

# A Constitution's Environment, Environment in the Constitution – Process and Background of the New Hungarian Constitution<sup>1</sup>

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It may be the 2011 Hungarian Constitution that had the most interesting birth among all the “modern” constitutions so far. Even if from a clearly constitutional legal aspect, it was a birth every mom-to-be may only wish for herself – fast, practically painless, almost boring... But here it becomes visible again that constitutional law is not standing alone in the void. It is interrelated – and with almost everything: international law, European law, environmental law, and basically every other legal branch as well, but also politics, and international investments.

In the following paper, certain aspects of the background of the new Hungarian Constitution will be discussed, laying special emphasis on the process of its adoption (including the so-called national consultation), its echo at an international level (above all in the European Parliament, the Venice Commission and the European Centre for Law and Justice) and even some “revolutionary” new dispositions, e.g. those relating to environmental protection.

## **I. The process – To be or not to be? That was indeed the question**

“Modern” Hungarian constitutional traditions date back to the 19<sup>th</sup> century and the longest living European 1848 revolution (that actually lasted into 1849), although

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the 1222 Golden Bull of King Andrew II – also called the Hungarian Magna Charta – is considered as the initial constitutional starting point. The history of Hungary has nevertheless always had its twists and turns, and as it is often the case, some parts of it remain forever disputed or simply unknown, especially as “the winner takes all” rule definitely applies to the writing of history.

The history of the Hungarian people is highly disputed when it comes to the times prior to the settlement in the Carpathian basin at the end of the 9<sup>th</sup> century. Attila’s Huns are definitely among our ancestors, and we seem to have been in the area of the Urals for some time in the first millenium, but the latest – genetically based – research shows that along with peoples such as the Polish and the Ukrainians, we seem to be one of the oldest nations in Europe.<sup>3</sup> We may only hope that the developing science will find the answers for the multiplying questions coming up in this regard. In 1000, we were already a Christian kingdom, and the Árpáds continued to rule until the very beginning of the 14<sup>th</sup> century. In the following centuries, Hungary represented a strong power of Europe under the rule of Louis the Great and that of Matthias I. Nevertheless, the discovery of the American continent changed the fate of Central-Eastern Europe forever, and the country faced several challenges in the ensuing centuries: the Ottoman Empire, the Habsburgs – who became the rulers of the country only to be challenged by various wars of independence, e.g. by Ferenc Rákóczi or the aforementioned 1848 revolution. This war of independence, where the Hungarian revolutionaries were supported by many other nations living under the Habsburgs’ rule and which could only be won by the Habsburgs with the help of the Tsar, was the last bastion of the European revolutions. The 1848 constitution adopted by the “revolutionary” country was maybe the most modern constitution on the continent – and, unfortunately, also a short-lived one.<sup>4</sup> In sum – and as always, this statement faces critics as well – Hungary had a so-called “historical constitution” basically connected to the symbol of the Holy Crown throughout the centuries, which is considered to have been interrupted in 1944 with the country’s invasion by Germany and the 1949 – Soviet-model – constitution. This constitution – Act XX of 1949 – was amended several times, but the most important change came of course with the change of regimes in 1989. The text of the constitution was practically rewritten – mainly by the first president of the newly established Constitutional Court and later President of the Republic, László Sólyom – but the numeration remained the same. The very first sentence declares the provisional status of this constitution – saying “*until the country’s new Constitution is adopted*” – but more than two decades had

**3** See Ferenc Cser, Lajos Darai, “Kárpát-medencei magyar ősiség”, in: *Magyarságtudományi Füzetek*, Vol. 12., especially Sections 1 and 3, as well as Endre Czeizel, *A magyarság genetikája*, Galenus, Budapest, 2003; Ornella Semino *et al.*, “The Genetic Legacy of Paleolithic Homo sapiens sapiens in Extant Europeans: A Y Chromosome Perspective”, *Science*, November 10, 2000, Vol. 290, No. 5494, pp. 1155-1159.

**4** To mention these briefly is even more important as the new constitution makes several references to historical events. Among others, the preamble, the so-called national avowal says “*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*”.

passed before this new one was adopted. And at that point, many started to question the need for a new constitution. Needless to say, none of them were members of the party alliance having won the 2010 elections by an unprecedented majority.

Those opposing a new constitution had several arguments, the most important of which were that a constitution should not be adopted by a parliament where the opposition has insufficient votes to veto the constitution; and that the 1989 constitution is a modern one, only the numeration reminding us of the Soviet times, not the content. These seemed to have remained political arguments: trying but failing to cause great social uproar, and having absolutely no practical effects whatsoever. The second argument could have raised the opportunity for a professional debate – which, as we are going to see, was not fully taken advantage of – but the first argument was a politically risky one that indeed backfired. Modification of or creation of a new constitution is – as basically true in most European countries – not an easy task: a two-thirds majority is needed thereto. In the modern democratic history of Hungary (*i.e.* since 1990), the governmental parties had twice held such a majority: between 1994 and 1998, when the Socialist Party allied with the – in the meantime ceased – Free Democrats, and since 2010, when the Young Democrats-Christian Democrats party union received the opportunity to govern the country. Between 1994 and 1998, there have been some changes in the Constitution – due to the two-thirds parliamentary majority – but although it was planned, no major changes could be made, because by the time of their planned adoption, political discrepancies had appeared between the allied parties and no consensus was reached. Before and after that period, *i.e.* when the governing parties had only a simple majority in the parliament, there was absolutely no opportunity for a modification of the Constitution: the parties have always had not simply diverging, but often even opposite interests and represented values. (There were nevertheless at least attempts – e.g. the draft constitution of József Petrétei of 2006 – but political reality often buried these texts in oblivion.) So a new constitution could definitely only be born when closely allied parties or a party alliance had won the parliamentary elections. The former having failed between 1994 and 1998, the latter took its chance after the 2010 elections. From a clearly political point of view, they indeed took a chance. For it is highly improbable – even under the new electoral legislation – that a party alliance may win the elections in a way that they receive a two-thirds majority again in the near future; moreover, this current two-thirds majority is a fragile one – six votes being decisive. But as the next elections will mean that at least half of the current parliamentary seats disappear due to an electoral reform that replaces the old parliament – one designed for Hungary before the end of WWI, *i.e.* before losing two-thirds of its territory and one-third of its nationals – with the smaller one required for this long reduced sovereignty, even some members of the party alliance may sooner or later realize that their jobs are more than in danger; this may be another reason why they try to create all the “cardinal laws” quickly. Putting these predominantly political questions aside, let us get back to the initial question, the process.

## II. The process – No veto, no vote

As indicated above, in 2010 regular parliamentary elections took place in Hungary. Due to various reasons – among others the even then already revealed unprecedented corruption and misconduct of numerous state leaders as well as the catastrophic economic and moral state of the country – the elections had quickly turned into a never-before-seen scenario. It was practically certain that the Young Democrat-Christian Democrat party alliance was going to win, the only question that remained was: with how many votes? The party alliance never declared it, but everyone could guess and basically all the other parties drew attention to the certainty that if they won two-thirds of the parliamentary seats, a new constitution would be adopted. Trying to stop this from happening was the only thing at stake before the second round of the elections, for almost all of the other parties. Two big parties of the change of regime were nevertheless hopelessly struggling for their own survival – the Forum of Hungarian Democrats, the party of the first freely elected Prime Minister, József Antal, has undergone some major changes in the past two decades and in 2010 was far from reaching the 4% of the votes necessary to enter the parliament, similarly to another major figure of the change of regime, the Alliance of Free Democrats, that had served as a governmental party for the previous two parliamentary periods (including the months they were *de jure* outside, but *de facto* voting in favour of their former coalition partner, the Socialists) and was practically sent to damnation by the voters. The parties receiving enough votes to get into the Parliament – the Hungarian Socialist Party,<sup>5</sup> as well as the two newcomers, the Movement for a Better Hungary (Jobbik) and the Politics Can Be Different party (*Lehet Más a Politika*, hereafter LMP) – found themselves in an interesting situation. They knew that they were mere supernumeraries and the government would not be forced to take their ideas into account. They had to choose between (i) assisting with the legislation and expressing their views, probably in vain if they did not meet the conception of the majority, and (ii) taking a drastic move: not participating in the debate, thus demonstrating its uselessness from their point of view. Unfortunately, the latter choice was taken by two parties out of three, and, in addition, they loudly lamented that a grave was being dug for democracy in Hungary... And as Hungarian voters – according to the polls – were not adequately impressed, this had to be heard at least abroad.

Before dedicating an entire section of this paper to this latter development, some major events of the constituency process – that had started much earlier – have to be mentioned.

First, a so-called *ad hoc* drafting committee of the constitution (*alkotmány-előkészítő eseti bizottság*, in the following: *ad hoc* drafting committee) was established. The body presided over by Prof. László Salamon started to work in July 2010 and ceased to exist on March 7, 2011. Originally, it had 45 members, but as the opposition's MPs gradually withdrew, by November 2010 it remained a body solely

<sup>5</sup> At the end of October 2011, they split into two groups – one remained under the current leadership, the other has basically become a new party of former Prime Minister Ferenc Gyurcsány.

consisting of members of the governing fractions. At the same time, in June 2010, an advisory board of the Prime Minister was set up whose task was to assist in the elaboration of the constitution.<sup>6</sup>

The first idea of the opposition that came up was to try – in vain – to convince the majority to hold a referendum about the draft constitution. The government did not fall for this political trick – according to the Constitution then in force, only an absolute majority (*i.e.* two-thirds of the votes of all the Members of the Parliament) was necessary for a modification of the constitution, but no referendum.<sup>7</sup> The government nevertheless took a different initiative, a “national consultation”. This consisted of sending each person entitled to participate in the elections a list of questions with three distinct answers to choose from. It was anonymous, and the questions referred to important questions later introduced into – or neglected by – the new constitution. The government argued that it was a more democratic way of asking for people’s opinion than a simple referendum, where they could have voted for or against one single version. In fact, neither a national referendum nor such a consultation was necessary according to the legislation in force, it was rather a political opportunity. Still, attention has to be turned to this consultation.

There are approximately 8 million voters in Hungary, each of whom received a questionnaire, and over 900,000 filled-in questionnaires arrived at the National Consultation Body<sup>8</sup> – set up for the management of this consultation – in time. That is over 11%, which – in the light of the Hungarians’ referendum and voting habits – is, sadly, not bad at all. (Indeed, the questions were much better formulated than in the next consultation about certain social issues, where in my view the possible answers did not serve as a real consultation, although this did not really show in numbers – almost the same amount of people answered it as the national consultation in the first round.<sup>9</sup>) The opposition declared the national consultation useless. Nevertheless, it

<sup>6</sup> Its members were Péter Boros, former Prime Minister (1993-1994); József Pálincás, President of the Hungarian Academy of Sciences; Imre Pozsgay, former Minister of Culture and Education (1976-1982); historian György Schöpflin; Constitutional Court Judge István Stumpf; and József Szájer, MEP.

<sup>7</sup> See Article 24 (3) and 28/C of the Constitution in force until December 31, 2011, Act XX of 1949. J. Szájer mentions as well that referenda were held in less than half of the cases when new constitutions have been adopted in Europe in the last two decades (József Szájer, “The New Fundamental Law of Hungary”. *Central European Political Science Review*, 2011, Vol. 12., No. 43, pp. 59-80, hereafter: Szájer, *CESPR*, p. 64). It does not make the other half less legitimate, especially as this question has to be regarded strictly in national context and foreign constitutional requirements cannot be imposed on other nations’ legislations, if the common European value of the rule of law had been respected.

<sup>8</sup> The National Consultation Body consisted of József Szájer; János Csák, Hungary’s Ambassador to Great Britain and former president of the Hungarian Oil Company (MOL); Zsigmond Járai, former president and current auditor of the Hungarian National Bank; József Pálincás; and Katalin Szili, former president of the Parliament.

