The Hungarian rule of law crisis and its European context

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I. Introduction

Developments in Hungarian constitutional law after 2010 suggest that the era in Hungarian constitutionalism characterized by a commitment to the rule of law has been replaced by an era where the law is regarded as an instrument available for government to rule. Under the new Fundamental Law, which places alike the 1989 Constitution on the rule of law at the centre of the constitutional order, the constraints that follow from the rule of law have been habitually overridden or ignored by the government acting in parliament. The Constitutional Court's attempts to continue the legacy of pre-2010 constitutionalism were reproached by the government delimiting the powers

of the Court or overruling its decisions in formal amendments of the constitutional text.[1] The independence of the judiciary was also challenged by the two-third-majority government through administrative and legislative means. Although European fora pointed out the deficiencies, the respect for the rule of law has significantly declined and the government got rid of the substantive bounds of this principle.

Despite the continued reliance on the rule of law in the Fundamental Law as the foundational principle of the Hungarian state, there have been a number of significant systemic developments which indicate that in the new constitutional order the ability of the government to rule by law enjoys priority over the idea that for government to be constitutional it must be constrained by law. The controversial practices followed in amending the constitutional text, the limitations imposed on the review of the powers of the Constitutional Court, and the evident subordination of the constitutional order as defended by the Constitutional Court to the political regime offer clear indications of this significant shift in Hungarian constitutionalism.[2]

II. The rule of law in Hungarian constitutionalism before 2010

The rule of law enjoyed a paramount position among the norms that constituted the constitutional order of post-1989 Hungary. It was modelled almost exclusively on the German *Rechtsstaat* concept.[3] There is scholarly consensus[4] that the incorporation of the substantive, structural, and procedural components of the *Rechtsstaat* principle led to the anchoring in Hungarian constitutionalism of foundational ideas, such as the protection of fundamental rights, the separation of powers and limited government, the legality of public administration, legal certainty, the independence of the judiciary, and the right of access to justice. The influence of the *Rechtstaat* principle also meant that in Hungary the written constitution enjoys the highest rank in the hierarchy of legal norms superseding other pieces of legislation, by which primacy is manifested primarily through the process of constitutional review exercised by the Constitutional Court. The jurisprudence developed by the Constitutional Court in a long chain of constitutional review cases emphasized primarily the formal dimensions of the rule of law, especially the principle of legal certainty, and left the substantive aspects of the principle somewhat underdeveloped.[5]

The prominence of the rule of law among the principles of the constitution, which was matched only by the human dignity principle, and the emphasis on its formal dimensions were thought to provide an essential guarantee for the successful completion of the post-1989 transition process.[6] The rule of law offered that formal guarantee which was able to establish a boundary between the constitutional arrangements that had been in place before the regime change and the new constitutional order where public powers are subjected to genuine legal constraints. The position held on the rule of law by the Constitutional Court, the central architect of the novel constitutional order and a key actor in the process of political and legal transition, was

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1 CHRONOWSKI NÓRA/VARJU MÁRTON, Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law, Hague J Rule Law (8) 2016 II, 271 et sqq.

2 VARJU MÁRTON/CHRONOWSKI NÓRA, Constitutional backsliding in Hungary. TvCR 2015 VI, 296 et sqq.

3 As LÁSZLÓ SÓLYOM, the first president of the Constitutional Court outlined "Even the traditional difference between the formal and the substantial concepts of the Rechtsstaat (...) was revived and had to be reinterpreted. (...) The Court made both the politicians and the population conscious of the secure protection constitutional rights (...) and aware of one of the most important characteristic of the rule of law: political intentions can only be implemented lawfully and within the framework of the Constitution – not vice versa, as before, when the law was conceived as merely a political tool. (...) The Court, moreover, developed a moral explanation of its position. It introduced the paradoxical phrase 'revolution under the rule of law'." SÓLYOM LÁSZLÓ, Introduction to the Decisions of the Constitutional Court of the Republic of Hungary, in: SÓLYOM/BRUNNER (eds.), Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court, University of Michigan Press, Ann Arbor 2000, 1 et sqq., 38.

