of two-thirds of the Members of the National Assembly present on the establishment of the absence of the conditions required for the election of the Prime Minister or on the declaration of a conflict of interests.

Article 21

(1) One-fifth of the Members of the National Assembly may, together with the designation of a candidate for the office of Prime Minister, submit a written motion of no-confidence against the Prime Minister.

(2) If the National Assembly supports the motion of no-confidence, it thereby expresses its lack of confidence in the Prime Minister and simultaneously elects the person proposed for the office of Prime Minister in the motion of no-confidence. For such decision of the National Assembly, the votes of more than half of the Members of the National Assembly shall be required.

(3) The Prime Minister may put forward a confidence vote. The National Assembly expresses its lack of confidence in the Prime Minister if more than half of the Members of the National Assembly do not support the Prime Minister in the confidence vote proposed by the Prime Minister.

(4) The Prime Minister may propose that the vote on a proposal submitted by the Government be simultaneously a confidence vote. The National Assembly expresses its lack of confidence in the Prime Minister if it does not support the proposal submitted by the Government.

(5) The National Assembly shall decide on the question of confidence after the third day, but no later than eight days following the submission of the motion of no-confidence or of the Prime Minister's motion pursuant to Paragraphs (3) or (4).

Article 22

(1) From the termination of its mandate until the formation of the new Government, the Government shall exercise its powers as a caretaker government, but may not express consent to be bound by international treaties, and may adopt decrees only on the basis of authorisation by an Act and in cases of urgency.

(2) If the Prime Minister's mandate terminates upon his or her resignation or the formation of the newly-elected National Assembly, the Prime Minister shall exercise his or her powers as a caretaker Prime Minister until the election of the new Prime Minister, but may not propose the dismissal of Ministers or the appointment of new Ministers, and may adopt decrees only on the basis of authorisation by an Act and in cases of urgency .

(3) If the Prime Minister's mandate has terminated upon his or her death, the declaration of a conflict of interests, due to the absence of the conditions required for his or her election or because the National Assembly has expressed its lack of confidence in the Prime Minister in a confidence vote, the powers of the Prime Minister shall be exercised by the Deputy Prime Minister or, in the case of more than one Deputy Prime Ministers, by the one designated as first Deputy Prime Minister, until the new Prime Minister is elected and with the limitations set out in Paragraph (2).

(4) A Minister shall exercise his or her powers as a caretaker Minister from the termination of the Prime Minister's mandate until a new Minister is appointed or another member of the new Government is assigned to temporarily perform the ministerial functions, but may adopt decrees only in cases of urgency.

AUTONOMOUS REGULATORY ORGANS

Article 23

(1) By means of a cardinal Act, the National Assembly may establish autonomous regulatory organs to perform and exercise certain functions and powers belonging to the executive branch.

(2) The head of an autonomous regulatory organ shall be appointed by the Prime Minister or, on the proposal of the Prime Minister, by the President of the Republic for the term specified in a cardinal Act. The head of an autonomous regulatory organ shall appoint his or her deputy or deputies.

(3) The head of an autonomous regulatory organ shall annually report to the National Assembly on the activities of the autonomous regulatory organ.

(4) Acting on the basis of authorisation by an Act and within his or her functions laid down in a cardinal Act, the head of an autonomous regulatory organ shall issue decrees; no such decree shall conflict with any Act, government decree, prime ministerial decree, ministerial decree or decree of the Governor of the National Bank of Hungary. In issuing decrees, the head of an autonomous regulatory organ may be substituted for by the deputy he or she designated in a decree.

THE CONSTITUTIONAL COURT

Article 24

(1) The Constitutional Court shall be the principal organ for the protection of the Fundamental Law.

(2) The Constitutional Court:

a) shall examine adopted Acts not yet published for conformity with the Fundamental Law;

b)* shall, at the initiative of a judge, review the conformity with the Fundamental Law of any legal regulation applicable in a particular case with priority but within ninety days at the latest;

* Supplemented by Article 12(1) of the Fourth Amendment to the Fundamental Law (25 March 2013), amended by Article 6(2) of the Fifth Amendment to the Fundamental Law (26 September 2013).

c) shall, on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any legal regulation applied in a particular case;

d) shall, on the basis of a constitutional complaint, review the conformity with the Fundamental Law of any judicial decision;

e)* shall, at the initiative of the Government, one-fourth of the Members of the National Assembly, the President of the Kúria, the Prosecutor General or the Commissioner for Fundamental Rights, review the conformity with the Fundamental Law of any legal regulation; shall examine any legal regulation for conflict with any international treaties; shall exercise further functions and powers laid down in the Fundamental Law or in a cardinal Act.

(3) The Constitutional Court:

a)† shall, within its powers set out in Paragraph (2)b), c), and e), annul any legal regulation or any provision of a legal regulation which conflicts with the Fundamental Law;

b) shall, within its power set out in Paragraph (2)d), annul any judicial decision which conflicts with the Fundamental Law;

c)‡ may, within its power set out in Paragraph (2)f), annul any legal regulation or any provision of a legal regulation which conflicts with an international treaty; and/or shall determine legal consequences set out in a cardinal Act.

(4)§ The Constitutional Court may review and/or annul any provision not requested to be reviewed of a legal regulation only if there is a close substantive connection between that provision and the provision requested to be reviewed of the legal regulation.

(5)¶ The Constitutional Court may review the Fundamental Law or the amendment of the Fundamental Law only in relation to the procedural requirements laid down in the Fundamental Law for its making and promulgation. Such examination may be initiated by:

a) the President of the Republic in respect of the Fundamental Law or the amendment of the Fundamental Law, if adopted but not yet published;

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* Supplemented by Article 12(2) of the Fourth Amendment to the Fundamental Law (25 March 2013).
† Amended by Article 6(3) of the Fifth Amendment to the Fundamental Law (26 September 2013).
‡ Amended by Article 6(3) of the Fifth Amendment to the Fundamental Law (26 September 2013).
§ Supplemented by Article 12(3) of the Fourth Amendment to the Fundamental Law (25 March 2013).
¶ Supplemented by Article 12(3) of the Fourth Amendment to the Fundamental Law (25 March 2013).

b) the Government, one-fourth of the Members of the National Assembly, the President of the Kúria, the Prosecutor General or the Commissioner for Fundamental Rights within thirty days of promulgation.