<sup>9</sup> E.g. Question 10 concerning the financing of education offers three options: 1) The state should use public funds to support primarily that kind of education which leads to landing a job. 2) The education system doesn’t need to be adjusted to economic realities. 3) I cannot judge. Well, I am afraid there are more options than these, as the issue is far too complex to be answered that easily.

did indeed affect the draft constitution, even if the main course was certainly set up by experts appointed by the government.

The national consultation concerned the following questions:<sup>10</sup> (1) whether the constitution should include the obligations of the citizens besides their rights, *expressis verbis* mentioning work, learning, home-defense and environmental protection. Ninety-one per cent of the valid answers (almost 800,000 people) voted for the inclusion of obligations.<sup>11</sup> It was often argued that this is reminiscent of the constitution of the national socialists. Well, the Weimar Constitution indeed included the obligations of citizens,<sup>12</sup> but so does the American Declaration of Human Rights, the first international human rights document (adopted some seven months prior to the Universal Declaration of Human Rights). Therefore, I see no revolution or reason for uproar here – the concept is given, and today’s Hungarian society (among other European societies, especially Central European societies; just consult our Slovakian neighbours in this regard) is very sensible – in the current economic situation even more – when it comes to the balances within the society, especially to the balance of social inputs and outputs.

(2) whether the Constitution should include provisions on public debts. Ninety-two per cent agreed to the inclusion of the prohibition of excessive public debts, but the respondents were split between its absolute character and the permission of certain *vis maior* cases. This later Europe-wide praised, but in the national debate highly criticized element – mainly by the former governmental party, well, in their situation humanly quite understandably – reflected naturally not only on our national problems, but also on other nations’, above all Greece’s struggles. The European warning signs were truly enhanced by the fact that Hungary had had to turn to the IMF *before* the worldwide crisis began...

(3) whether the Constitution should include some “common social values” besides human rights, such as family, order, home, work and health.<sup>13</sup> Although over 90 per cent agreed to the inclusion, certain theoretical questions arise in this regard. Unfortunately, to discuss in detail the problem of e.g. the right and obligation to work

**10** The questions start with “*There are those according to whom...*” or “*There are those who propose...*” which indeed is an interesting choice of wording.

**11** The official statistics of the national consultation can be found on [http://static.fidesz.hu/download/156/A\\_Nemzeti\\_Konzultacios\\_Testulet\\_kerdoivenek\\_eredmenyei\\_2156.pdf](http://static.fidesz.hu/download/156/A_Nemzeti_Konzultacios_Testulet_kerdoivenek_eredmenyei_2156.pdf) (last consulted 05/11/2011). The present article uses the results occurring here, later referred to as “NC statistics”.

**12** The “most democratic and liberal” constitution of its time, the Weimar Constitution faced several critics, but not in the above-mentioned regard, rather – in the light of the upcoming events – institutional problems are quoted as its major shortcomings, e.g. the tragedy of really representative democracy. See the widely criticized and at the same time praised book William L. Shirer, *The Rise and Fall of the Third Reich*, Simon & Schuster, USA, 1990, or Richard J. Evans, *The Third Reich Trilogy*, Penguin, UK, 2003-2008.

**13** The new constitution says: “*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 person are based on labour, an achievement of the human mind.*”

or the extremely complicated issue of health would exceed the scope of the present article.

Question No. (4) was one of the most interesting ones. In certain aspects (and I will come back to that) the New Constitution is often referred to as a Green Constitution. The drafters had an – at least in Hungary – unusual idea how to defend the interests of the next generations more effectively: according to this, even the children would have a right to vote, but their parents would make use of it. The question was whether every child should have such a vote (meaning parents with two children under 18 would have altogether four votes instead of two), or only one extra vote should be given to each family regardless of the number of children (that means three votes in the above-mentioned family). The third option was to refuse such a – let us admit, at least in modern democracies rather revolutionary – system. Eight per cent voted for the first, 15 for the second option, but the vast majority, 74 per cent could not agree with the vision of the Prime Minister. At least he admitted in an interview that the result truly was a blow, as it was an issue close to his heart, and he had counted on the support of the Hungarian people. Nevertheless, many people expect the reoccurrence of this question, as he hinted that the government will try to persuade the population of the positive effects of such a regulation (*i.e.* that if people with children have more votes, the interests of future generations would be taken more into account). Although the main idea seems surely attractive, the refusal was nevertheless no surprise, knowing Hungarian society and its core problems.

Question (5) turns again to the question of future generations, but in the context of taxation. Over 70 per cent agreed to exempt the costs of raising children from taxing, which is – partly introduced already this year in the Hungarian taxing system – a considerable help to families with minors, especially if both parents work and they have at least three children. In the background lay several reasons, above all the problem of the aging and depopulating Hungarian society – this year, for the first time, the population of Hungary went under the psychological limit of ten million. To ease the burden for families with children, the society may pay the price and promote the birth of more children – at least three in a family, in order to create in some – well, at least two or three – decades a generation that may again be capable of paying the pensions of the elderly, without chasing the country into financial difficulties.<sup>14</sup> Even if we humans are more than overpopulating the Earth, I simply cannot bring myself to condemn the European – and here especially Hungarian – efforts to maintain the population or at least slow its decrease, as European countries', above all Central-Eastern European

**14** Many scientists warn nevertheless against such measures and urge Europe as well to take steps and not promote the growth of its population, see e.g. the opinion expressed by the Balaton Group, among others by Jorgen Stig Norgard. In my view, given the formerly mentioned statistics, Europe is highly contributing to an amelioration of this situation, *i.e.* to depopulation. This question is rather complicated, even more than questions relating to the common responsibility of mankind towards itself and the planet in general, and therefore exceeds the scope of the present article.

countries' populations are moderately but steadily decreasing while at the same time this cannot be said about any other populated continent.<sup>15</sup>

The questionnaire continues in the same direction, asking directly in question (6) whether the constitution shall undertake responsibility for future generations. Not surprisingly, a direct and general question like this earned the approval of 86 per cent. Although it was only the second time "future generations" were explicitly mentioned in the questionnaire, many preceding questions touched upon the topic some way or another. It clearly shows that the makers of the new constitution have been more than determined to create something progressive in this regard among European constitutions.<sup>16</sup>

Question (7) nevertheless turns away from this topic and reflects on current problems, or – let us admit – scandals. It asks whether the new constitution should declare that only companies with transparent ownership should have access to state funds. Even without entering into the details of those scandals – which are, of course, not a Hungarian peculiarity and are well-known around the world – it is needless to say that over 90 per cent reacted positively to such a constitutional interdiction.

Question (8) concerned the possible obligations of future governments towards Hungarians living across the borders (over 60 per cent voted for obligations, almost 30 for a mere declaration of values). This is indeed a Hungarian peculiarity, which is hard to understand for anyone not familiar with Central European history. In sum, the peace treaties (called 'peace dictates') of WWI deprived Hungary of approximately two-thirds of its territory, and placed one-third of the Hungarian nationals outside the borders.<sup>17</sup> It may be described the best if we say it is as if France would only consist of the territory between Val-d'Oise and Puy-de-Dôme, Sarthe and Côte-d'Or, and the areas outside this circle would suddenly belong to the neighbouring countries, of course including the population living there. It is surely a vague simplification of what happened, but it may convey why this question plays an important part in the political life of Hungary (and that of the neighbouring countries as well).

Question (9) arrives back to environmental protection, asking whether the Constitution should protect the biological diversity of the Carpathian basin. The vast majority (78 per cent) voted for the constitutional obligation to protect both the natural environment and the traditional Hungarian flora and fauna species, 17 per cent opted only for the protection of the traditional species.<sup>18</sup> Still, it shows that

**15** In fact, Hungary has one of the worst fertility rates in Europe (approx. 1.3; for maintenance, approx. 2.1-2.3 would be needed; Europe's average is app. 1.50; the world average is approx. 2.5; but e.g. Africa has over 4.6). See <http://esa.un.org/unpd/wpp/Excel-Data/fertility.htm> (22/1/2012).

**16** The text of the New Constitution states this commitment already in the National Avowal, saying that "We bear responsibility for our descendants; therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources".

**17** The New Constitution partly refers to this in the National Avowal saying that "We promise to preserve the intellectual and spiritual unity of our nation torn apart in the storms of the last century".

**18** The New Constitution says in its National Avowal that "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".



a considerable part of the society gives environmental values a high priority. Even bearing in mind that only adequate practical realization may show real results, it is indeed a very good sign. Such sensitivity may also result from very recent tragedies like the red sludge catastrophe of 2010.<sup>19</sup>

Respondents showed highest agreement on question (10). Ninety-seven per cent wanted to see national assets, especially arable land and water supplies, protected by the new constitution. Indeed it is needless to say how important these are for a sustainable economy under these climatic circumstances. But again the question is how to make it a reality – as this is a complicated issue related to European law<sup>20</sup> or even human rights law,<sup>21</sup> among many others. Giving these values a constitutional status is at least a firm declaration. As to arable land, in 2014 at the latest, but as for water supplies, much sooner the real question will arise: how to defend the own interests without violating European law or making international investors endlessly furious. As for the former problem, the acquisition of arable land, the Swiss or the Danish legislation model could be an easy solution, but as for the latter, our water resources and the interested foreign investors, it is going to be much more difficult to face both ways...

Question (11) – to which 93 per cent responded they would like the constitution to give the possibility to the courts to sentence perpetrators of extremely serious crimes to life imprisonment without the possibility of parole – is particularly understandable under the given social circumstances. It has been often claimed to violate human rights standards, but this is evidently not supported by any evidence. Democracy and the rule of law are not questioned in countries like the United States of America where even the death penalty exists. Absolute life imprisonment leaves indeed less motivation for inmates to alter their behaviour. Sanctions of crimes have

**19** See the report of the Parliamentary Commissioner for Future Generations on the red sludge catastrophe (A jövő nemzedékek országgyűlési biztosának állásfoglalása az Ajkai Timföldgyár területén bekövetkezett vörösiszap katasztrófa építésügyi jogi és hatósági háttérrel kapcsolatában), JNO-619/2010, April 7, 2011.

**20** See Tamás Andréka, "Birtokpolitikai távlatok a hazai mezőgazdaság versenyképességének szolgálatában", in: Csilla Csák (ed.), *Az európai földszabályozás aktuális kihívásai* (Current challenges of the European legislation on agricultural land) Aktuelle Herausforderungen der europäischen Regulierung über den landwirtschaftlichen Boden. Novotni Alapítvány, Miskolc, 2010 (hereafter: Csák, *Legislation on agricultural land*), pp. 7-19; Christian Busse, "Beziehungen zwischen Landpachtrecht und Agrarmarktrecht", in: Csák, *Legislation on agricultural land*, pp. 51-67; Tamás Prugberger, "A mező- és gazdasági földingatlan tulajdonának, használatának-hasznosításának és jogát ruházásuk szabályozásának lehetőségei az uniós jog tükrében", in: Csák, *Legislation on agricultural land*, pp. 211-239; Donald Rennie, "Land ownership and land use in the United Kingdom". in: Csák, *Legislation on agricultural land*, pp. 255-262; János Ede Szilágyi, "Az Európai Unió termőföld-szabályozása az Európai Bíróság joggyakorlatának tükrében", in: Csák, *Legislation on agricultural land*, pp. 269-281.

**21** See among others Anikó Raisz, "Földtulajdoni és földhasználati kérdések az emberi jogi bíróságok gyakorlatában", in: Csák, *Legislation on agricultural land*, pp. 241-253, or in George Ress, "Reflections on the Protection of Property under the European Convention on Human Rights", in: Stephan Breitenmoser, Bernhard Ehrenzeller, Marco Sassòli, Walter Stoffel, Beatrice Wagner Pfeifer (eds.), *Human Rights, Democracy and the Rule of Law, Liber Amicorum Luzius Wildhaber*, Dike-Nomos, Zürich, St-Gallen, Baden-Baden, 2007, pp. 625-645.

nevertheless several functions. Besides amelioration, punishment is also an important aspect, just like the protection of the society against criminals.<sup>22</sup> In extreme cases, e.g. brutal murders, especially if committed regularly, I do not see why we would expect amelioration. The absolute life imprisonment may have a restraining effect for possible future perpetrators.<sup>23</sup> The balance of these effects of criminal sanctions is nevertheless highly disputed among experts, and basically it is improbable to find two identical national solutions.