4 PETRÉTEI JÓZSEF, Az alkotmányos demokrácia alapintézményei, Dialóg Campus/Budapest-Pécs 2009, pp. 139-159.

5 GYŐRFI TAMÁS/JAKAB ANDRÁS, Jogállamiság, in: JAKAB (ed), Az Alkotmány kommentárja, Századvég/Budapest 2009, 155 et sqq., 174.

6 SÓLYOM LÁSZLÓ, The Rise and Decline of Constitutional Culture in Hungary, in: VON BOGDANDY/SONNEVEND (eds.), Constitutional Crisis in the European Constitutional Area, Hart Publishing/Oxford 2015, 5 et sqq., 6-7.

simple but effective: "the rule of law cannot be achieved against the rule of law".[7] This meant foremost that the Court systematically enforced the principle of legal certainty and applied the rule of law, which it aimed to interpret and develop as a neutral concept,[8] as the fundamental benchmark of its constitutional control powers.[9] It was interpreted as having a normative content independent from concrete constitutional provision, the violation of which could give rise to protection before the Constitutional Court. The rule of law was also available to support as their conceptual basis more specific constitutional norms and it provided a philosophical umbrella for the entire constitutional order, the individual norms of which were in turn available to give effect in individual instances to the rule of law as a general principle.

In the jurisprudence of the Constitutional Court under the 1989 Constitution,[10] the rule of law emerged as a self-standing normative principle, and it was used to provide the basis of other, more specific constitutional norms, such as legal certainty and the separation of powers.

III. Moving away from the rule of law towards rule by law after 2010

The new Fundamental Law accorded a position in Hungarian constitutionalism to the rule of law similar to that in the 1989 Constitution. Its Article B) recognised the rule of law and democracy as the foundational principles of the Hungarian republic. Article C) contains the now self-standing principle of the separation of powers, which continues to be expressed in the detailed constitutional provisions on the organisation and the functioning of the state. Beyond the constitutional text there are, however, a number of systemic developments which raise doubts as to the commitment of the new constitutional order, and of the political order which developed the new constitutional framework, to sustaining and building upon the legacy of post-1989 Hungarian constitutionalism which had placed the rule of law at the heart of the functions performed by the constitution in the Hungarian political, economic, and social order. These developments include the instability of the Fundamental Law which followed from its frequent, politically-driven modifications, the imposition of serious limitations on the constitutional review exercised by the Constitutional Court, and the open struggle between the Constitutional Court and the Government acting in parliament for the supreme constitutional authority in the country. The events of constitution making after 2010 seem to contradict the iconic statement in the early jurisprudence offering the foundations of a culture of the rule of law in Hungary that "the rule of law cannot be achieved against the rule of law".[11]

1. Constitutional turmoil: the instability of the new constitution

The constitution-making process which started in 2010 and which led to the adoption of the Fundamental Law and to a series of major modifications to the brand new constitutional text made instability and uncertainty the second nature of the new constitutional order. The technical cause of constitutional instability and uncertainty lies in the relative easiness of pushing a constitutional amendment through the Hungarian parliament, which requires a two-thirds majority vote of all members.[12] This, however, does not change the fact that the frequent amendments of the Fundamental Law pursued *ad hoc* political interests represented – likely in bad faith – in the parliament of the day. These could involve considerations, such as reproaching the Constitutional Court through constitutional modifications for unfavourable decisions, preventing in advance the constitutional review of controversial legislation by raising the matter to the constitutional level, or excluding compliance with Constitutional Court judgments by declaring in the constitutional text the unlawful practices in question as constitutional. The frequent modifications of the Fundamental Law also raise the question of whether the stability

7 Decision 11/1992 of the Constitutional Court.

8 Tóth Gábor Attila, Túl a szövegen. Értekezés a magyar alkotmányról. Osiris/ Budapest, 2009. 147.

9 For example, the Constitutional Court never paid much attention to the concept of democracy and to its relevance in constitutional interpretation, see, Minority Opinion of Judge Kiss in Decision 39/1999 of the Constitutional Court.