(6)* The Constitutional Court shall decide on the motion pursuant to Paragraph (5) with priority but within thirty days at the latest. If the Constitutional Court finds that the Fundamental Law or the amendment of the Fundamental Law does not comply with the procedural requirements referred to in Paragraph (5), the Fundamental Law or the amendment of the Fundamental Law:

a) shall again be debated in the National Assembly in the case laid down in Paragraph (5)a);

b) shall be annulled by the Constitutional Court in the case laid down in Paragraph (5)b).

(7)† The Constitutional Court shall, as provided for by a cardinal Act, hear the legislator of the legal regulation, the initiator of the Act or their representative or shall obtain their opinions during its procedure if the matter affects a wide range of persons. This stage of the procedure shall be public.

(8)‡ The Constitutional Court shall be a body composed of fifteen members, each elected for twelve years with the votes of two-thirds of the Members of the National Assembly. The National Assembly shall, with the votes of two-thirds of the Members of the National Assembly, elect a member of the Constitutional Court to serve as its President until the expiry of his or her term of office as judge of the Constitutional Court. Members of the Constitutional Court may not be members of political parties or engage in political activities.

(9)§ The detailed rules for the powers, organisation and operation of the Constitutional Court shall be laid down in a cardinal Act.

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* Supplemented by Article 12(4) of the Fourth Amendment to the Fundamental Law (25 March 2013).
† Supplemented by Article 12(4) of the Fourth Amendment to the Fundamental Law (25 March 2013).
‡ Supplemented by Article 12(4) of the Fourth Amendment to the Fundamental Law (25 March 2013).
§ Supplemented by Article 12(4) of the Fourth Amendment to the Fundamental Law (25 March 2013).

COURTS

Article 25

(1) Courts shall administer justice. The supreme judicial organ shall be the Kúria.

(2) Courts shall decide on:

a) criminal matters, civil disputes and on other matters specified in an Act;

b) the lawfulness of administrative decisions;

c) the conflict of local government decrees with any other legal regulation, and on their annulment;

d) the establishment of non-compliance of a local government with its obligation based on an Act to legislate.

(3) In addition to Paragraph (2), the Kúria shall ensure uniformity of the application of the law by the courts and shall take uniformity decisions which shall be binding on the courts.

(4)* The organisation of the judiciary shall have multiple levels. Separate courts may be established for specific groups of cases.

(5)† The central responsibilities of the administration of the courts shall be performed by the President of the National Office for the Judiciary. The National Council of Justice shall supervise the central administration of the courts. The National Council of Justice and other bodies of judicial self-government shall participate in the administration of the courts.

(6)‡ The President of the National Office for the Judiciary shall be elected by the National Assembly from among the judges for nine years on the proposal of the President of the Republic. The President of the National Office for the Judiciary shall be elected with the votes of two-thirds of the Members of the National Assembly. The President of the Kúria shall be amember of the National Council of Justice further members of which shall be elected by judges, as laid down in a cardinal Act.

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* Supplemented by Article 13(1) of the Fourth Amendment to the Fundamental Law (25 March 2013).
† Supplemented by Article 3 of the Fifth Amendment to the Fundamental Law (26 September 2013).
‡ Supplemented by Article 3 of the Fifth Amendment to the Fundamental Law (26 September 2013).

(7)* An Act may provide that in certain legal disputes other organs may also act.

(8)† The detailed rules for the organisation and administration of courts, for the legal status of judges, as well as the remuneration of judges shall be laid down in a cardinal Act.

Article 26

(1) Judges shall be independent and only subordinated to Acts; they shall not be instructed in relation to their judicial activities. Judges may only be removed from office for the reasons and in a procedure specified in a cardinal Act. Judges may not be members of political parties or engage in political activities.

(2)‡ Professional judges shall be appointed by the President of the Republic, as provided for by a cardinal Act. Only persons having reached the age of thirty years may be appointed judge. Except for the President of the Kúria and the President of the National Office for the Judiciary, the service relationship of judges shall terminate upon their reaching the general retirement age.

(3) The President of the Kúria shall be elected by the National Assembly from among the judges for nine years on the proposal of the President of the Republic. The President of the Kúria shall be elected with the votes of two-thirds of the Members of the National Assembly.

Article 27

(1) Unless otherwise provided in an Act, courts shall adjudicate in chambers.

(2) Non-professional judges shall also participate in the administration of justice in the cases and ways specified in an Act.

(3) Only professional judges may act as a single judge or as the president of a chamber. In cases specified in an Act, court secretaries may also act within the powers of a single judge; in the course of such activity of the court secretary, Article 26(1) shall apply to him or her.

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* Supplemented by Article 13(1) of the Fourth Amendment to the Fundamental Law (25 March 2013).

† Supplemented by Article 13(2) of the Fourth Amendment to the Fundamental Law (25 March 2013), amended by Article 6(4) of the Fifth Amendment to the Fundamental Law (26 September 2013).

‡ Amended by Article 21(1)q) of the Fourth Amendment to the Fundamental Law (25 March 2013).

(4)*

Article 28

In the course of the application of law, courts shall interpret the text of legal regulations primarily in accordance with their purposes and with the Fundamental Law. When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good.

Article 29

The prosecution service

(1)† The Prosecutor General and the prosecution service shall be independent, shall contribute to the administration of justice by exclusively enforcing the State's demand for punishment as public accuser. The prosecution service shall prosecute criminal offences, take action against other unlawful acts or non-compliances, as well as contribute to the prevention of unlawful acts.