Question (12) is so particular, and at first – and also second – sight so unusual in relation to a constitution that it may only be understood under the current circumstances in Hungary. It is a clearly politically motivated question, as it is based on the practice of some former high government officials who refused to show up before parliamentary committee hearings set up to investigate certain – economic or political – questions related to their time in office. In a normal democracy, I would be more than astonished to see such a question appearing in a questionnaire for a constitution. Under normal circumstances, politicians could not afford not to show up. Apparently, here the vast majority<sup>24</sup> of respondents agreed that sanctions should be determined for such behaviour. It is rather a judgment *vis-à-vis* our politicians – and exactly that might have been the reason why the drafters included it in this questionnaire...

Once the national consultation was over, parliamentary debate could have started. But it did not. As mentioned before, after some hesitation, some of the opposition parties (namely the LMP and the Socialists) chose not to participate in the debate, being unwilling to merely “assist” in the adoption of the new constitution. Only the president of the LMP was present, but declared the displeasure of his party and did not take part actively in the debate. Jobbik and independent MPs participated in the debate, and the former member of the Hungarian Socialist Party (now an independent MP), Katalin Szili even prepared an own draft constitution.<sup>25</sup> This draft – as she is the president of the Socialist Union, a party created by her – emphasizes social values and would have (re)introduced a two-chamber legislative system.<sup>26</sup> It was the only alternate to the draft elaborated by the three-member drafting committee consisting of József Szájer, László Salamon and Gergely Gulyás, created by the governing fractions in February 2011.

**22** See among others István Kónya, “Gondolatok a büntetőjogi szankciók rendszeréről”, *Magyar jog*, 2002, Vol. 49, No. 12, pp. 718-721.

**23** Although it is often shown that it is not the severity of the possible punishment but its surety that could dissuade possible future perpetrators.

**24** 83 per cent, and further 9 per cent voted for a simple declaration of such an obligation. See NC statistics, p. 14.

**25** She had already taken part in the work of a national consultation committee (nemzeti konzultációs testület) led by one of the leading figures of the drafting of the constitution, József Szájer, considered as the main legal philosopher of the Fidesz (or Young Democrats) that elaborated the questionnaire.

**26** See the draft on the homepage of the Office of the Parliament, <http://www.parlament.hu/irom39/02628/02628.pdf>.

When the final voting came on April 18, 2011, only two big parliamentary powers were present: the governmental party alliance and the Jobbik. MPs of the former accepted, those of the latter rejected the draft constitution, as Jobbik politicians felt the proper protection of Hungarian interests in the constitution was lacking.<sup>27</sup> The MPs of the Socialist Party and the LMP were absent. Two independent MPs voted “no”, one “yes” and one abstained. Later the issue came up of the reduction of the salary of the MPs missing the constitutional debate completely, as according to the House Rules, MPs missing more than a third of the parliamentary votes are not entitled to their proportionate salary...<sup>28</sup>

A week later, on April 25, 2011, the President of the Republic, Pál Schmitt signed the act, which entered into force on January 1, 2012. Before turning to the reception of the Constitution, I deem it an important question to look at the result of the voting, *i.e.* the actual constitution of Hungary, at least in certain aspects.

### III. The result – The Constitution at a glance

Before coming to some highly interesting issues of international, mainly European relevance, let us begin with a brief overview of the act at issue, concentrating on just a few questions regarded as particularly significant by the author.

First of all, the title is eye-catching. Instead of “Constitution” as beforehand, the new one is entitled “Fundamental Law”. Although it is not unknown around the world that constitutions have alternate names, in my view, “constitution” would have fit better in Hungary. One of the main drafters, J. Szájer, underlined that it was in order to distinguish the present constitution from the former mentioned historical constitution that the new act was going to be called the fundamental law. He also referred to the German fundamental law bearing that name. Nevertheless, Germany has a basically different interpretation in this regard. Their constitution in 1949 in the divided and occupied Germany was declared a provisional one, under the fiction that for a period Germany (*i.e.* Western Germany) was not able to exercise its competences in the Eastern territories. It was for this reason that they entitled their constitution “fundamental law” instead of “constitution”. It is a different question that since the reunion of Germany, no change in its title has occurred. In Hungary, J. Szájer’s proposal finally won, although according to the information available, this question was object to a sincere debate within the governing party alliance as well.

**27** All MPs of the governing party alliance voted “yes”, except for László Kövér, who served as the president of the Parliament during the voting. Besides the MPs of the Jobbik, independent MPs Gábor Ivády and the formerly mentioned Katalin Szili voted “no”. Independent Oszkár Molnár, MP of the Fidesz in the previous cycle, abstained, while a former Jobbik MP, Lajos Pösze, voted “yes”. Altogether, this resulted in 262 “yes” and 44 “no” votes and one abstention; 78 MPs did not vote. See <http://www.kormany.hu/hu/hirek/elfogadta-magyarország-uj-alkotmányat-az-országgyűlés>. (09/12/2011)

**28** House Rules (Házzsabály), 44 § (2).

The Constitution comprises five parts: National Avowal, Foundation, Freedom and Responsibility, State and Special Legal Orders. It contains several dispositions that are of particular interest, but as we are going to encounter many of them in the next section, let me make a few remarks about the so-called Green Constitution character.<sup>29</sup>

Although not the first constitution<sup>30</sup> to include environment or sustainability in the text, the New Constitution (as I prefer to refer to the “Fundamental Law”) still made an important step forward, becoming one of the few constitutions dedicating various provisions to the countless aspects of sustainability, partly incorporating issues the National Consultation had touched upon.

First of all, the National Avowal declares that “[w]e bear responsibility for our descendants; therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources.”<sup>31</sup> Furthermore, it states in Article P that “[a]ll natural resources, especially agricultural land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation’s common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations.”<sup>32</sup> It even refers to international environmental law in Article Q when proclaiming that “[i]n order to (...) achieve the sustainable development of humanity, Hungary shall strive for cooperation with every nation and country of the world.” It is a special gesture in the year of the Rio+20 Conference.

Article XX goes another step forward and takes definite sides in the debate on GMOs.<sup>33</sup> This article is especially relevant when reflecting on certain events in summer 2011, when thousands of hectares of predominantly corn grown from

**29** Csilla Csák, “Gondolatok a ‘szennyező fizet’ elvének alkalmazási problémáiról”, *Miskolci Jogi Szemle*, 2011 special edition, pp. 31-45, pp. 44-45.

**30** See among others the French, Norwegian or Finnish constitutional solutions. Also the former Constitution included a brief provision on the protection of the environment. See furthermore László Fodor, “A környezethez való jog dogmatikája napjaink kihívásai tükrében”, *Miskolci Jogi Szemle*, 2007/1, pp. 5-19.

**31** See János Ede Szilágyi, “Az agrárjog dogmatikájának új alapjai: Útban a természeti erőforrások joga felé?”, *Jogtudományi Közöny*, 2007/3, pp. 112-121.

**32** On the important role of water supplies in the Hungarian economy see Péter Szűcs, Ferenc Sallai, Balázs Zákányi, Tamás Madarász (eds.), *Vízkezeléstudományok*. Miskolc, Bíbor Kiadó, 2009, pp. 21-36.

**33** It says: “(1) Every person shall have the right to physical and mental health. (2) Hungary shall promote the exercise of the right set out in Paragraph (1) by ensuring that its agriculture remains free from any genetically modified organism, by providing access to healthy food and drinking water, by managing industrial safety and healthcare, by supporting sports and regular physical exercise, and by ensuring environmental protection.” On GMO regulation, see the systematic overview in János Ede Szilágyi, “A géntechnológia jogi szabályozása”, in: János Ede Szilágyi (eds.), *Környezetjog: Tanulmányok a környezetjogi gondolkodás köréből*. Miskolc, Novotni Alapítvány, 2010, pp. 105-128, and János Ede Szilágyi, “A géntechnológiai szabályozás nemzetközi- és közösségi jogi kérdései”, in: János Ede Szilágyi (ed.), *Környezetjog: Ágazati környezetvédelem és kapcsolódó területei*, Miskolc, Novotni Alapítvány, 2008, pp. 61-72.

illegally<sup>34</sup> imported GMO-polluted seeds had to be destroyed in Hungary.<sup>35</sup> The mere declaration in the constitution is clearly not enough to protect the country against this new form of aggression. Although Europe has just started to realize as well that not only the forms declared in UN General Assembly Resolution 3314 (XXIX) may infringe sovereignty, and European countries have begun to elaborate national strategies against hacker attacks (which – see the example of Estonia, 2007 – may be at least as devastating as military attacks), it should not stop there, new forms of aggression surely may be environment-related as well: deliberate, severe pollution of waters, soil, air, etc. or even the smuggling and spreading of GMOs to countries not willing to use them. Although it is an issue under debate,<sup>36</sup> European consumers generally warmly welcome GMO-free products, therefore GMO-free agriculture is not only positive from an ethical or environmental, but also from an economic point of view.<sup>37</sup> Nevertheless, also in Hungary the concrete rules are under elaboration. It was not until the 2011 GMO scandal that a special Working Group was set up to help to clarify the situation also in a legal sense.<sup>38</sup>

The above rules are completed with Article XXI stating that “(1) Hungary shall recognise and enforce the right of every person to a healthy environment. (2) A person who causes any damage to the environment shall be obliged to restore it or to bear all costs of restoration as defined by law. (3) No pollutant waste shall be brought into Hungary for the purpose of dumping.” This phrasing necessarily has not come out of the blue: the relevance of this article is underlined by certain – even internationally known – sad events in the recent past (the scandal of illegally imported waste from Germany, the red sludge catastrophe, etc.). The above provision is clearly in line with the internationally

**34** *I.e.* contrary to the regulations then in force on which see István Olajos, “A géntechnológiai tevékenység szabályozása Magyarországon”, in: János Ede Szilágyi (ed.), *Környezetjog II. kötet – Ágazati Környezetvédelem és kapcsolódó területei*, Novotni, Miskolc, 2008. pp. 73-89.

**35** János Ede Szilágyi, Anikó Raisz, *Hungarian National Report, Scientific and Practical Development of Rural Law in the EU, in States and Regions and in the WTO*, CEDR, XXVI European Congress and Colloquium of Agricultural Law, Bucharest, September 21-24, 2011, accessible at [http://www.cedr.org/congresses/bucarest/pdf/Commission\\_III\\_Hongrie.pdf](http://www.cedr.org/congresses/bucarest/pdf/Commission_III_Hongrie.pdf) (23/01/2012), p. 7.

**36** Even the ECtHR seems to have feared to enter into details and simply declared: “*l’impact des OGM sur l’environnement et la santé des personnes n’est pas encore pu connu (it is not yet known what impact GMOs have on the environment and on people’s health)*”. See ECtHR, *Hubert Caron and Others vs. France*, inadmissibility decision, June 29, 2010, No. 48629/08. Its conclusion, that the applicants had no status of victim because of the distance between the GMO contaminated lands and their own, raises several issues that would certainly exceed the scope of this article. Nevertheless, the violation of Articles 2, 8 ECHR and Article 1 Protocol 1 was not excluded per se in such cases.

**37** See furthermore János Ede Szilágyi, “Környezetvédelem az európai uniós jogban”, in: János Ede Szilágyi (ed.), *Környezetjog: Tanulmányok a környezeti jogi gondolkodás köréből*, Novotni Alapítvány, Miskolc, 2010. pp. 51-72.