10 Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989-90, in force until 31 December 2011.

11 Decision 11/1992 of the Constitutional Court.

12 This was also the case with the 1989 Constitution.

of the constitutional text, which in the Hungarian *Rechtsstaat* enjoys the position of superior law, should be regarded as a value under the rule of law.[13]

The Fundamental Law adopted has been amended six times since 2011.[14] The sixth amendment (new, relaxed rules on introducing special legal order in case of a terror threat) was on the political agenda in 2016, and entered into force on the 1 July 2016.[15] In October 2016 already the seventh amendment is on the agenda as well.[16] Almost all of these were (and are) major modifications of the constitutional text and the related constitutional practice. Such as cementing the model of limited constitutional review, breaking the continuity in the jurisprudence of the Constitutional Court under the 1989 Constitution and under the Fundamental Law, imposing restrictions on the exercise of the right to vote and the freedom of expression, and perpetuated practice of overruling the Constitutional Court's decisions by means of constitutional amendments.

The sharpest criticism was raised by the Fourth Amendment to the Fundamental Law, with which *lex specialis* rules (e.g. Article U) were introduced in contrast to the fundamental principles of the rule of law, and the protection

13 There are a number of instruments which are capable of conserving the constitutional text, such as including unchangeable provisions, requiring a referendum to approve certain amendments, or the requirement to obtain the approval of two consecutive parliaments.

14 For a scholarly analysis of the amendments, see VÖRÖS IMRE, The constitutional landscape after the fourth and fifth amendments of Hungarian Fundamental Law, Acta Juridica Hungarica 2014, 1-20; ZELLER JUDIT, Nichts ist so beständig ... Die jüngsten Novellen des Grundgesetzes Ungarns im Kontext der Entscheidungen des Verfassungsgerichts, Osteuropa-Recht 2013, 307-325.

15 Draft bill was officially not published at the parliament website, but it was leaked by a far-right MP from the opposition. No social debate or democratic deliberation took place in the subject matter. Civil unions harshly criticized the amendment for undermining the rule of law: <http://www.helsinki.hu/en/newest-amendment-to-the-fundamental-law-of-hungary-would-seriously-undermine-the-rule-of-law/>.

16 The amendment sets new substantive limits on common exercising the power with other member states in the framework of the European Union in order to protect the Hungarian constitutional identity, and prohibits the resettlement of foreign population in the territory of Hungary. There is an invalid referendum (took place 2 October 2016) on EU refugee relocation quota in the background of the issue.

of fundamental rights; regulations evading or bypassing Constitutional Court rulings were enacted, substantially reducing the space for constitutional protection (e.g. student contracts, acknowledgement of churches, concept of family); a specific review, and a new interpretation limit was raised in the way of constitutional judicial review (excluding substantial review of the amendments to the Fundamental Law, and repealing Constitutional Court decisions adopted before the Fundamental Law).

2. Budgetary limitation on the constitutional review

The anchoring of the rule of law as the core principle of Hungarian constitutionalism which will effectively contribute to the successful completion of the transformation process from socialist Hungary to the Hungarian Republic defined in the 1989 Constitution, was as much the achievement of the proactive Constitutional Court of the 1990s endowed with extensive competences in constitutional review as of the declarations of the constitutional text.[17] Under the 1989 Constitution, the Constitutional Court was given by design a central role in safeguarding the new constitutional order, especially *vis-à-vis* the executive, the powers of which in the Hungarian parliamentary governmental system are *de facto* united with those of parliament. Its competences in constitutional review available to enforce constitutional principles, including the rule of law, were essential to separate the branches of public powers and to maintain a balance between them by imposing legal constraints on government acting in parliament.