(2)‡ The Prosecutor General and the prosecution service:

a)§ shall exercise rights in connection with investigations, as provided for by an Act;

b) shall represent the prosecution in court proceedings;

c) shall supervise the lawfulness of penal enforcement;

d)¶ shall, as a guardian of public interest, exercise further functions and powers laid down in the Fundamental Law or in an Act.

(3) The organisation of the prosecution service shall be led and directed by the Prosecutor General, who shall appoint prosecutors. Except for the Prosecutor

* Supplemented by Article 14 of the Fourth Amendment to the Fundamental Law (25 March 2013), repealed by Article 7(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).
† Amended by Article 21(1)r) of the Fourth Amendment to the Fundamental Law (25 March 2013).
‡ Amended by Article 21(1)s) of the Fourth Amendment to the Fundamental Law (25 March 2013).
§ Amended by Article 21(1)t) of the Fourth Amendment to the Fundamental Law (25 March 2013).
¶ Amended by Article 21(1)u) of the Fourth Amendment to the Fundamental Law (25 March 2013).

General, the service relationship of prosecutors shall terminate upon their reaching the general retirement age.

(4) The Prosecutor General shall be elected by the National Assembly from among the prosecutors for nine years on the proposal of the President of the Republic. The Prosecutor General shall be elected with the votes of two-thirds of the Members of the National Assembly.

(5) The Prosecutor General shall annually report to the National Assembly on his or her activities.

(6) Prosecutors may not be members of political parties or engage in political activities.

(7) The detailed rules for the organisation and operation of the prosecution service, for the legal status of the Prosecutor General and the prosecutors, as well as their remuneration shall be laid down in a cardinal Act.

THE COMMISSIONER FOR FUNDAMENTAL RIGHTS

Article 30

(1) The Commissioner for Fundamental Rights shall perform fundamental rights protection activities, his or her proceedings may be initiated by anyone.

(2) The Commissioner for Fundamental Rights shall inquire into any violations related to fundamental rights, that come to his or her knowledge, or have such violations inquired into, and shall initiate general or specific measures to remedy them.

(3) The Commissioner for Fundamental Rights and his or her deputies shall be elected for six years with the votes of two-thirds of the Members of the National Assembly. The deputies shall protect the interests of future generations and the rights of nationalities living in Hungary. The Commissioner for Fundamental Rights and his or her deputies may not be members of political parties or engage in political activities.

(4) The Commissioner for Fundamental Rights shall annually report to the National Assembly on his or her activities.

(5) The detailed rules for the Commissioner for Fundamental Rights and his or her deputies shall be laid down in an Act.

LOCAL GOVERNMENTS

Article 31

(1) In Hungary local governments shall function to manage local public affairs and exercise local public power.

(2) Local referendums may be held on any matter within the functions and powers of the local government, as provided for by an Act.

(3) The rules relating to local governments shall be laid down in a cardinal Act.

Article 32

(1) In the management of local public affairs and within the framework of an Act, local governments:

a) shall adopt decrees;

b) shall take decisions;

c) shall autonomously administer their affairs;

d) shall determine the rules of their organisation and operation;

e) shall exercise the rights of ownership with respect to local government property;

f) shall determine their budgets and autonomously manage their affairs on the basis thereof;

g) may engage in entrepreneurial activities with their assets and revenues available for this purpose, without jeopardising the performance of their mandatory duties;

h) shall decide on the types and rates of local taxes;

i) may create local government symbols and establish local decorations and honorific titles;

j) may request information from the organ having the relevant duties and powers, initiate decisions or express an opinion;

k) may freely associate with other local governments, establish associations for the representation of their interests, cooperate with local governments of other countries within their functions and powers, and become members of international organisations of local governments;

l) shall exercise further functions and powers laid down in an Act.

(2) Acting within their functions, local governments shall adopt local government decrees to regulate local social relations not regulated by an Act, and/or on the basis of authorisation by an Act.

(3) No local government decree shall conflict with any other legal regulation.

(4) Local governments shall send local government decrees to the capital or county government office immediately after their promulgation. If the capital or county government office finds the local government decree or any of its provisions to be in conflict with any legal regulation, it may apply to a court for a review of the local government decree.

(5)* The capital or county government office may apply to a court for the establishment of non-compliance of a local government with its obligation based on an Act to adopt decrees or take decisions. Should the local government fail to comply with its obligation to adopt decrees or take decisions by the date determined by the court in its decision establishing non-compliance, the court shall, at the initiative of the capital or county government office, order the head of the capital or county government office to adopt the local government decree or local government decision required to remedy the non-compliance in the name of the local government.

(6) The property of local governments shall be public property which shall serve for the performance of their tasks.

Article 33

(1) The functions and powers of a local government shall be exercised by its representative body.

(2) A local representative body shall be headed by the mayor. The president of a county representative body shall be elected by the county representative body from among its members for the term of its mandate.

* Amended by Article 21(1)v) of the Fourth Amendment to the Fundamental Law (25 March 2013).

(3) A representative body may elect committees and establish an office, as provided for by a cardinal Act.

Article 34

(1) Local governments and state organs shall cooperate to achieve community goals. An Act may set out mandatory functions and powers for local governments. For the performance of their mandatory functions and powers, local governments shall be entitled to proportionate budgetary and/or other financial support.

(2) An Act may provide that mandatory tasks of local governments shall be performed through associations.

(3)* An Act, or a government decree based on authorisation by an Act may exceptionally specify functions and powers of state administration for mayors, presidents of county representative bodies and for heads or officers of the office of representative bodies.

(4) The Government shall ensure supervision of the legality of local governments through the capital or county government offices.

(5) In order to preserve a balanced budget, an Act may provide that for any borrowing or for other undertaking of commitments by local governments to the extent determined in an Act, certain conditions and/or the consent of the Government shall be required.

Article 35

(1) Local government representatives and mayors shall be elected by universal and equal suffrage in a direct and secret ballot, in elections which guarantee the free expression of the will of the voters, in a manner laid down in a cardinal Act.