**38** See an excellent overview of the issue in János Ede Szilágyi, “A zöld géntechnológiai szabályozás fejlődésének egyes aktuális kérdéseiről”, *Miskolci Jogi Szemle*, 2011/2, pp. 36-54, especially p. 41.

recognised polluter pays principle<sup>39</sup> as well as the jurisprudence of the ECtHR<sup>40</sup> and the Council of Europe's efforts<sup>41</sup> in this regard.

Obviously, many draw attention to the fact that the constitution itself is not enough. Other legal acts, as well as the economic actors and members of the society have to make the right choices.<sup>42</sup> Nevertheless, it is more than significant that the New Constitution bears responsibility for future generations, provides protection for the natural environment and declares GMO-free agriculture.

The New Constitution contains many other relevant dispositions<sup>43</sup> that will not be elaborated here, but at least it is worth mentioning – as it is especially important from the point of view of an international lawyer – that finally the Constitution clarifies that Hungary is a dualistic state (Article Q) and tries to provide the institutional-legal frames for the membership of the European Union.<sup>44</sup> These two issues particularly caused headaches for constitutional court judges and lawyers in the past few decades/years and constitute a debated fragment of the deservedly praised jurisprudence of the Constitutional Court.<sup>45</sup>

**39** István Olajos, Csilla Csák, Pál Bobvos, János Ede Szilágyi, Szilvia Horváth, Tamás Prugberger, “The polluter pays principle in the agriculture: A szennyező fizet elv megjelenése a mezőgazdaságban”, *Journal of Agricultural and Environmental Law*, 2006(1)/1 pp. 29-55.

**40** See among many others ECtHR, *Okyay v. Turkey*, July 12, 2005, No. 36220/97; *Taşkin et al. v. Turkey*, November 10, 2004, No. 46117/99; *Fadeyeva v. Russia*, June 9, 2005, No. 55723/00. See furthermore Manual on Human Rights and the Environment – Principles Emerging from the Case-Law of the European Court of Human Rights; Committee of Ministers, 2005/186 Addendum, December 16, 2005, CDDH, 61<sup>st</sup> meeting, Final Activity Report, point 2.

**41** Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Lugano, 1993 and Convention on the Protection of Environment through Criminal Law, Strasbourg, 1998. So far, both conventions are light-years away from entering into force, although only three ratifications are needed for each...

**42** See e.g. the Position of the National Council for Sustainable Development on the New Fundamental Law of Hungary, May 25, 2011, [http://www.nfft.hu/allasfoglalasok\\_az\\_uj\\_alaptorvenyrol\\_es\\_a\\_videkstrategia\\_koncepciojarol](http://www.nfft.hu/allasfoglalasok_az_uj_alaptorvenyrol_es_a_videkstrategia_koncepciojarol) (6/8/2011), p.1; Zoltán Nagy, “Fenntartható költségvetési elvonások rendszere a környezetvédelem területén” *Publicationes Universitatis Miskolcensis, Sectio Juridica et Politica*, Tomus XXIX/1, Miskolc University Press, 2011, pp. 247-258.

**43** See e.g. the prohibition of eugenics (Article III(3)), in line with the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, Oviedo, 1997.

**44** See e.g. Article XXVIII (4), and in this regard Raisz, Anikó: Keresztútúben az európai elfogatóparancs – avagy emberi jogi aggályok az Alkotmánybíróság határozata kapcsán. *Jogtudományi Közöny*, 2008/7-8. pp. 387-394.

**45** Article 7 and Article 2/A of the former Constitution (Act XX of 1949) were not clear in this regard. See among others Kovács, Péter: Alkotmányosság és nemzetközi jog, in: Gábor Jobbágy (ed.), *Iustum, aequum, salutare. Emlékkönyv Zlinszky János tiszteletére*, Budapest, Osiris, 1998. pp. 187-203, pp. 188 ff; Imre Vörös, “Az EU-csatlakozás alkotmányjogi: jogdogmatikai és jogpolitikai aspektusai”, *Jogtudományi Közöny*, 2002/9. pp. 397-407, p. 406; László Kecskés, “Az EU-csatlakozás magyar alkotmányjogi problémái”, *Magyar Tudomány*, 2006/9. pp. 1081-1089; Ferenc Kondorosi, *Az EU-tagság Jogi Összefüggései*. Budapest, Emberi Jogok Magyar Központja Közalapítvány; Ernő Várnay, Allan F. Tatham, “A New Step on the Long Way – How to Find the Proper Place for Community Law in the Hungarian Legal Order?”, *Miskolc Journal of International Law*, 2006(3)/3 pp. 76-84; Nóra Chronowski, “Constitutional Consequences of Hungarian EU Membership”. in: István Illéssy

In sum, the New Constitution aimed at enabling “citizens to participate more directly in the exercise of power”,<sup>46</sup> but at the same time it was surely made to expect some attention even from abroad. Nevertheless, the drafters rather hoped it would become a source of inspiration and not a first-line infantry in the political battlefield of Europe.

#### IV. Afterlife – *i.e. quo vadis, Europe?*

Once the Constitution was adopted by the Parliament and signed by the President of the Republic, and all was settled – or so one could have thought<sup>47</sup> – the logical afterlife would have been the adoption of the corresponding acts, mostly so-called cardinal laws (*sarkalatos törvények*), which actually detail the necessarily mainly general provisions of the fundamental law. What happened instead was rather frustrating: the Hungarian Constitution became a European issue, a “concern” for European democracy (?), in sum: it seemed that the fights that had been partly avoided in the national parliament had to be fought at a European level. Unfortunately, the rules of conduct were not well established, and the criticism flooding in had several characters and forms. I do not consider it necessary to detail each of them, I am merely going to touch upon some in the following discussion.

Critics regarding the fundamental law may be divided basically into three groups: legal, pseudo-legal and political critics. Absolutely ignoring the last group, only the first two have to be paid attention to, even if not exhaustively. Legal critics are those phrased for purely legal reasons, and pseudo-legal ones are those pretending to have a legal ground, but in fact (only) politically/economically motivated. The present grouping is nevertheless not absolute.<sup>48</sup> While I consider the overwhelming majority of media reports as belonging to the pseudo-legal (or the political) group, opinions of the Venice Commission or the European Parliament represent rather a mix of the

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(ed.), *Constitutional Consequences of the EU Membership*, Pécs, University of Pécs, Faculty of Law, 2005, pp. 53-95, pp. 59 ff; László Kecskés, “Alkotmánymódosítás Magyarország EU-csatlakozása kapcsán”, *Info-Társadalomtudomány*, December 2002, Nr. 59. pp. 53-67; Jenő Czuczai, “Kritikai meglátások a kormánynak a Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. tv.-nek az EU csatlakozást érintően szükséges módosításáról szóló T/1114 számú törvényjavaslatáról”, *Európa 2002*, 2002/4. pp. 26-32, p. 27; István Kukorelli, Imre Papp, “A Magyar Alkotmány EU-konformitása”, *Európai jog*, 2002/6. pp. 3-9; Anikó Raisz, “Confronted with direct applicability of a directive: the Hungarian Constitutional Court before challenges”, *Miskolc Journal of International Law*, 2007(4)/1, pp. 113-127; Anikó Raisz, “L’absence paradoxale de la jurisprudence de la CJCE dans la jurisprudence de la Cour constitutionnelle hongroise”, *Civitas Europa*, 2008(20), pp. 133-151.

**46** Szájer, *CESPR*, p. 66.

**47** On the last occasion, on December 30, 2011, the Jobbik almost hindered the entering into force of the constitution on January 1, 2012, but this scandal was finally avoided – by convening emergency committee meetings, suspending the session of Parliament, etc.

**48** See e.g. the grouping of the European Centre for Law and Justice, see below, into criticism as to values or law.

first two. In the following, I will concentrate only on some reactions belonging clearly to the pseudo-legal group, as these reactions rarely have a legal basis, their authors are almost never lawyers, and most of the time were made by people who did not only not speak Hungarian (which may seem relevant for the time before the official translation was adopted), but were also unfamiliar with Hungary or its (legal) past and present. Media reports add undisputedly much to public concern and may draw attention to important events, and therefore their role may under no circumstances be underestimated, but a thorough legal article may not work exclusively with such reports. Therefore, I turn more attention to more characteristic opinions, citing three of the most relevant ones: the Resolution of the European Parliament,<sup>49</sup> the Venice Commission reports<sup>50</sup> and the Memorandum of the European Centre for Law and Justice.<sup>51</sup>

The Venice Commission issued two reports as to the New Hungarian Constitution. The first was issued on the request of the Hungarian Government, regarding certain questions that were to be incorporated in the new constitution, and the second appeared after the Monitoring Commission issued a new reporting process on the already adopted constitution that had not yet come into force. I shall refer predominantly to the second opinion. Instead of going through each document, the most relevant issues are going to be discussed briefly, with reference to the documents they are incorporated in.

Both the Venice Commission in its second report and the European Parliament argue that the process of the adoption was too short.<sup>52</sup> Not knowing of any specific timeframe that would be suitable and internationally accepted for the adoption of constitutions, we may simply regard the facts and the background information in order to form an opinion in this regard. Admitting that the present Parliament has been probably the most active legislator since the change of the regimes, I do not see a problem in not waiting years until the adoption of a new constitution. One could say we have actually been waiting for twenty-one years... What is needed for a constitution? Free and democratic parliamentary elections, *via* which – according to the rules of a representative democracy – MPs receive the possibility and obligation from the citizens to become their legislators for a certain period; in Hungary this is four years. Elections, free and democratic? Done, in 2010. A year later, in 2011, a new constitution is adopted. How long should they have waited? This argument is lacking every legal basis. Especially knowing that the drafting process – as indicated above – had actually started in June 2010, not merely five weeks before adoption,

**49** European Parliament resolution of 5 July 2011 on the Revised Hungarian Constitution (hereafter: EP Resolution).

**50** Venice Commission, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, Opinion 614/2011, CDL-AD(2011)001, March 18, 2011 (hereafter: First Opinion) and Opinion on the New Constitution of Hungary, Opinion 621/2011, CDL-AD(2011)016, June 20, 2011 (hereafter: Second Opinion).

**51** European Centre for Law and Justice, Memorandum on the Hungarian New Constitution of 25 April 2011, May 19, 2011 (hereafter: ECLJ Memorandum).

**52** Second Opinion, p. 144, EP Resolution, p. D.



as some critics claim. The fact that the concrete text remained before MPs for five weeks is just a part of the drafting process. And this being the issue with the highest priority in that period in the Parliament, five weeks should surely be enough to read scarcely 50 pages... Regarding the fact that only a part of the opposition bothered to be present at the debate, there was no need for time for further discussions. Even the Venice Commission stated with regret that unfortunately in the present Hungary no political consensus was possible.<sup>53</sup> Even if we personally consider wider time frames to be more advantageous or elegant, the fact remains that according to the then in force legal requirements, it was completely appropriate to handle the new constitution in the mentioned time frame. By the way, in the 1990s there had been an opportunity to create a new constitution; as mentioned before, the Socialists and the Free Democrats had had the majority to do so. Nevertheless, they waited too long. After two and a half years of negotiations, the common will disappeared, so everyone with a basic knowledge of the modern Hungarian democratic experiences would try to avoid such a long process, as you may never know what happens next...