The new Fundamental Law, maintaining the limitations introduced in controversial political circumstances[18] a few months after the 2010 elections,[19]

17 SÓLYOM (footnote 5), 7-10.

18 The limitation of the review powers of the Constitutional Court was a political reaction by the government to a preceding decision by the Court annulling an act which imposed as intended by government retroactive tax obligations (Decision 184/2010 of the Constitutional Court). The quasi nationalisation of the entire private limb of the compulsory pension system followed the introduction of the limitation very shortly, the challenges against which were al declared as inadmissible by the Court on the basis of its new jurisdictional rules in Decisions 3291/2012, 3292/2012, 3293/2012, 3294/2012, 3295/2012, 3296/2012 and 3243/2012.

19 Act CXIX of 2010.

departed from this tradition of a powerful constitutional court capable of enforcing the rule of law.[20] Article 37 (4) in the chapter on public finances holds that in *ex post* norm control and constitutional complaint procedures the Constitutional Court is prevented, with the exception of the grounds provided by the four so called "protected fundamental rights",[21] from engaging in the constitutional review of acts concerning public finances as long as public debt exceeds half of the Gross Domestic Product.[22] Even though this modification, considering the traditionally restrictive interpretation of the jurisdiction available to the Constitutional Court in matters of fiscal policy, can be assessed as having no practical impact on the policy leeway available to government, it offers a sobering reading of Hungarian constitutionalism where constitutional safeguards and the constitutional guarantees enforced within can be suspended on the government's whim with no foreseeable prospect of their reintroduction.[23] The conditional nature of the suspension, which circumstance may be regarded as being capable of mitigating its overall negative impact, has only very limited value as despite the explicit commitment of the Fundamental Law to debt reduction there is no guarantee that the government will be able, or will be convinced, to achieve the stated public debt target. Paradoxically, under Article 37(4) the Constitutional Court is also prevented from enforcing the debt reduction provisions of the Fundamental Law – assuming that parliament had intended that those provisions are genuinely enforceable in law – which are most likely to be affected by legislative measures of a fiscal nature.[24]

3. The struggle for the ultimate constitutional authority: Constitutional Court vs. Parliament

As mentioned earlier, some of the amendments of the Fundamental Law were motivated by the government's decision to refuse to comply with unfavourable decisions of the Constitutional Court and to prevent it from exercising its review powers by lifting matters to the constitutional level. This in the process leading to the adoption of the Fourth Amendment culminated in an open struggle for the ultimate constitutional authority in Hungary, marking the end of constitutionalism under the 1989 Constitution and the beginning of a new constitutional era. The entry into force of the Fundamental Law was prepared by the so- called Transitional Provisions in which the government managed to compile a particularly controversial set of provisions.[25] In the opinion of the Commissioner for Fundamental Rights, the Transitional Provisions severely violated the rule of law, caused considerable uncertainty in the law, and put the unity and operation of the legal system at risk.[26] As a response to the constitutional review procedure initiated by the Commission-

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Disapproved by the Venice Commission in its comprehensive report on the Fundamental Law, supra (FN 42), and on the Fourth Amendment, supra (FN 43), and in the opinion on the new act on the Constitutional Court, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282012%29009-e>.

The violation of procedural rules in the legislative process, as it follows from the legal certainty principle, may also give rise to review by the Constitutional Court.

"As long as state debt exceeds half of the Gross Domestic Product, the constitutional Court may, within its competence set out in Article 24(2)b-e), only review the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding Acts due to violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship. The constitutional Court shall have the unrestricted right to annul the related Acts for non-compliance with the Fundamental Law's procedural requirements for the drafting and publication of such legislation."

VARJU MÁRTON, Governance, Accountability and the Market, in: TÓTH (ed.), Constitution for a Disunited Nation, CEU Press/Budapest/New York 2012, 301 et sqq., 325.