(2)† The general elections of local government representatives and mayors shall be held in the month of October of the fifth year following the previous general election of local government representatives and mayors.

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* Supplemented by Article 15 of the Fourth Amendment to the Fundamental Law (25 March 2013).

† Supplemented by Article 16 of the Fourth Amendment to the Fundamental Law (25 March 2013).

(3) The mandate of representative bodies shall last until the day of the general elections of local government representatives and mayors. If no elections can be held due to a lack of candidates, the mandate of the local representative body shall be extended until the day of the interim elections. The mandate of mayors shall last until the election of the new mayors.

(4) Representative bodies may declare their own dissolution, as provided for by a cardinal Act.

(5) At the motion of the Government – submitted after obtaining the opinion of the Constitutional Court –, the National Assembly shall dissolve representative bodies the operation of which is in conflict with the Fundamental Law.

(6) Upon a representative body dissolving itself or upon it being dissolved, the mandate of the mayor shall also terminate.

PUBLIC FINANCES

Article 36

(1) The National Assembly shall adopt an Act on the central budget and on the implementation of the central budget for each year. The Government shall submit the legislative proposal on the central budget and on the implementation of the central budget to the National Assembly by the deadline determined in an Act.

(2) The legislative proposal on the central budget and the legislative proposal on the implementation thereof shall contain state expenditures and revenues in the same structure, in a transparent manner and in reasonable detail.

(3) The adoption of the Act on the central budget by the National Assembly shall constitute an authorisation for the Government to collect the revenues and to disburse the expenditures determined in that Act.

(4) The National Assembly may not adopt an Act on the central budget as a result of which state debt would exceed half of the Gross Domestic Product.

(5) As long as state debt exceeds half of the Gross Domestic Product, the National Assembly may only adopt an Act on the central budget which provides for state debt reduction in proportion to the Gross Domestic Product.

(6) Any derogation from the provisions of Paragraphs (4) and (5) shall only be allowed during a special legal order and to the extent necessary to mitigate the consequences of the circumstances triggering the special legal order, or, in case of an enduring and significant national economic recession, to the extent necessary to restore the balance of the national economy.

(7) If the National Assembly fails to adopt the Act on the central budget by the beginning of the calendar year, the Government shall be authorised to collect the revenues determined in legal regulations and, within the framework of the appropriations determined in the Act on the central budget for the previous year, disburse expenditures on a pro-rata basis.

Article 37

(1) The Government shall be obliged to implement the central budget in a lawful and expedient manner, with efficient management of public funds and by ensuring transparency.

(2) With the exceptions specified in Article 36(6), no such borrowing may be contracted and no such financial commitment may be undertaken in the course of the implementation of the central budget which would allow the state debt to exceed half of the Gross Domestic Product.

(3) As long as the state debt exceeds half of the Gross Domestic Product, with the exceptions specified in Article 36(6), no such borrowing may be contracted and no such financial commitment may be undertaken in the course of the implementation of the central budget which would result in an increase, as compared to the previous year, of the ratio of state debt in relation to the Gross Domestic Product.

(4) As long as the state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its powers set out in Article 24(2)b) to e), review the Acts on the central budget, the implementation of the central budget, central taxes, duties and contributions, customs duties and the central conditions for local taxes for conformity with the Fundamental Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or the rights related to Hungarian citizenship, and it may annul these Acts only for the violation of these rights. The Constitutional Court shall have the unrestricted right to annul also Acts having the above subject matters, if the procedural requirements laid down in the Fundamental Law for the making and promulgation of those Acts have not been met.

(5)* In the case of provisions of Acts that entered into force in a period while the state debt exceeded half of the Gross Domestic Product, Paragraph (4) shall apply to such period even if state debt no longer exceeds half of the Gross Domestic Product.

(6)† The method for the calculation of the state debt and the Gross Domestic Product, as well as the rules relating to the implementation of the provisions of Article 36 and Paragraphs (1) to (3) shall be laid down in an Act.

(7)‡

Article 38

(1) The property of the State and of local governments shall be national assets. The management and protection of national assets shall aim at serving public interest, meeting common needs and preserving natural resources, as well as at taking into account the needs of future generations. The requirements for preserving and protecting national assets, and for rhe responsible management of national assets shall be laid down in a cardinal Act.

(2) The scope of the exclusive property and of the exclusive economic activities of the State, as well as the limitations and conditions of the alienation of national assets of outstanding importance for the national economy shall be determined in a cardinal Act with regard to the goals referred to in Paragraph (1).

(3) National assets may only be transferred for purposes specified in an Act, with the exceptions specified in an Act, taking into account the requirement of proportionate values.

(4) Contracts for the transfer or utilisation of national assets may only be concluded with organisations of which the ownership structure, the organisation and the activity aimed at the management of the national assets transferred or assigned for utilisation is transparent.

(5) Business organisations owned by the State or local governments shall manage their affairs in a manner determined in an Act, autonomously and responsibly according to the requirements of lawfulness, expediency and efficiency.

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* Supplemented by Article 17(1) of the Fourth Amendment to the Fundamental Law (25 March 2013).

† Supplemented by Article 17(2) of the Fourth Amendment to the Fundamental Law (25 March 2013) and by Article 4 of the Fifth Amendment to the Fundamental Law (26 September 2013).

‡ Repealed by Article 7(2) of the Fifth Amendment to the Fundamental Law (26 September 2013).

Article 39

(1) Support or contractual payments from the central budget may only be granted to organisations of which the ownership structure, the organisation and the activity aimed at the use of the support is transparent.

(2) Every organisation managing public funds shall be obliged to publicly account for its management of public funds. Public funds and national assets shall be managed according to the principles of transparency and the purity of public life. Data relating to public funds and national assets shall be data of public interest.

Article 40

In the interest of predictable contributions to common needs and of a secure livelihood for the elderly, basic rules for the sharing of public burdens and for the pension system shall be laid down in a cardinal Act.