More important seems the issue of the absolute two-thirds majority that is needed for the adoption and amendment of the constitution. It is argued by the EP that the lack of consensus is shown in the fact that the constitution “was adopted exclusively with the votes of the MPs from the governing parties”.<sup>54</sup> First of all, this statement is mistaken.<sup>55</sup> As shown above, not only MPs of the governing parties voted “yes”. But even if it had been the case, I do not know of any other constitution that would require a two-thirds majority of votes plus a specific number of votes from this and that party, too. It would sound rather strange in representative democracies, wouldn't it? It is neither the Security Council, with some members having more privileges (and obligations), nor certain European institutions with weighted voting systems. The fact is that “simply” an absolute two-third majority is required, meaning concurrent votes of two-thirds of *all* MPs, as mentioned above. It is not at all easy to reach. As mentioned several times before, parliamentary coalitions or party alliances had a two-thirds majority only twice during the last twenty years in Hungary, and in the first case, they finally failed to reach the necessary consensus. The two-thirds is a rule that is not only widely known in European constitutions, but understandably accepted, providing the necessary checks and balances in the process of constituency. The fact that today the two-thirds majority belongs to one party alliance is not an anti-democratic, life-threatening situation, but the result of democratic parliamentary elections. Hungarians have voted and – particularly due to the events of the former parliamentary cycle – they voted for *such* a parliament.<sup>56</sup> As mentioned at the

**53** Second Opinion, p. 11.

**54** EP Resolution, p. E.

**55** At the same time, the Second Opinion gives a correct description on p. 26.

**56** And, contrary to some allegations (in fact, sadly, pseudo-legal argumentations) in the press, democratic parliamentary elections take place every four years in order to give the opportunity to effectively run the country. Saying that – according to the new polls – a year or two after the elections the parties would not receive the same amount of seats in the parliament is no reason to question the legitimacy of the legislator. An argumentation like this would require polls before every legal act,

beginning, nobody who could hear or read could be unaware before the second round of the 2010 parliamentary elections at the latest that the Young Democrat-Christian Democrat party alliance was about to reach this majority, and if this happened, their power was going to be used to create a new constitution.<sup>57</sup> The present opposition parties could not mention it often enough in that two-week period. And the voters decided to empower them. So why question the democratic will of a people? Why question the constitutional system of a democratic state? This criticism is maybe the one undermining the most the EU's well-known "United in diversity" motto.

Even more important seems to be the argument occurring both in the Venice Commission report and the EP Resolution claiming the lack of social consensus. In this regard we may partly refer to the previous passage. The task of the legislator is to legislate. The MPs are paid for that, so they should do the hard work. It is another question that it is desirable to consult widely with the representatives of the society in order to have a result that is widely accepted. It is nevertheless not a legal criterion, neither in Hungary, nor in the majority of European states. Consultations had been going on nevertheless,<sup>58</sup> and that only a part of the suggestions were incorporated is actually no surprise, but nothing anti-democratic.

Both the European Parliament Resolution and the Venice Commission claim the lack of transparency in the constituency process. Even if those interested would like to have more information during the drafting procedure in general, it is clearly no legal obligation, neither in Hungarian law or in international texts. It may be named as one of the major shortcomings of legislative processes, not only in Member States, but also in the European Union as such. If we consider this to be a cardinal question, possible solutions have to be found for making legislative drafting procedures more

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asking for the opinion of the people: do you want it or not? This is absurd. It would basically hinder every elected parliament and government from work, and that not only on the Old Continent. Even the Swiss system – which, as widely known, uses a posteriori referenda to confirm certain legislative acts – has its strict burdens; otherwise, democracy would quickly become anarchy – and, moreover, extremely expensive. See e.g. the argumentation of Kim Lane Scheppele, "Hungary, Misunderstood?", in: Paul Krugman's column, *New York Times*, January 21, 2012, point 1. (<http://krugman.blogs.nytimes.com/2012/01/21/hungary-misunderstood/>; 22/01/2012) Prof. Scheppele also referred to the "disproportionate" election system in Hungary, saying that the two-thirds majority means in reality "only" 53% of the voters. Besides mentioning that 53% is an extremely high number, let us just remember the wide acceptance of such systems, or even refer to the UK, where the election system is far more disproportionate, but the question of legitimacy has not been raised.

**57** They did not expressly refer to this; nevertheless, contrary to point T of the EP Resolution, it is not contrary to any democratic obligation.

**58** The author herself along with her colleagues was invited at least twice to such consultations, but more importantly, so were the Parliamentary Commissioner for Future Generations (see <http://jno.hu/hu/?&menu=alkotmanyozas>), or representatives of the Hungarian Association of Judges (see Communication on January 6, 2012, [www.mabie.hu](http://www.mabie.hu)), see furthermore the Position of the National Council for Sustainable Development on the New Fundamental Law of Hungary, p. 1. J. Szájer emphasizes in his essay published on the New Constitution that during the preparatory work, the drafting committee took into consideration the preparatory work done between 1994 and 1998 as well as the jurisprudence of the Hungarian Constitutional Court over the past twenty years. (Szájer, *CESPR*, p. 63).

transparent. I am nevertheless against going to extremes. Democracy is – as far as we know – the best form of government for Europe, but let us not forget, it is not a cheap one (although it is rarely more expensive than dictatorships...). Establishing more institutions and procedures to reinforce transparency in an institutionalized form would be rather costly; pros and contras should be considered before naming it a future requirement as presented in the Venice Commission report. Repeatedly, a *future* requirement. It seems rather odd to question the democratic character of a constitution based on a requirement that not only the European Union could rarely fulfil, but on a requirement that has no absolutely clear content whatsoever. Furthermore, even if we think to have missed something in the drafting process, we have to admit that several main ideas were published beforehand, a months-long preparation period preceded the parliamentary debate, a number of ideas present in the constitution were discussed at various conferences, and a legislative procedure is – as mentioned before – not a process where the drafters each have to email their proposed dispositions every day to the non-existing mailing list of Hungarian voters. The critique concerning consultation, consensus and transparency seems especially strange regarding the fact that the previous constitution, apparently posing no problems as to European standards, was not elaborated and adopted by a democratically elected parliament. The ECLJ even draws attention to the fact that it is “astonishingly ironic” that European institutions claim to know better how a democratic constitution should be adopted, after what happened to the “European Constitution”, and especially in Ireland.<sup>59</sup>

The EP Resolution has a point which sounds rather confusing. In Point E it says “the Constitution has been widely criticised by national, European and international NGOs and organisations, the Venice Commission and representatives of Member States’ governments”. Simply that legislation is criticized by NGOs does not mean it is not democratic, valid or even correct! I mean, NGOs represent a wide spectrum of ideas, values, interests and motives. If NGOs’ opinions served as a rule to legislative acts, not a single one could ever enter into force or be accepted anywhere in the world. Putting these opinions in such a context is very irresponsible from an organ keen on safeguarding European democracy. Referring to criticism from other Member States’ governments also sounds awkward, as these are political manifestations, which very often have nothing to do with a legal basis. This sentence of the EP may also be interpreted in the way that actually only a national constitution would be acceptable that was not criticized by NGOs and politicians, *i.e.* one accepted by everyone. Regarding the fact that constitutions declare values and preferences, and in every major question you may find at least a small dissidence among the over 700,000,000 inhabitants of Europe, well, the EP clearly asks here for the moon and the stars.

The Venice Commission and, based on its opinion, the European Parliament<sup>60</sup> both voice concerns on the Constitutional Court and the independence of the

<sup>59</sup> ECLJ Memorandum, p. 21.

<sup>60</sup> EP Resolution, p. F.

judiciary due to changes in the Constitution. These are serious concerns that must be dealt with. The rules for the Constitutional Court have been significantly altered: e.g. there are 15 judges instead of 11, and the forms of procedures have changed as well. For instance – and this is especially welcomed by an international lawyer – the conformity of national legislation with international treaties could previously not be examined if a national judge in a pending case requested this, but now it is possible;<sup>61</sup> while the general opportunities of individuals seeking the Constitutional Court's judgment became closer to the German model of *Verfassungsbeschwerde*. Unfortunately, this truly interesting issue would require a wider frame for discussion than this article may give, but to cut it short here, let the critics be reminded that throughout Europe, there are several forms in which constitutional courts are working, and in relation to none of them – correctly – was democracy and rule of law questioned before. Recalling that not every EU country even has a constitutional court as such,<sup>62</sup> as well as the wording of the first report of the Venice Commission,<sup>63</sup> the present concern is rather unsubstantial, just as criticism concerning the independence of the judiciary.<sup>64</sup> Especially in comparison with the in this regard rather succinct, but of course democratic<sup>65</sup> European constitutions such as the Norwegian one, the New Hungarian Constitution for instance states that “Judges shall be independent and only subordinated to laws, and may not be instructed in relation to their judicial activities”.<sup>66</sup> Without going further into the details, let me just quote the communication of the Hungarian Association of Judges (hereafter MABIE)<sup>67</sup> of January 7, 2012, where they declared – among other issues<sup>68</sup> – that “although the

**61** See Act XXXII of 1989, Articles 1.c and 21 (3) *vis-à-vis* Fundamental Law, Article 24 (2) f and Act CLI of 2011 on the Constitutional Court, Article 32 (2).

**62** See, besides the UK, e.g. Finland.

**63** E.g. as to the *ex ante* review, the Venice Commission stated that “*there is no common European standard as regards the initiators and the concrete modalities of this review. States decide, in accordance to their own constitutional traditions and specific needs, which organs, and to what extent, are authorized to conduct an a priori review and who should have the right to initiate it*”. Venice Commission, First Opinion, p. 35. In further questions, it also referred to the sovereignty of the state (p. 57).

**64** The Venice Commission lacks more detailed description on the judiciary in the Constitution (Second Opinion, p. 24). It is nevertheless no legal obligation, I consider it rather a political view that is expressed now with regard to Hungary, but could be – as mentioned above – mentioned as to other countries as well. The provisions on the judiciary in the Constitution include e.g. rules on the organisation, the Curia or non-professional judges.

**65** Furthermore, the author finds it unnecessary to enter here in the problematic of constitutional monarchies called in this regard “democracies”.

**66** Article 26 (1).

**67** Magyar Bírói Egyesület, which includes over 1,600 of the 2,800 Hungarian judges.

**68** Apropos of such an unprecedented communication was the act of an MP (Gergely Bárándy, who is responsible for judicial policy in the Socialist Party) declaring in a communication on January 6, 2012 that judges – whom he calls “party commissars” – currently having leading positions in their institutions are going to be removed and punished when they come to power again. See [http://mszp.hu/hirek/orban\\_baratnojen\\_keresztul\\_veszelyeztet\\_i\\_az\\_igazsagszolgalatas\\_fuggetlenseget\\_es\\_a\\_penzugyi\\_s](http://mszp.hu/hirek/orban_baratnojen_keresztul_veszelyeztet_i_az_igazsagszolgalatas_fuggetlenseget_es_a_penzugyi_s) (07/01/2012).

legislature has not adopted each of the MABIE's proposals, the laws<sup>69</sup> adopted on the judiciary correspond to the criteria of the rule of law".<sup>70</sup>

Both the Venice Commission and the European Parliament are concerned about the number of cardinal laws that should provide the constitutional basis in a wider sense.<sup>71</sup> Since 1990, we had only a few (six) areas regulated by cardinal laws. This circle has been multiplied now, the constitution naming thirty-two such areas, and as such, the EP is in my view absolutely correct in stating that they "*will cover a wide range of issues relating to Hungary's institutional system, the exercise of fundamental rights and important arrangements in society; whereas in practice this makes their adoption part of the new Hungarian constitutional process*".<sup>72</sup> Nevertheless, there is a factual mistake here. The EP Resolution says "*the new Constitution provides for the extensive use of cardinal laws, whose adoption is also<sup>73</sup> subject to a two-thirds majority*". This clearly suggests that it is a two-thirds majority such as that required for the amendment of the constitution. It is mistaken. It is not the same two-thirds majority. It is not "absolute", but "relative". It requires namely not a two-thirds majority of the votes of Members of Parliament, but a two-thirds majority of the votes of Members of Parliament present, which in the present system may make a difference of over 120 votes, and in the Parliament after 2014, 66 votes.<sup>74</sup> Therefore it is essential to distinguish between the two types of voting systems. The relative two-thirds majority is not easy to reach either, and it aims at determining certain questions of the Hungarian social order for the long term, but it surely is a democratic system. Point M of the EP Resolution, going further in the above direction, seems to go to the extreme in stating that the system of cardinal laws "*put[s] the principle of democracy at risk*".<sup>75</sup> Regarding the fact that from a purely procedural point of view all this was adopted according to the rules of conduct of democracy, and that no international obligation has been disregarded,<sup>76</sup> again we find ourselves in a situation where simple "bad feelings" and

**69** Including cardinal acts.

**70** "Ugyan a törvényhozó nem minden tekintetben vette át a MABIE javaslatait, az elfogadott igazságszolgáltatási törvények a jogállamiság kritériumainak megfelelnek." [www.mabie.hu](http://www.mabie.hu) (07/01/2012).