As ZOLTÁN SZENTE assesses, "the elimination of constitutional review of the public finance legislation (...) creates the impression that the constitutional constraints of the executive power can be put aside in economically difficult times." SZENTE ZOLTÁN, The Decline of Constitutional Review in Hungary – Towards a Partisan Constitutional Court?, in: SZENTE/MANDÁK/FEJES (eds.), Challenges and Pitfalls in the Recent Hungarian Constitutional Development, L'Harmattan/Budapest 2015, 185 et sqq., 195.

See HALMAI GÁBOR/SCHEPPELE KIM LANE, Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws, 2012. <http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf>.

Petition of the Ombudsman to the Constitutional Court concerning the Transitional Provisions, <http://www.ajbh.hu/en/web/ajbh-en/press-releases/-/content/14315/26/petition-of-the-ombudsman-to-the-constitutional-court-concerning-the-transitional-provisions-of-the-fundamental-law>.

er, parliament adopted the First Amendment to the Fundamental Law, which aimed at preventing the scrutiny of the Transitional Provisions by the Constitutional Court by declaring it to form part of the Fundamental Law. The Court, faithful perhaps for the last time to its ethos created in the 1990s, struck down the majority of rules in the Transitional Provisions.[27]

The most contentious issue in the decision was the Court establishing its jurisdiction despite the subsequently adopted First Amendment, in order to review the Transitional Provisions. It argued that it is entitled to exercise its review powers to the extent that the Transitional Provisions had substituted the Fundamental Law and had, thus, disrupted its coherence and structure. The Court also claimed to have jurisdiction to review the provisions that affected its competences in constitutional review. In addition it made a vague reference to the possibility that future amendments to the Fundamental Law could be subject to review on the basis of international standards pertaining to the rule of law.[28] The government reacted by adopting the Fourth Amendment which incorporated into the Fundamental Law most of the provisions which had been found unconstitutional by the Court. In order to cement the superior constitutional authority of government acting in parliament, and to take the edge out of potential future attempts by the Court to oppose government action in the spirit of pre-2010 constitutionalism, the Fourth Amendment repealed every decision of the Constitutional Court that had been delivered prior to the entry into force of the Fundamental Law.[29] The negative impact of this latter development on ordinary courts and individuals entertaining expectations as to the meaning of constitutional principles seems to have been ignored by government.

27 Decision 45/2012 of the Constitutional Court. The governing party declared immediately after the decision that the annulled provisions will be inserted into the Fundamental Law by way of a constitutional amendment.

28 The Court in Decision 12/2013 acting in the review of the Fourth Amendment, although it rejected the admissibility of the application, made similar references to international and European constitutional achievements.

29 Before the Fourth Amendment, the Court followed the practice of revisiting its previous jurisprudence adopted under the 1989 Constitution in case the text of the constitutional provisions was the same in the two documents, see Decision 22/2012. Decision 12/2013 on the Fourth Amendment established that under strict circumstances the previous jurisprudence may indeed be considered.

IV. Judicial independence and the rule of law

Assurance of the effective enforcement of EU law is significant in terms of EU membership, therefore the integration organisation generally pays special attention to the functioning of the guarantees of justice at Member State level. It is a remarkable but not a strange coincidence, evidenced by the content of motions and by the practice of their acceptance, that the Constitutional Court has dealt relatively often with the requirement of judicial independence and fair trial since the entry into force of the Fundamental Law.

After the adoption of the Fundamental Law, the two-third majority also challenged the judicial branch of power in many ways. First, the legislator lowered the retirement age of judges from 70 to 62 years. Since 1869, Hungarian judges were allowed to remain in office beyond the retirement age, thus they could freely choose their day of retirement between the age of 62 and 70. However, the Fundamental Law and Act 162 of 2011 on the legal status of judges unexpectedly obliged them to retire at the general retirement age from the beginning of 2012.[30] It has led to a mass removal of over 270 judges in the first half of 2012.