Article 41

(1) The National Bank of Hungary shall be the central bank of Hungary. The National Bank of Hungary shall be responsible for monetary policy, as provided for by a cardinal Act.

(2)* The National Bank of Hungary shall perform the supervision of the financial intermediary system.

(3)† The Governor and Deputy Governors of the National Bank of Hungary shall be appointed for six years by the President of the Republic.

(4)‡ The Governor of the National Bank of Hungary shall annually report to the National Assembly on the activities of the National Bank of Hungary.

(5)§ Acting on the basis of authorisation by an Act and within his or her functions laid down in a cardinal Act, the Governor of the National Bank of Hungary shall issue decrees; no such decree shall conflict with any Act. In issuing de-

* Supplemented by Article 5(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).
† Supplemented by Article 5(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).
‡ Supplemented by Article 5(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).
§ Supplemented by Article 5(1) of the Fifth Amendment to the Fundamental Law (26 September 2013).

crees, the Governor of the National Bank of Hungary may be substituted for by the Deputy Governor he or she designated in a decree.

(6)* The detailed rules for the organisation and operation of the National Bank of Hungary shall be laid down in a cardinal Act.

Article 42†

Article 43

(1) The State Audit Office shall be the organ of the National Assembly responsible for financial and economic audit. Acting within its functions laid down in an Act, the State Audit Office shall audit the implementation of the central budget, the management of public finances, the use of funds from public finances and the management of national assets. The State Audit Office shall carry out its audits according to the criteria of lawfulness, expediency and efficiency.

(2) The President of the State Audit Office shall be elected with the votes of two-thirds of the Members of the National Assembly for twelve years.

(3) The President of the State Audit Office shall annually report to the National Assembly on the activities of the State Audit Office.

(4) The detailed rules for the organisation and operation of the State Audit Office shall be laid down in a cardinal Act.

Article 44

(1) As an organ supporting the legislative activity of the National Assembly, the Budget Council shall examine feasibility of the central budget.

(2) The Budget Council shall take part in the preparation of the Act on the central budget, as provided for by an Act.

(3) In order to meet the requirements set out in Article 36(4) and (5), prior consent of the Budget Council shall be required for the adoption of the Act on the central budget.

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* Supplemented by Article 5(2) of the Fifth Amendment to the Fundamental Law (26 September 2013).

† Repealed by Article 7(3) of the Fifth Amendment to the Fundamental Law (26 September 2013).

(4) The members of the Budget Council shall be the President of the Budget Council, the Governor of the National Bank of Hungary and the President of the State Audit Office. The President of the Budget Council shall be appointed for six years by the President of the Republic.

(5) The detailed rules for the operation of the Budget Council shall be laid down in a cardinal Act.

THE HUNGARIAN DEFENCE FORCES

Article 45

(1) Hungary's armed forces shall be the Hungarian Defence Forces. Core duties of the Hungarian Defence Forces shall be the military defence of the independence, territorial integrity and borders of Hungary, the performance of collective defence and peacekeeping tasks arising from international treaties, as well as the carrying out of humanitarian activities in accordance with the rules of international law.

(2) Unless otherwise provided in an international treaty, and within the framework determined in the Fundamental Law and in a cardinal Act, the National Assembly, the President of the Republic, the National Defence Council, the Government or the Minister having the relevant functions and powers shall have the right to direct the Hungarian Defence Forces. The Hungarian Defence Forces shall operate under the direction of the Government.

(3) The Hungarian Defence Forces shall take part in the prevention of disasters, and the relief and elimination of their consequences.

(4) Professional staff members of the Hungarian Defence Forces may not be members of political parties or engage in political activities.

(5) The detailed rules relating to the organisation, tasks, command and control, and operation of the Hungarian Defence Forces shall be laid down in a cardinal Act.

THE POLICE AND NATIONAL SECURITY SERVICES

Article 46

(1) The core duties of the police shall be the prevention and investigation of criminal offences, and the protection of public security, public order, and the order of state borders.

(2) The police shall operate under the direction of the Government.

(3) The core duties of the national security services shall be the protection of the independence and lawful order of Hungary, and the promotion of its national security interests.

(4) The national security services shall operate under the direction of the Government.

(5) Professional staff members of the police and the national security services may not be members of political parties or engage in political activities.

(6) The detailed rules relating to the organisation and operation of the police and the national security services, the rules for the use of special investigative means and techniques, as well as the rules concerning national security activities shall be laid down in a cardinal Act.

DECISIONS ON PARTICIPATION IN MILITARY OPERATIONS

Article 47

(1) The Government shall decide on any troop movement of the Hungarian Defence Forces and foreign armed forces that involves the crossing of borders.

(2) With the exception of the cases specified in Paragraph (3), the National Assembly shall, with the votes of two-thirds of the Members of the National Assembly present, decide on the deployment of the Hungarian Defence Forces abroad or within Hungary, on their stationing abroad, as well as on the deployment of foreign armed forces in Hungary or departing from the territory of Hungary, or on their stationing in Hungary.

(3) The Government shall decide on the deployment of the Hungarian Defence Forces and of foreign armed forces, referred to in Paragraph (2) and based on

the decision of the European Union or the North Atlantic Treaty Organisation, and on other troop movements thereof.

(4) The Government, while simultaneously informing the President of the Republic, shall forthwith report to the National Assembly on its decisions taken under Paragraph (3) or authorising the participation of the Hungarian Defence Forces in peacekeeping or their humanitarian activity in a foreign operational area.

SPECIAL LEGAL ORDERS

Common rules for the state of national crisis and the state of emergency

Article 48

(1) The National Assembly:

a) shall declare a state of national crisis and set up a National Defence Council in the event of the declaration of a state of war or an imminent danger of armed attack by a foreign power (danger of war);

b) shall declare a state of emergency in the event of armed actions aimed at subverting the lawful order or at exclusively acquiring power, or in the event of serious acts of violence endangering life and property on a massive scale, committed with arms or with objects suitable to be used as arms.