**71** Second Opinion, p. 24, EP Resolution p. L

**72** EP Resolution, p. L

**73** Italics added by the author.

**74** According to Act XXXIV of 1989, currently in force as to parliamentary elections, there are 386 MPs in the Hungarian Parliament. Its absolute two-third majority is 258, while the relative is 129. According to the new Act CCIII of 2011 (23/12/2011) on the election of Members of the Parliament, from the next parliamentary elections (due in 2014) on there are going to be 199 MPs, where the absolute two-third majority is 133, while the relative is 67.

**75** See Second Opinion, p. 24.

**76** The provision cited by the Venice Commission, Article 3 of Protocol 1 to the European Convention on Human Rights may be also interpreted in the way that these critics, in view of the above written circumstances, question especially the opinion of the people. It would further mean that they regard an established rule of democracy, namely a two-third majority vote antidemocratic. And furthermore, it is simply a political and not a legal question what issues are considered as especially important for a society. After democratic elections, it is task and right of the national parliament to set priorities, and not that of foreign organs, as falling completely within national sovereignty. For instance, the Venice Commission cites the rules on the protection of families as something requiring only a simple majority

political as well as economical antipathy of certain MEPs try to appear as contravened legal obligations. This surely aggressive political step taken by the EP is nevertheless a dangerous path, causing nothing but more euro-scepticism and undermining efforts to give the EP an even bigger role in European decision-making. Who would like to have an EP having truly legislative competences (apart from the already existing ones) seeing that the MEPs are easily misled? It may seem to be a political victory of some sort right now, but it definitely is an assault upon the idea of common European development that may eventually backfire one day.

Point G of the EP Resolution is an extremely interesting point, referring to a field almost every lawyer feels himself to be some kind of expert of, namely human/fundamental rights. The mentioned article declares that “*the new Constitution fails to explicitly lay down a number of principles which Hungary, stemming from its legally binding international obligations, is obliged to respect and promote, such as the ban on the death penalty and life imprisonment without parole, the prohibition on discrimination on the grounds of sexual orientation and the suspension or restriction of fundamental rights by means of special legal orders*”. Unfortunately, there are several mistakes in this assertion. First, the ban on the death penalty. It is a widely known legal peculiarity that in the Landesverfassung Hessen (the Constitution of Hessen, adopted in 1946) Article 21 (1) includes the possibility of the death penalty. (As the German Grundgesetz is a norm of higher level, purely legally there is no problem with the mentioned article, as it may not be executed.) But such a fact would not question the democracy in Germany, would it? With the well-known techniques of law, the problem may be solved. It is even more the case in Hungary, where i.) our former constitution, apparently not causing any problems, did not include a word on the prohibition of death penalty, but nobody was worried about it.<sup>77</sup> ii.) In point Q Hungary declares that it will follow its international obligations, and the ban on death penalty is clearly an issue Hungary is devoted to. It became party to Protocol No. 6 to the European Convention on Human Rights in 1992, earlier than nations such as Belgium or the United Kingdom, and in 2003 to Protocol No. 13, again earlier than many other European states, for instance Italy, France or Norway. iii.) While for instance the Constitutions of Germany (Art. 102), France (Art. 66-1), Austria (Art. 85) and Finland (Section 7) include explicitly the abolition of the death penalty, among others the constitutions of Latvia, Estonia, Lithuania and Poland do not mention it, while Spain reserves it for times of war (Section 15),<sup>78</sup> and of course there is no need to refer to the issue of the constitution of the United Kingdom... We have to mention that although not a member of the

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in their view. I may have agreed twenty years ago, but now it is clear that the sustainability of the society requires different standards than some decades ago.

**77** Death penalty was declared unconstitutional by the Constitutional Court in Resolution 23/1990 (X.31.). The values it was declared unconstitutional upon (rule of law, human dignity for instance) are included in the new constitution as well.

**78** Although Protocol No. 13 entered into force in their regard in 2010.

European Union, the obviously democratic European state of Norway even mentions the death penalty in its constitution, although it clearly does not use it anymore.<sup>79</sup>

The EP Resolution may have been motivated by the Venice Commission report, which dedicates a whole page to the “criticized” notion of marriage<sup>80</sup> and family,<sup>81</sup> simply to admit at the end that i.) it is up to the Hungarian state to determine this issue, ii.) that actually Hungary is far from being alone in this regard (as in 2010, 41 states out of the 47 Members States of the Council of Europe have not accepted same-sex marriage, which only at the most legalized same-sex relationships, just like Hungary)<sup>82</sup> and iii.) it is completely in line with international human rights texts. This part of the report might be misleading if one does not read the lines thoroughly, creating the impression that legal problems lay here, but in fact declaring there are none. Quite similar is, among others, point 45 of the report, finding it “regrettable” that the New Constitution – in a specific point – “*does not include a constitutional guarantee for the protection of the languages of national minorities*”, while admitting a sentence later that actually Article XXIX rules so. (As declared – correctly – by the Venice Commission itself, it is the right of every state to provide extra protection for its own language;<sup>83</sup> that is the logical reason why the two questions – Hungarian language and that of the minorities – are treated separately.)<sup>84</sup> This whole paragraph leaves a nasty taste in the mouth when thinking about the problems surrounding the recent language law of Slovakia and the functional inactivity of the Venice Commission<sup>85</sup> in that regard.

To mention the ban on life imprisonment without parole in the EP Resolution – as seen above – is even more peculiar, given the fact that for instance none of the above mentioned constitutions includes the explicit prohibition of life imprisonment

**79** Article 20: “...*In proceedings which the Storting causes to be brought before the Court of Impeachment, no pardon other than deliverance from the death penalty may be granted, unless the Storting has given its consent thereto.*”

**80** “*the union of a man and a woman established by voluntary decision*”.

**81** “*the family as the basis of the nation's survival*”, see furthermore: ICCPR, Article 23.

**82** Second Opinion, p. 47, referring to the European Court of Human Rights and p. 49, 50. Other constitutions in Europe, e.g. in Latvia (Art. 110) or Poland (Art. 18) state as well that a marriage is a bond between a man and a woman. Having regard to the recent evolution of rules in this regard and the numerous related debates, every nation has the right to determine which path to take. The declaration of the importance of families and children for the society is not only a question of sovereignty, but also of a healthy mind. If everyone decided at the same point to be only interested in the same sex, there would be no people to work and feed the elderly in some years, and in some decades no mankind at all. It seems to be a radical way of reaching the desired depopulation targets...

**83** See Venice Commission, Opinion on the Act on the State Language of the Slovak Republic, October 21, 2010, Opinion no. 555/2009, p. 132.

**84** See furthermore Péter Kovács, *International Law and Minority Protection*. Akadémiai Kiadó, Budapest, 2000.

**85** As well as the Council of Europe, the OSCE and the European Union; “functional inactivity” as the weak, useless and only-for-the-protocol acts did not serve the safeguard of common European values. The Venice Commission, when preparing its above-mentioned report, used soft terms after determining the violation of certain international obligations, while the phrasing of the Second Opinion here at issue has a much stricter wording, after not having established the violation of international obligations. See Opinion on the Act on the State Language of the Slovak Republic, p. 137.

without parole. Nor do actually any of the relevant international texts (e.g. European Convention on Human Rights, International Covenant on Civil and Political Rights, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Convention Against Torture), as it is regarded as a justified punishment against repeat felons for particularly serious crimes.

As – unlike several European constitutions – the New Hungarian Constitution in Article XV explicitly prohibits discrimination<sup>86</sup> on any grounds, the above-mentioned criticism of the EP saying that “*the new Constitution fails to explicitly lay down ... the prohibition on discrimination on the grounds of sexual orientation*” is therefore at least a misconception, but rather another gross and manifest error. Discrimination may have several roots; both international and national texts name only some of them. Therefore, anybody with a basic knowledge of the rules of legal interpretation understands that if the provision says “*Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of race, colour, sex, disability, language, religion, political or other views, national or social origin, financial, birth or other circumstances whatsoever*”,<sup>87</sup> sexual orientation is included. In such a situation, I rather find it astonishing that the EP allows itself such a manifest error. By the way, only the Charter of Fundamental Rights of the European Union includes an explicit reference to sexual orientation.<sup>88</sup> Does this omission make the European and the American Convention on Human Rights, the International Covenant on Civil and Political Rights and other international human rights documents incomplete in the EP’s eyes? Criticism versus the Hungarian Constitution seems even weaker when we take a glance at the relevant dispositions of the mentioned documents. If we would like to really find fault, we could argue that, “*or other circumstances whatsoever*” may be interpreted much more broadly than “*or any other social condition*”,<sup>89</sup> “*or other status*”.<sup>90</sup>

The EP Resolution’s phrasing radically alters in translation as to the last part. The German version is almost incomprehensible, as it indicates that the New Constitution does not say anything about the suspension or restriction of fundamental rights by means of special legal orders. It surely is a mistranslation from the not-so-clear, but still, at the second run understandable English version, while the French version is clear: the EP lacks “the prohibition on ... the suspension or restriction of fundamental

**86** On the former regulations see Pierre-Alain Collot, *Le principe de non-discrimination au regard de l'appartenance nationale dans le droit constitutionnel des États scèbique, slovène et hongrois*, Broché, Paris, 2006.

**87** Italics added by the author. See furthermore Nóra Jakab, “A fogytékkal élő emberek egyes alkotmányos jogainak gyakorlati érvényesülése Magyarországon a Rendszerváltás után”, in: *Publicationes Universitatis Miskolcensis, Sectio Juridica et Politica*, Tomus XXIV, Miskolc University Press, 2006, pp. 219-237.

**88** Even the Second Opinion of the Venice Commission, also lacking the explicit reference in the constitution, admits that it is rarely the case elsewhere too.

**89** American Convention on Human Rights, Article 1.

**90** European Convention on Human Rights, Article 14, International Covenant on Civil and Political Rights, Article 26.



rights by means of special legal orders”.<sup>91</sup> This version is nevertheless almost as embarrassing as the German one. Not only does the New Constitution determine the rules on the suspension and restriction of fundamental rights in special legal orders (e.g. war or state of emergency), but it clarifies what fundamental rights are to be respected in any case,<sup>92</sup> e.g. also in times of war. According to the international human rights doctrine, e.g. torture falls under an absolute prohibition, just as proclaimed by the Constitution. It is another question, maybe raising some dogmatic debate in the future, as to how times of war and – according to the New Constitution – the absoluteness of the right to life should be understood.<sup>93</sup> As an additional guarantee, it declares that in a special legal order, the operation of the Constitutional Court may not be restricted.<sup>94</sup> In sum, the text clearly fulfils international obligations and common sense. And let us not forget that the rule of law has not been questioned in the case of other constitutions lacking such provisions or regulating them in a similar way.<sup>95</sup>

By the way, the New Hungarian Constitution – like each and every other constitution – indeed fails to lay down *in concreto* every principle stemming from international obligations. A constitution is a catalogue of the most significant rules, not of all international obligations. Even if we regard only the “principles” deriving from such international legal sources, a constitution including each of them would be at least two or three hundred pages in the case of an average European country. Therefore, it lies within the sovereignty of the state to decide what to include in their constitution. Moreover, the argument in the Venice Commission report lacking the reference to international obligations in Article 28 loses its strength when using the measure of systematic interpretation. With regard to Article Q (which basically states that Hungary is a dualist country, but respecting its international obligations)<sup>96</sup> and the provisions on the Constitutional Court completed by the related cardinal law introducing the new form of procedure where – as mentioned above – national judges

**91** “*que la nouvelle constitution omet de déclarer explicitement un certain nombre de principes que la Hongrie, du fait de ses obligations internationales juridiquement contraignantes, est tenue de respecter et de promouvoir, par exemple l’interdiction de la peine de mort et de la perpétuité réelle, de la discrimination fondée sur l’orientation sexuelle et de la suspension ou de la restriction des droits fondamentaux au moyen d’ordres juridiques spéciaux.*”

**92** Article 54 (1).

**93** Article 54 (1) indicating that – among others – Article II stating *inter alia* the right to life cannot be suspended in a special legal order. But even the ECHR recognizes the practical unaccomplishability of the absoluteness of the right to life in times of war. See ECHR, Article 15 (2).