Second, in the course of the constitutional and judicial reform, the Supreme Court was renamed as Curia (in Hungarian Kúria, it is the historical name of the highest judicial body), without any significant changes regarding its competence. However, the Transitional Provisions of Fundamental Law terminated the mandate of the President of the Supreme Court, who was elected by the Parliament in 2009 for a six year term.[31] The President of the Supreme Court earlier criticized the premature retirement of judges and other supermajority actions concerning the independence of the judiciary.

Third, before the Fundamental Law, the administration of justice was organised on the basis of autonomy and judicial independence. In 2011 the reforms aiming to improve the efficacy placed the administrative powers held

30 Gyulavári Tamás/Hős Nikolett, Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts, Ind Law J (42) 2013 III, 289.

31 Vincze Attila, Judicial independence and its guarantees beyond the nation state – some recent Hungarian experience, J Indian Law Institute (56) 2014 II, 204.

by the National Council of Justice and its president (the President of the Supreme Court) into the hands of two new bodies – the National Judicial Office and the National Judicial Council. While the Council serves mostly control and consultative functions, the latter exercises the effective administrative competence over the judiciary. The President of the NJO originally had a vast array of competence relating to judicial appointments, case allocation, administration, management and supervision, and thus this extensive power over the judiciary belonged to a politically appointed individual. However, following the widespread alarm of the national and international community regarding these powers and their impact on the independence of the judiciary, in 2012 the parliament restricted some of the competence of the President of the NJO and increased that of the NJC.

Fourth, the so called Nullity act, Act XVI of 2011 on the redress of the court judgments in connection with the crowd controls in the autumn of 2006, nullified certain judgments relating to the civil unrest of autumn 2006,[32] on the basis that the law interfered with the right of judges (rather than the legislature) to assess evidence and decide on individual cases. The act suggested that the police gave false evidence in each case when exclusively their evidence confirmed the commitment of the act – in these cases the prosecutors brought charges wrongly, and that the judgments of the first and second instance were wrong.

These issues raised international criticism and ended in procedures before the Constitutional Court. In most cases the Court argued solely upon a domestic constitutional basis and did not refer to the European values of rule of law.

The radical lowering of the retirement age of judges in 2012 was the subject of the constitutional complaint leading to the declaration of the first unconstitutionality under the Fundamental Law.[33] The main argument of the Constitutional Court in this matter was the inability to remove implied by the principle of judicial independence, which means that the retirement age may only be lowered gradually, with a necessary transition period. The decision was dominated by internal argumentation on the basis of domestic constitutional law, and only one of the relevant recommendations of the Council of Europe[34] appeared to provide suitable support, although it was known that the Court of Justice of the European Union (CJEU) was also dealing with the case as initiated by the European Commission. The Constitutional Court did however avoid involving the issue of age discrimination in the review, seeking assistance in the law of the EU to interpret the amendments of the Fundamental Law in the Transitional Provisions, or seeking direct contact to the Luxembourg court through initiating a preliminary ruling procedure. The impropriety of the policy of burying one's head in the sand, and the insufficiency of the *pro futuro* nullification of the law amending the Act on Status of the Judges were further highlighted by the decision of the CJEU[35] a few months later.[36] Although the Hungarian Constitutional Court stated the unconstitutionality, it failed to repair the infringement of the affected judges' fundamental rights.

The premature termination of the appointment of the President and Vice President of the Supreme Court was also related to the intended transformation of the judicial organisation. Whereas the mandate of the President of the Supreme Court was terminated by the Transitional Provisions,[37] only the Vice President could lodge a constitutional appeal as his term was terminated pursuant to the Act on the organisation and administration of courts. The Constitutional Court found, with the narrow majority of 8 to 7, that the re-

32 On 18 September 2006 a massive demonstration was held near the Hungarian Parliament. The protests, allegedly attended by 40,000 people, concerned the audio recording, which surfaced on 17 September 2006, on which the then Prime Minister GYURCSÁNY admitted to lying to the public for a couple of years, including lying about budget deficit. Police violence during the crowd control ended in criminal or offence procedures.