(2) For the declaration of a state of war, the conclusion of peace or the declaration of a special legal order referred to in Paragraph (1), the votes of two-thirds of the Members of the National Assembly shall be required.

(3) If the National Assembly is prevented from taking such decisions, the President of the Republic shall have the right to declare a state of war, to declare a state of national crisis and set up the National Defence Council, or to declare a state of emergency.

(4) The National Assembly shall be deemed to be prevented from taking such decisions if it is not in session and its convening is made impossible by insurmountable obstacles caused by shortage of time or the events resulting in a state of war, state of national crisis or state of emergency.

(5) The Speaker of the National Assembly, the President of the Constitutional Court and the Prime Minister shall unanimously determine that the National

Assembly is prevented from acting and that the declaration of a state of war, state of national crisis or state of emergency is justified.

(6) As soon as the National Assembly is no longer prevented from acting, it shall at its first sitting review whether the declaration of a state of war, state of national crisis or state of emergency was justified, and decide on the legality of the measures adopted. For such decision, the votes of two-thirds of the Members of the National Assembly shall be required.

(7) During a state of national crisis or a state of emergency, the National Assembly may not dissolve itself and may not be dissolved. During a state of national crisis or a state of emergency, no general elections of Members of the National Assembly may be called or held; in such cases, a new National Assembly shall be elected within ninety days of the termination of the state of national crisis or state of emergency. If the general elections of Members of the National Assembly have already been held but the new National Assembly has not been formed yet, the President of the Republic shall convene the constitutive sitting for a date within thirty days of the termination of the state of national crisis or state of emergency.

(8) The National Assembly that has dissolved itself or has been dissolved may be convened also by the National Defence Council during a state of national crisis, and by the President of the Republic during a state of emergency.

STATE OF NATIONAL CRISIS

Article 49

(1) The President of the National Defence Council shall be the President of the Republic, and its members shall be the Speaker of the National Assembly, the leaders of parliamentary groups, the Prime Minister, the Ministers and – in a consultative capacity – the Chief of the National Defence Staff.

(2) The National Defence Council shall exercise:

a) the powers delegated to it by the National Assembly,

b) the powers of the President of the Republic,

c) the powers of the Government.

(3) The National Defence Council shall decide:

a) on the deployment of the Hungarian Defence Forces abroad or within Hungary, on their participation in peacekeeping, on their humanitarian activity in a foreign operational area, or on their stationing abroad,

b) on the deployment of foreign armed forces in Hungary or departing from the territory of Hungary, or on their stationing in Hungary,

c) on the introduction of extraordinary measures laid down in a cardinal Act.

(4) The National Defence Council may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.

(5) Upon the termination of the state of national crisis, such decrees of the National Defence Council shall cease to have effect, unless the National Assembly extends those decrees.

STATE OF EMERGENCY

Article 50

(1) Should the use of the police and the national security services prove insufficient, the Hungarian Defence Forces may be used during a state of emergency.

(2) During a state of emergency, if the National Assembly is prevented from acting, the President of the Republic shall decide on the use of the Hungarian Defence Forces under Paragraph (1).

(3) During a state of emergency, the extraordinary measures laid down in a cardinal Act shall be introduced by the President of the Republic in decrees. By means of his or her decrees, the President of the Republic may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.

(4) The President of the Republic shall forthwith inform the Speaker of the National Assembly of the extraordinary measures introduced. During a state of emergency, the National Assembly or, if it is prevented from acting, the committee of the National Assembly dealing with national defence issues shall remain continuously in session. The National Assembly or, if it is prevented from acting, the committee of the National Assembly dealing with national defence issues may suspend the application of the extraordinary measures introduced by the President of the Republic.

(5) Extraordinary measures introduced by means of decrees shall remain in force for thirty days, unless the National Assembly or, if it is prevented from acting, the committee of the National Assembly dealing with national defence issues extends them.

(6) Upon the termination of the state of emergency, such decrees of the President of the Republic shall cease to have effect.

STATE OF PREVENTIVE DEFENCE

Article 51

(1) In the event of a danger of external armed attack or in order to meet an obligation arising from an alliance, the National Assembly shall declare a state of preventive defence for a fixed period of time, and shall simultaneously authorise the Government to introduce extraordinary measures laid down in a cardinal Act. The period of the state of preventive defence may be extended.

(2) The votes of two-thirds of the Members of the National Assembly present shall be required for a special legal order referred to in Paragraph (1) to be declared or to be extended.

(3) After initiating the declaration of a state of preventive defence, the Government may, by means of decrees, introduce measures derogating from the Acts regulating the operation of public administration, the Hungarian Defence Forces and law enforcement organs, and shall continuously inform the President of the Republic and the standing committees of the National Assembly having the relevant functions and powers thereof. The measures thus introduced shall remain in force until the decision of the National Assembly on the declaration of a state of preventive defence but for no longer than sixty days.

(4) During a state of preventive defence, the Government may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.

(5) Upon the termination of the state of preventive defence, such decrees of the Government shall cease to have effect.

UNEXPECTED ATTACK

Article 52

(1) In the event of an unexpected incursion of external armed groups into the territory of Hungary, until the decision on the declaration of a state of emergency or state of national crisis, the Government shall be obliged – if necessary, in accordance with the armed defence plan approved by the President of the Republic – to immediately take action using forces proportionate to and prepared for the attack, to repel the attack, to defend the territory of Hungary with domestic and allied emergency air defence and aviation forces, in order to protect lawful order, life and property, public order and public security.

(2) The Government shall forthwith inform the National Assembly and the President of the Republic of its action taken under Paragraph (1).

(3) In the event of an unexpected attack, the Government may introduce extraordinary measures laid down in a cardinal Act, and may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.

(4) Upon the termination of the unexpected attack, such decrees of the Government shall cease to have effect.