**94** Article 54 (2).

**95** See e.g. the French or Spanish as well as the German or Polish constitutions, none of them being more detailed.

**96** Article Q says: “(1) *In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with every nation and country of the world.* (2) *Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under 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 publication in the form of legislation.*”

may refer cases to the Constitutional Court where they deem necessary a judgment on international treaties and national law, it is clear that Hungary aims at respecting its international obligations. Both the EP and the Venice Commission would like to see explicit reference e.g. to international human rights instruments. It would of course be a nice gesture, but not more. As many other countries, Hungary did not include these documents explicitly; although the drafters had aimed at including the Charter of Fundamental Rights of the European Union, they were advised in the first report of the Venice Commission not to do so.

Even this lack of concrete reference to international human rights obligations appearing in the Venice Commission report is nothing but a technical disagreement. As the Venice Commission itself concludes,<sup>97</sup> the New Constitution states – in a dualistic way – the fulfilment of its international obligations, so other dispositions, e.g. those including human rights questions, should be interpreted this way, without explicit reference to international human rights documents.

Attacking the values declared in the Constitution in point H of the EP Resolution remains even then a major violation of national sovereignty if the resolution adds that the EP is only concerned about feeling a “risk of discrimination” against certain groups in society. Criticising the protection of the right to life from the moment of conception is not only strange in view of other, completely accepted European constitutions like the Irish<sup>98</sup> or the Slovakian,<sup>99</sup> but as Christian values truly form the basis of European culture, it may only be regarded as an eager-beaver mentality towards “modern”, value-free thinking or the unnecessary influence of countries dreading non-secularism (which is obviously not the case here).<sup>100</sup> It is furthermore strange that on the one hand the EP insists on the acceptance of a wider range of ideologies and values (see above) but on the other hand strongly refuses to accept them itself at the same time. Not only the EP, also the Venice Commission touches upon this issue. Needless to say, that the criticized protection of foetal life – in J. Szájer’s words: “*protection of life in the abstract*”<sup>101</sup> – cannot be understood as prohibiting abortion, as the private life of a woman is also protected under this constitution. Nevertheless, in this regard I cannot go by the voluminous jurisprudence of the European Court of Human Rights (hereafter: ECtHR), also mentioned by the Venice Commission. Our European standards simply need amelioration when even the ECtHR could let

**97** See Second Opinion, p. 30.

**98** Article 40 (3.3.).

**99** Article 15 (1).

**100** As the ECLJ writes: the Constitution “*reflects a balanced, and inclusive approach toward religion*” (ECLJ Memorandum, p. 12). Here, rather the motto ‘separate, but cooperate’ rules, but there are various solutions in Europe, which the ECtHR accepts (see among others ECtHR, *Leyla Sahin v. Turkey*, Grand Chamber, November 10, 2005, No. 44774/98, p. 109). Some countries are secular, like France or Turkey, while others, like Norway, Denmark, or the UK, have state religions, and some – like Italy or Spain – support/cooperate with the churches. The Bulgarian, Irish or Greek constitutions refer explicitly to Christianity as well (see ECLJ Memorandum, pp. 8-11), while the Swiss constitution begins with “Im Namen Gottes des Allmächtigen!”.

**101** Szájer, *CESPR*, p. 71.

something so horrifying happen as in the Evans case,<sup>102</sup> where an embryo was ordered to be destroyed on the father's will (he had formerly approved), thus depriving the mother – whose reproductive organs had had to be removed – of any chance in the future for her own child. The Venice Commission's fears on the Article 8 related delimitations of a woman's rights should be also borne in mind when it is about life and not only death. The constitution at cause and its Article II – as actually, at the end declared by the Commission itself<sup>103</sup> – is not violating any obligation and remains within its well established sovereignty in this regard. Once again, this question is rather a conflict of values than an infringement of any legal obligations.

As to discrimination in general, why should our constitution include more provisions on this subject than others do? As mentioned above, the Constitution has already taken sides against discrimination. To mention another, more concrete example, the EP is concerned here about single-parent families being at risk by the constituency, also due to the “*unclear wording when defining basic notions such as 'family'*”. i.) Family is not defined in the Constitution, and I see no need why it should have been (nor is it in, say, the Polish<sup>104</sup> or the Spanish<sup>105</sup> constitution), those allegedly unclear words merely say (and it would be rather hard to contradict the statement):<sup>106</sup> “*Hungary shall protect ... the family as the basis of the nation's survival*”. It only adds that “*The protection of families shall be regulated by a cardinal Act*”. ii.) Hopefully concerns will be calmed when reading the mentioned cardinal act that for instance says in its Article 15 (2) that “*... single parents are entitled to further facilities in their employment determined by law*”.

Point 74 of the Second Opinion criticizing Article IX on the freedom of the press is based on a dogmatic disagreement. Freedom of the press as an individual freedom (as expected from the Venice Commission) is much less concrete than as an obligation of the state (as declared in the New Constitution). Who else would we like to force to guarantee the freedom of the press? It is only understandable from the obligation side, and of course, it is no violation of the principle. The Venice Commission does not even substantiate its reasons for urging the modification of this provision by citing international legal obligations.

The Venice Commission's criticism on Article O<sup>107</sup> (point 52) seems to ignore the current social problems that many states, including Hungary, are facing. The Commission is needlessly horrified by fictive threats, instead of looking into the heart of this provision. They also forget that – besides the simple fact that similar solutions,

**102** ECtHR, *Evans v. United Kingdom*, April 10, 2007, No. 6339/05. For a brief description see Anikó Raisz, *Az emberi jogok fejlődése az Emberi Jogok Európai és Amerikaiközi Bíróságának kölcsönhatásában*, Miskolc, Novotni, 2010., p. 73.

**103** That is why I call this again a part of the worst-case-scenario feature of the Second Opinion (see later).

**104** Article 18.

**105** E.g. Article 50.

**106** Article L.

**107** “*Every person shall be responsible for his or herself, and shall be obliged to contribute to the performance of state and community tasks to the best of his or her abilities and potential.*”

*i.e.* on the right and obligation to work, can be found in other constitutions as well, see e.g. Spain – this provision is based on the mentioned national consultation, *i.e.* wide social approval, just like the criticized Article P on the obligation to protect natural resources. As constitutions are to declare principles, as formerly stated, I can only feel frustrated to see that such an achievement – again not alone-standing in Europe – of the Constitution is not praised for taking the green path, but criticized.

As partly referred to in the introductory section, the history of Central-Eastern Europe is much more complicated than is generally known in other parts of the world. While most of the Central-Eastern European countries teach the history of Western European at school, it is rarely a case of *vice versa*. With no other nation having the same situation as Hungary (see above the short description in the section to Question (8) of the national consultation), it seems rather peculiar to judge our relations with this background. Furthermore, it is not unknown in Europe that citizens possess citizenship of two or even more nations (and here I would not like to enter into the debate on the terminology of citizenship-nationality and what is connected to it), see for instance the Romanian nationality law. Unfortunately, the concerns of the EP raised in Point I should be addressed in a much more detailed way, one that would exceed the scope of this article. Also as to the Venice Commission report,<sup>108</sup> a dogmatic problem arises that may be (actually has long been) the cause for disagreement in related questions. The report argues that to understand Hungarians living beyond borders as parts of the Hungarian nation “*may hamper inter-state relations and create inter-ethnic tension*”. Again, no legal arguments here, only political concerns, which may not be ignored but do not necessarily have to be accepted, especially in view of other countries’ similar solutions. Such phrasing in the report is also unfortunate in creating the – hopefully wrong – impression that once again, this specific country is to be blamed for tensions in the region; it causes distrust in the people and may have an adverse effect. Not having any other nation in Europe struggling with a similar problem, our solutions – which, in a legal sense, fulfil all the international obligations – should be respected as well. In fact, it is not these efforts that undermine the future of Europe; mutual acceptance is expected to be mutual, *i.e.* respecting each others’ international-law-respecting solutions, and when having a political disagreement, let us call it a political disagreement, and not pretend that non-existing obligations had been breached. It is another part of the report which is in my view rather like a worst-case-scenario book, where the Commission is raising concerns about provisions that it misinterprets or that could be misinterpreted if interpreted in a more than a broad sense – and an incorrect way; and then declare that actually it may not cause a problem at all if interpreted correctly.<sup>109</sup> Furthermore, even when ignoring similar and accepted solutions like in Israel or Ireland,<sup>110</sup> reference should be made to Recommendation 1735/2006 of the PACE (particularly Points 4, 5 and 12), the concept of which seems to be reflected in the New Constitution.

**108** P. 39.

**109** See Second Opinion, p. 44, see also p. 45 on the language question, p. 46. versus 50.

**110** See ECLJ Memorandum, p. 6.

Point J of the EP Resolution must rely again on a misunderstanding or misreading. It claims that it may lead to legal uncertainty that the Preamble (called the National Avowal) has legal force. Instead, the Constitution says that “*The provisions of the Fundamental Law shall be interpreted in accordance with ... the National Avowal...*”,<sup>111</sup> representing a clear and old rule of legal interpretation called teleological interpretation.<sup>112</sup>

The Venice Commission's report<sup>113</sup> was at this point partly based on a misunderstanding. The admittedly at the first glance shocking sentence – “*We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid.*” does not implicate as many open questions as feared by the Venice Commission. Nevertheless, it is a sentence that needs thorough interpretation. It does not imply that the Constitutional Court's previous jurisprudence is invalid<sup>114</sup>, as feared by the Venice Commission, nor are the numerous legal acts of the past years. Emphasis lays here on “communist”, which means indeed the constitution of 1949, which was absolutely a totalitarian one. And this is a right for “transitional justice” of every state as declared by the ECtHR as well as by the Parliamentary Assembly Resolution of the Council of Europe No. 1096/1996.<sup>115</sup> I presume only misunderstandings could lead to thinking that the 1989 modification – which, as the number has not changed, is indeed only a modification of the 1949 constitution, but not a communist one in this sense anymore and which created the Constitutional Court – is meant under this phrase. Likewise, the present legal order has been basically formed after the change of regime, so even acts bearing their former numbers have undergone severe modification after 1989; see the Civil Code (Act IV/1959) among others. All this said, though not in the way the Venice Commission declares (as it – in my view – definitely goes too far), the cited sentence indeed may cause headaches in the future, even when two things have to be borne in mind: i.) it is the preamble (national avowal), *i.e.* only a guide for interpretation, ii.) it was presumably supposed to nullify many unjust acts of the former regime that have not yet been (and probably never will be) remedied.<sup>116</sup> Even the Venice Commission admits that such an interpretation as in point 35 goes too far, and its critical remarks

**111** Article R (3).

**112** The Venice Commission report is clearer in this regard, recognizing that there is no “legal force” as such here, they only fear for problems occurring from such a teleological interpretation. Admittedly, it is a widely-known problem in international law, but this method nevertheless remains generally used – obviously, for having more advantages than disadvantages. Second Opinion, p. 34.

**113** P. 35.

**114** Although the new rules and guidelines are not ready yet, I strongly presume that the Constitutional Court is going to rely on its previous jurisprudence wherever it is not contrary to the New Constitution.

**115** See ECLJ Memorandum, p. 5.

**116** E.g. many imprisonments or other acts appearing to be legal according to the law in force, but having only a political-suppressing motive. See among others Anikó Raisz, “The ‘lawfully condemned’ – Forgotten aspect of the 1956 revolution in Hungary: Reflections on history, human rights, reconciliation and justice”, *Miskolc Journal of International Law*, 2006/3, pp. 41-45.

remain rather political in point 36, stating that no legal obligation has been reached in this regard either.