33 Decision 33/2012 of the Constitutional Court.

34 Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities. Quoted by Decision 33/2012 of the Constitutional Court.

35 Case C-286/12, Commission v. Hungary, judgment of 6 November 2012.

36 VINCZE ATTILA, Der EuGH als Hüter der ungarischen Verfassung – Anmerkung zum Urteil des EuGH vom 6. November 2012, Rs. C-286/12 (Kommission/Ungarn), Europarecht 2013 III, 323 et sqq., 324-325.

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

organisation of the courts and the significant modification of the scope of responsibilities of the Kúria (Curia, i.e. Supreme Court), its president and its vice president, provide sufficient constitutional justification for the shortening of their mandates, and abstained from reviewing the relevant Strasbourg jurisprudence.[38] But according to the dissenting opinion of some judges of the Constitutional Court, there was harm caused to the rule of law and violation of the petitioners' right to a remedy. By contrast, the European Court of Human Rights (ECtHR) stated after hearing the complaint of the President of the Supreme Court that the State of Hungary had infringed his right to fair trial, because it had not allowed any judicial review in the case. Moreover, the right of the President of the Supreme Court to free expression had also been infringed, whereas his removal may have been related to his criticism of the transformation of the organisation of courts, which had not only been his right, but, as a court leader his duty as well.[39]

In the decision on case allocation that belonged to the competence of the President of the National Judicial Office, the Constitutional Court held the right to an appointed judge and the prohibition of being removed from an appointed judge to be basic requirements for a fair trial and concluded that the appointment of the members of the proceeding court at the sole discretion of the President of the National Judicial Office does infringe these rights, and that the legal regulation does not meet the so-called objective test of an impartial judiciary.[40] The Court heroically declared the rules to be not in force any more, but still having an effect on the cases of the petitioners causing them, to be unconstitutional and in conflict with international treaties, and provided subjective protection of fundamental rights as befits the function of a constitutional appeal. The Court's reasoning provided extensive references to the relevant jurisprudence of the ECtHR, and it also took into consideration the relevant, and sharply critical, positions of the Venice Commission.

38 Decision 3076/2013 of the Constitutional Court.

39 Baka v. Hungary, Judgment of 27 May 2014, no. 20261/12, § 79, 100, 103 (Final judgment 23 June 2016).

40 Decision 36/2013 of the Constitutional Court (upon normative appeal, with eight dissenting opinions).

The picture would not be complete without mentioning the fact that the independence of judicial branch and the principle of rule of law suffered a severe defeat from the rather obscure argument about justice in the Constitutional Court decision on the Nullity Act, in which the reasoning considered foreign solutions only, and European standards did not appear included in the reasoning.[41] The Court found the act of Parliament on annulling the judgments of the courts of law justifiable and constitutional in the given historical circumstances, which is clearly an argument beyond constitutional law.

Reference to the principle of rule of law seems to become more and more relegated to the background in these decisions, and in other constitutional judicial review cases as well. The Court protects the principle of rule of law to a very narrow extent only, as far as the lack of required preparation time and the prohibition of adverse retroactive effects are concerned, but still not as far as the course of constitutional complaint procedures are concerned.[42] Protection of acquired rights or protection of legitimate expectations *(Vertrauensschutz)* are completely disappearing.[43]

V. European context

The growing exposure of the constitution to political power through these amendments was followed with keen interest by European bodies that were not afraid to raise criticisms of controversial, politically unsavoury developments.

41 Decision 24/2013 of the Constitutional Court.

42 Originally: Order 1140/D/2006 of the Constitutional Court, but at the time when the Constitution was in force, this did not mean any problem due to the *actio popularis* subsequent constitutional review.