STATE OF DANGER

Article 53

(1) In the event of a natural disaster or industrial accident endangering life and property, or in order to mitigate the consequences thereof, the Government shall declare a state of danger, and may introduce extraordinary measures laid down in a cardinal Act.

(2) In a state of danger the Government may adopt decrees by means of which it may, as provided for by a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.

(3) The decrees of the Government referred to in Paragraph (2) shall remain in force for fifteen days, unless the Government, on the basis of authorisation by the National Assembly, extends those decrees.

(4) Upon the termination of the state of danger, such decrees of the Government shall cease to have effect.

COMMON RULES FOR SPECIAL LEGAL ORDERS

Article 54

(1) Under a special legal order, the exercise of fundamental rights – with the exception of the fundamental rights provided for in Articles II and III, and Article XXVIII(2) to (6) – may be suspended or may be restricted beyond the extent specified in Article I(3).

(2) Under a special legal order, the application of the Fundamental Law may not be suspended, and the operation of the Constitutional Court may not be restricted.

(3) A special legal order shall be terminated by the organ entitled to introduce the special legal order if the conditions for its declaration no longer exist.

(4) The detailed rules to be applied under a special legal order shall be laid down in a cardinal Act.

CLOSING AND MISCELLANEOUS PROVISIONS*

1. The Fundamental Law of Hungary shall enter into force on 1 January 2012.

2. This Fundamental Law shall be adopted by the National Assembly pursuant to Sections 19(3)a) and 24(3) of Act XX of 1949.

3.† The transitional provisions related to the entry into force of the Fundamental Law are contained in Points 8 to 26.

4. The Government shall be obliged to submit to the National Assembly the legislative proposals required for the implementation of the Fundamental Law.

* The designation of the title is defined by Article 18 of the Fourth Amendment to the Fundamental Law (25 March 2013).

† Supplemented by Article 19(1) of the Fourth Amendment to the Fundamental Law (25 March 2013).

5.* The decisions of the Constitutional Court taken prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions.

6.† The 25th day of April shall be Fundamental Law Day to commemorate the promulgation of the Fundamental Law.

7.‡ The first general election of local government representatives and mayors after the entry into force of the Fundamental Law shall take place in October 2014.

8.§ The entry into force of the Fundamental Law shall not affect the legal force of legal regulations adopted, normative decisions and normative orders, and other legal instruments of state control issued, specific decisions taken and international legal commitments undertaken before its entry into force.

9.¶ The legal successor of the organ exercising the relevant functions and powers under Act XX of 1949 on the Constitution of the Republic of Hungary shall be the organ exercising the relevant functions and powers under the Fundamental Law.

10.** After the entry into force of the Fundamental Law, the name referring to the Republic of Hungary may remain in use as a reference to Hungary in accordance with the legal regulations in force on 31 December 2011, until the transition to the use of the name under the Fundamental Law can be achieved in accordance with the principles of responsible management.

11.†† With the exceptions laid down in Points 12 to 18, the entry into force of the Fundamental Law shall not affect the mandate of the National Assembly, the Government and the local representative bodies, as well as of persons appointed or elected before the entry into force of the Fundamental Law.

12.‡‡ The following provisions of the Fundamental Law shall also apply to the mandate of the following:

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* Supplemented by Article 19(2) of the Fourth Amendment to the Fundamental Law (25 March 2013).
† Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
‡ Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
§ Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
¶ Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
** Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
†† Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
‡‡ Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).

a) Articles 3 and 4 to the mandate of the National Assembly and Members of the National Assembly in office;

b) Articles 12 and 13 to the mandate of the President of the Republic in office;

c) Articles 20 and 21 to the mandate of the Government in office and the Members of the Government in office;

d) Article 27(3) to the mandate of court secretaries in office;

e) Article 33(2) to the mandate of the Presidents of the county assemblies; and

f) Article 35(3) to (6) to the mandate of the local representative bodies and mayors in office.

13.* The calculation of the period referred to in Article 4(3)f) of the Fundamental Law shall start upon the entry into force of the Fundamental Law.

14.† (1) The legal successor of the Supreme Court, the National Council of Justice and its President shall be the Kúria in terms of administering justice, and, with the exception laid down in a cardinal Act, the President of the National Office for the Judiciary in terms of the administration of courts.

(2) 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.

15.‡ (1) With the exception laid down in Paragraph (2), the lowest age requirement laid down in Article 26(2) of the Fundamental Law shall apply to judges appointed on the basis of a call for applications announced after the entry into force of the Fundamental Law.

(2) In the case of appointments for which, as laid down in an Act, no call for applications is required, the lowest age requirement shall apply to judges appointed after the entry into force of the Fundamental Law.

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* Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
† Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
‡ Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).

16.* As of the entry into force of the Fundamental Law, the designation for the office of the Parliamentary Commissioner for Citizens' Rights shall be Commissioner for Fundamental Rights. The legal successor of the Parliamentary Commissioner for Citizens' Rights, the Parliamentary Commissioner for National and Ethnic Minority Rights and the Parliamentary Commissioner for Future Generations shall be the Commissioner for Fundamental Rights. As of the entry into force of the Fundamental Law, the Parliamentary Commissioner for National and Ethnic Minority Rights in office shall become Deputy of the Commissioner for Fundamental Rights responsible for the protection of the rights of nationalities living in Hungary; as of the entry into force of the Fundamental Law, the Parliamentary Commissioner for Future Generations in office shall become Deputy of the Commissioner for Fundamental Rights responsible for the protection of the interests of future generations; their mandates shall terminate upon the termination of the mandate of the Commissioner for Fundamental Rights.

17.† The mandate of the Commissioner for Data Protection shall terminate upon the entry into force of the Fundamental Law.

18.‡ For the purposes and as of the entry into force of the Fundamental Law, the designation for the office of the President of the county assembly shall be President of the county representative body. The county representative body pursuant to the Fundamental Law shall be the legal successor of the county assembly.

19.§ (1) With the exceptions laid down in Paragraphs (2) to (5), the provisions of the Fundamental Law shall also apply to cases in progress.