EP Resolution Points L, M and N disapprove of the wide range of cardinal laws. I do agree that this aims at determining certain rules for a longer period, but by formulating it in the way that the “democratic” complaint concerns excessive powers of the democratically elected parliament over the executive, the government may raise eyebrows. Furthermore, I have to contradict the statement that “*specific aspects of family law and the tax and pension systems ... normally fall within the sphere of competence of the government*”. This is a question that lies under the sovereignty of the state, and Hungary has predominantly regulated these fields *via* laws adopted by the Parliament even before now.

EP Resolution, point O refers – negatively – to the Europe-wide praised disposition aiming at limiting the current and next parliaments’ competence as to raising national debts.<sup>117</sup> A pilot provision in Europe, it would surely be worth discussing it in a more detailed way, not only from a legal, but also from an economic point of view.

EP Resolution Q clearly disregards political reality and simple facts. Mistaken is the statement that “more recently the Hungarian Parliament elected the judges who will sit on the new Hungarian Constitutional Court,” suggesting that the Parliament has voted for 15 new members, so a completely new court. Instead, the correct description of the situation is that most recently, the four new members of the Constitutional Court have been elected, but in 2010 also a mandate of a former judge<sup>118</sup> who had been originally nominated by the Socialist Party was prolonged, for instance. Also, suggesting that the Government cleared all positions in order to place its own people there is at least laughable: both the new Attorney-General and the President of the State Audit Office were appointed after their predecessors’ mandate was up; while the Budget Council was reorganised, and has now – besides the member appointed by the President of the Republic, as previously – the President of the State Audit Office as well as the President of the Hungarian National Bank as its members. Requiring political consensus by the elections and appointments would mean in the present Hungary that not a majority, not even a qualified majority, but basically everybody should agree on a regulation, as the opposition parties are mainly using the technique “no veto – no consent”. Even in international law, only negotiations (or the attempt thereto) are a requirement, but not the results – needless to say, it would make a country unguidable and the smallest party the biggest dictator; therefore, there is no such rule, not even elsewhere in Europe, but pure political reality.

EP Resolution points S and U refer to other international organs – the Council of Europe’s Parliamentary Assembly and the UN Secretary General – suggesting that the Hungarian Constitution has received or would shortly receive a condemnation from there, which is not the case.

As a – provisionally – final act of this drama, the debate on Wednesday, January 18, 2012 in the European Parliament on the “Hungarian situation” showed a lack of

**117** See National Consultation, Question (2).

**118** Mihály Bihari.

familiarity with the concrete content of the constitution, intemperate manners and also composed participants. All in all, when somebody has followed the events closely, two things appear evident: i.) the constitution itself was no longer a key question, it had slipped through the MEPs fingers, and ii.) it was less advantageous for the EP than the whole procedure for Hungary or its government; the incapacity and incompetence of the EP (via certain MEPs) was displayed again, hardly serving neither the common European aim nor the ambitions of the EP itself. And this is not the only danger.

While on the one hand, I am truly touched that Europe is so concerned about my well-being, democracy in my country and the protection of European values, on the other hand, this unprecedented international attention and threats of all kinds of sanctions are unfortunately overshadowed by various events of the not-so-distant past. Why was Europe not concerned when some years ago peaceful demonstrators had their eyes shot out in the streets of Budapest?<sup>119</sup> Or, going beyond our borders? Why was the European Union not concerned about the first version of the reparation act of Serbia declaring the collective guilt of Germans and Hungarians, an idea reminiscent rather of the troubling times of the Second World War than of modern democracies? The Beneš decrees are certainly another point where this question may be raised again and again... Or why are the European institutions not so concerned about the fact that in the middle of Europe, a country is depriving some of its citizens (mostly Czechs and Hungarians) of citizenship against their own will – a behaviour not only against international obligations, but also contrary to its own constitution? Why do we quickly forget what happened to Gipsies in Belgium or France lately (speaking of collective expulsions), or that the situation of immigrants of Northern Africa is not rosy at all? Compared to just these mentioned events, it may seem rather awkward that a democratically adopted constitution with a democratic content receives such negative attention. While really grateful to know that European institutions are watching over my fundamental rights right now, at least a sort of proportionality would not hurt and keep up appearances, hiding truly political motives. The recent threats of the so-called “Article 7 proceedings”<sup>120</sup> are just another drop in the ocean.

**119** In September 2006, a speech of the then Prime Minister, Ferenc Gyurcsány delivered in a former party meeting was published in which besides admitting to have been lying all the time and having falsified several data (e.g. concerning the budget) in order to win the elections previously that year, he used obscene expressions describing the country and its people. The huge social uproar resulted in ongoing demonstrations. The police response had its peak on the 23<sup>rd</sup> October. That day – being a national holiday and the 50-year-anniversary of the 1956 revolution – several hundred thousands of people went out on the streets. Besides the disturbers, also thousands of peacefully and legally demonstrating people met with unidentifiable police officers using brutal measures against them and violating even the then existing rules. The responsibility question has not been settled until today.

**120** Article 7, Treaty on European Union establishes the possibility for European institutions to react in case there is a “clear risk of a serious breach” by a Member State of the values referred to in Article 2 (e.g. freedom, democracy, equality, rule of law and human rights). This procedure has never been used, as – among others resulting in the suspension of the voting rights of the given Member State – it is reserved for extremely serious situations.

If a country may come under attack by its so-called allies in this way, well, the dictum seems more than true: with these friends you do not need any enemies...

Finally, some remarks on the logical consequences of the adoption of the Constitution. There are several corresponding acts that are to be adopted in order to fulfil the mission declared in the fundamental law. The Parliament has in the meanwhile adopted some of these, but there are still several to follow.<sup>121</sup> Cardinal laws are to be adopted with a two-thirds majority of the MPs present (therefore it is not absolute two-thirds voting as in the case of the constitution). Among others, cardinal laws on the State Audit Office of Hungary,<sup>122</sup> Hungarian Defence Forces,<sup>123</sup> Constitutional Court,<sup>124</sup> status of the President of the Republic,<sup>125</sup> protection of families,<sup>126</sup> parliamentary elections,<sup>127</sup> national assets,<sup>128</sup> municipalities,<sup>129</sup> and the National Bank of Hungary<sup>130</sup> as well as the status of churches<sup>131</sup> have been adopted. Just like the Constitution, some of these provisions are equally drawing international attention, but the present article cannot wait for the results of these consultations. Generally, it is going to be rather hard to find major shortcomings in the mentioned acts, since several models of each exist across Europe, which all have been accepted so far – consider, for example, the variety in constitutional courts. Putting aside what we Hungarians, knowing our constitutional evolution in the past two decades, feel about the new regulation on our Constitutional Court, it would be rather hard to welcome criticism from abroad, especially from countries not even having a constitutional court. Nevertheless, the Venice Commission should be content to see that according to the adopted cardinal law, the Constitutional Court's judges' terms are non-renewable, just as was proposed in Point 95 of the Second Opinion.

As indicated above, some fields are not ruled by cardinal laws, but ordinary acts. Act CXI of 2011 on the Ombudsman (11/7/2011) is an example for such executing rules of the Constitution. I consider it to be an unfortunate legislation, as the new system is a step backwards, and weakens the "green constitution" character. From now on, there is only one ombudsman,<sup>132</sup> and only a deputy ombudsman is responsible

**121** According to the New Constitution, cardinal laws are to be adopted among others on citizenship, functioning of parties, media freedom, legal status of MPs, and these are only some examples of the thirty-two concerned areas, some of which – as indicated above – have already been adopted.

**122** Act LXVI of 2011 (20/6/2011).

**123** Act CXIII of 2011 (11/7/2011).

**124** Act CLI of 2011 (14/11/2011).

**125** Act CX of 2011 (11/7/2011).

**126** Act CCXI of 2011 (23/12/2011).

**127** Act CCIII of 2011 (23/12/2011).

**128** Act CXCVI of 2011 (23/12/2011).

**129** Act CLXXXIX of 2011 (19/12/2011).

**130** Act CCVIII of 2011 (30/12/2011).

**131** Act CCVI of 2011 (30/12/2011).

**132** This is criticized by the EP Resolution as well. I agree with the first part of its point P, as I would have liked to see a more effective system as well, nonetheless, it strictly lies within the sovereignty of the state to determine how many ombudsmen it would like to have, if any, and with what competence(s). European countries differ in their solutions in this regard as well. (See for instance



for the protection of interests of future generations, just like for that of national minorities living in Hungary. In our new constitutional order, I would have liked to see the position of the ombudsman for future generations rather strengthened and not weakened; even if corresponding to the solutions in other European countries, it is in my view a mistaken approach; especially in 2012, in the year of Rio+20.<sup>133</sup> Hopefully, there is going to be time and willingness to correct such missteps. It is definitely easier in the case of ordinary acts than for cardinal laws.

## Conclusions

The new Hungarian Constitution will enter history books not only based on its own attributes, but also by partly provoking and definitely pointing to some major problems of the European democracy as such.

Being a constitution of the 21<sup>st</sup> century, it surely has advantages vis-à-vis older documents, e.g. as to its green constitution character or the praised dispositions on the restriction of state debts. Although these ideas are definitely not new, the New Hungarian Constitution has indeed made a huge step forwards in this regard, and hopes for others to follow. In other aspects, it has simply adopted and adapted successful solutions of other European constitutions, and of course maintained many ideas laid down in the 1989 Constitution as well.

Its own attributes are nevertheless almost overshadowed by certain reactions on the European level that should in my view make us reconsider our common European values or at least what we do with them. Without denying that in reality law and politics – just like politics and economics – are always interrelated, I am convinced that in fact criticism of the Constitution was predominantly motivated by other economics-related decisions of the Parliament, e.g. the media law, the change of the private pension system or the interim tax on financial institutions. Some of the above-mentioned reactions on the Hungarian Constitution show that sacred burdens were overstepped. Not being willing to enter into a philosophic debate on the role of law as such, at least the rules we declared for ourselves should be respected; putting media and political reactions aside (as in this context they are less important), above all the European Parliament should restrain from urging the European Commission to infringe in the declared sovereignty of a Member State, or the Venice Commission

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the diverging models in Belgium, Austria or Germany.) For further reading see among others Gábor Mélypataki, "Munkajogi adatvédelem aktuális kérdései", in: *Miskolci Doktoranduszok Jogtudományi Tanulmányai*, Vol. 10, Miskolc, 2010. pp. 175-195.

**133** See furthermore the Opinion of the Parliamentary Commissioner for Future Generations of June 8, 2011 (JNO-427-2/2011) condemning the new ombudsman act, the Position of the Hungarian National Council on the Environment, June 21, 2011 and July 5, 2011, all drawing attention to inconformity with the new Constitution, as well as the call of the European Environmental Bureau of July 8, 2011.

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should reconsider some of its (second) conclusions using a bit of a double standard, as clarified above.

As the ECLJ states, the “objections to the constitutional process appear to be largely ideologically predetermined”<sup>134</sup> and the main problem is that with this Constitution the country is rejecting the “post-modern model of society”.<sup>135</sup> I am not aiming at following *Candide*’s path by saying this is the best constitution ever,<sup>136</sup> but – as examined above – the vast majority of concerns are unfounded. And that is decisive. Still, the unprecedented negative campaign will surely hinder this constitution from realising the inspiring and positive effects that its undoubtedly positive points would otherwise have. And that is what really hurts the European legal culture.

Certain political (and economical) interests should not make us forget our common European achievements in the field of rule of law and democracy, as the misuse of our institutions could easily result in undesired situations, among others scepticism or distrust – something Europe cannot afford in the challenging times awaiting us.

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**134** ECLJ Memorandum, p. 2.

**135** ECLJ Memorandum, p. 2.

**136** I generally would refrain from making comparisons in this regard.