(2) Article 6 of the Fundamental Law shall apply as of the first sitting of the National Assembly to be held following the entry into force of the Fundamental Law.

(3) Proceedings instituted upon applications submitted to the Constitutional Court before the entry into force of the Fundamental Law by applicants who no longer have the right to submit applications under the Fundamental Law shall be terminated and if, as of the entry into force of the Fundamental Law, the proceeding falls within the powers of another organ, the application shall be

* Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
† Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
‡ Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
§ Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).

transferred. In accordance with the conditions laid down in a cardinal Act, the applicant may repeatedly submit the application.

(4) Articles 38(4) and 39(1) of the Fundamental Law shall apply to contracts and subsidy entitlements existing on 1 January 2012, and to proceedings in progress aimed at concluding contracts or granting subsidies if provided for by an Act, and as provided for by that Act.

(5) The third sentence of Section 70/E(3) of Act XX of 1949 on the Constitution of the Republic of Hungary in force on 31 December 2011 shall, until 31 December 2012, apply to benefits which qualify as pension benefits under the rules in force on 31 December 2011 with respect to any change in their conditions, nature or amount, to their conversion to other benefits or to their termination.

20.* Sections 26(6), 28/D, 28/E, and 31(2) and (3) of Act XX of 1949 on the Constitution of the Republic of Hungary in force on 31 December 2011 shall apply to cases in progress at the entry into force of the Fundamental Law also after the entry into force of the Fundamental Law.

21.† The participation of the nationalities living in Hungary in the work of the National Assembly as referred to in Article 2(2) of the Fundamental Law shall be ensured for the first time in the work of the National Assembly formed after the first general election of Members of the National Assembly after the entry into force of the Fundamental Law.

22.‡ The entry into force of the Fundamental Law shall not affect any decision of the National Assembly or the Government taken before that entry into force and under Act XX of 1949 on the Constitution of the Republic of Hungary on the deployment of the Hungarian Defence Forces within Hungary or abroad, on the deployment of foreign armed forces in Hungary or departing from the territory of Hungary as well as on the stationing of the Hungarian Defence Forces abroad and/or of foreign armed forces in Hungary.

23.§ In a declared

* Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
† Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
‡ Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
§ Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).

a) state of national crisis, the provisions of the Fundamental Law on the state of national crisis,

b) state of emergency, if it was declared due to armed actions aimed at overthrowing the constitutional order or at exclusively acquiring power, or in the event of serious acts of violence endangering life and property on a massive scale, committed with arms or with objects suitable to be used as arms, the provisions of the Fundamental Law on the state of emergency,

c) state of emergency, if it was declared due to a natural disaster or industrial accident massively endangering life or property, the provisions of the Fundamental Law on the state of danger,

d) state of preventive defence, the provisions of the Fundamental Law on the state of preventive defence,

e) state defined in Section 19/E of Act XX of 1949 on the Constitution of the Republic of Hungary, the provisions of the Fundamental Law on unexpected attack, and

f) state of danger, the provisions of the Fundamental Law on the state of danger shall apply.

24.* (1) Anyone prohibited from participating in public affairs under a final sentence at the entry into force of the Fundamental Law shall not have the right to vote and to be voted for while the prohibition is in force.

(2) Anyone under guardianship restricting or excluding his or her capacity to act under a final judgement at the entry into force of the Fundamental Law shall not have the right to vote and to be voted for until such guardianship is terminated or until a court establishes the existence of his or the right to vote and to be voted for.

25.† (1) Section 12(2) of Act XX of 1949 on the Constitution of the Republic of Hungary in force on 31 December 2011 shall, until 31 December 2013, apply to the delivery of any local government property to the State or another local government.

(2) Section 44/B(4) of Act XX of 1949 on the Constitution of the Republic of Hungary in force on 31 December 2011 shall apply until 31 December 2012. After

* Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).
† Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).

31 December 2011, an Act, or a government decree based on authorisation by an Act may specify functions and powers of state administration for local government notaries.

(3) Section 22(1) and (3) to (5) of Act XX of 1949 on the Constitution of the Republic of Hungary in force on 31 December 2011 shall apply until the entry into force of the cardinal Act referred to in Article 5(8) of the Fundamental Law. The National Assembly shall adopt the cardinal Act referred to in Articles 5(8) and 7(3) of the Fundamental Law by 30 June 2012.

(4) Until 31 December 2012, a cardinal Act may provide that for the adoption of certain decisions of the National Assembly, qualified majority shall be required.

26.* The following shall be repealed:

a) Act XX of 1949 on the Constitution of the Republic of Hungary,

b) Act I of 1972 on the amendment to Act XX of 1949 and the consolidated text of the Constitution of the People's Republic of Hungary,

c) Act XXXI of 1989 on the amendment to the Constitution,

d) Act XVI of 1990 on the amendment to the Constitution of the Republic of Hungary,

e) Act XXIX of 1990 on the amendment to the Constitution of the Republic of Hungary,

f) Act XL of 1990 on the amendment to the Constitution of the Republic of Hungary,

g) the Amendment to the Constitution dated 25 May 2010,

h) the Amendment to the Constitution dated 5 July 2010,

i) the Amendments to the Constitution dated 6 July 2010,

j) the Amendments to the Constitution dated 11 August 2010,

k) Act CXIII of 2010 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary,

* Supplemented by Article 20 of the Fourth Amendment to the Fundamental Law (25 March 2013).

l) Act CXIX of 2010 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary,

m) Act CLXIII of 2010 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary,

n) Act LXI of 2011 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary required for the adoption of certain temporary provisions related to the Fundamental Law,

o) Act CXLVI of 2011 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary, and

p) Act CLIX of 2011 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary.

We, the Members of the National Assembly elected on 25 April 2010, being aware of our responsibility before God and man and in exercise of our constitutional power, hereby adopt this to be the first unified Fundamental Law of Hungary.

"MAY THERE BE PEACE, FREEDOM AND ACCORD"

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