43 See early retirement – Decision 23/2013 of the Constitutional Court; gambling monopoly – Decision 26/2013 of the Constitutional Court. It is to be mentioned that when investigating the rules limiting the operation of slot machines, the Constitutional Court considered the legislative efforts of the EU and the decisions of the CJEU supporting free discretion of national authorities and the exceptions of public interest from the freedom of service provision as regards organising gambling.

The *Venice Commission* of the Council of Europe issued eleven opinions concerning changes in Hungarian public law since 2010, the most relevant of which focused on the adoption and the modifications of the Fundamental Law.[44] Its opinion on the most controversial Fourth Amendment of the Fundamental Law, the circumstances of the adoption of which are discussed below, emphasised, besides pointing out the substantive shortcomings found in the Hungarian constitutional system, that the frequent amendments of the Fundamental Law reflect an instrumental view of the constitution by the government, which is regarded to be available as a means to be used in politics, and they indicate that the boundary has disappeared between ordinary politics and the political process of constitution-making.[45] The opinion noted that some of the new constitutional provisions were introduced as reactions to unfavourable decisions by the Constitutional Court aiming to circumvent the limitations imposed on government action by those decisions by raising the issues affected to the constitutional level and, thus, making the criticisms formulated by the Court as irrelevant as a matter of formal legal obligations. It held that such developments undermine the ability of the Constitutional Court to fulfil its main function of controlling "the democratic system of checks and balances". This, together with the other provisions of the Fourth Amendment affecting the review powers of the Court[46] were held to "amount to a threat for constitutional justice and for the supremacy of the basic principles contained in the Fundamental Law".

The state of constitutionalism and the rule of law in Hungary have since 2011 become a subject matter for constant debate and contestation in the European Union.[47] Even the open infringement of EU law by constitutional

44 <http://www.venice.coe.int/webforms/documents/?country=17&year=all>. The opinion providing a comprehensive assessment of the new Fundamental Law, while welcoming the Hungarian attempt at constitutional consolidation, formulated substantive criticisms of the new constitutional order, <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29016-e>.

45 <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e>.

46 The "repeal" of its jurisprudence under the 1989 Constitution and the confirmation that its review powers are limited in matters affecting public finances.

47 See – also below – the triple-infringement procedures initiated by the Commission against Hungary in 2012 on constitutional matters, <http://europa.eu/rapid/press-release_IP-12-24_en.htm?locale=en, and the ensuing judgments>, Case C-286/12 Commission v. Hungary and Case C-288/12 Commission v. Hungary.

amendments (limitation of election campaigns, possibility of special taxation as an indirect result of court rulings) was risked. As for the election campaigns, bans on media campaigns[48] were inserted into the Fundamental Law with the Fourth Amendment, overriding this way a former Constitutional Court's ruling.[49] Finally the Fifth Amendment[50] – upon the intervention of the European Commission – modified this ban.[51] The Transitional Provisions, and then the Fourth Amendment, also introduced further indirect constraints on the right to effective judicial protection. It was prescribed that if the ruling of the Constitutional Court or the CJEU results in a debt obligation of the State, under certain circumstances a general contribution covering the common needs – i.e. extra tax – shall be adopted. It can be understood as an intention to sanction – at least indirectly – the lawsuits and complaints in cases of great economic significance.[52] As the European Commission ex-

48 Article IX(3) of the Fundamental Law shall be replaced by the following provision: "For the dissemination of appropriate information required for the formation of democratic public opinion and to ensure the equality of opportunity, political advertisements shall be published in media services, exclusively free of charge." In the campaign period prior to the election of members of Parliament and of Members of the European Parliament, political advertisements published by and in the interest of nominating organisations setting up country-wide candidacy lists for the general election of members of Parliament or candidacy lists for the election of Members of the European Parliament shall exclusively be published by way of public media services and under equal conditions, as determined by cardinal Act.

49 Decision no. 1/2013 of the Constitutional Court.

50 The Fifth Amendment of the Fundamental Law was adopted by the governing majority in September 2013 with the intention of "closing international debates", however not all of the challenged articles were modified. It entered into force on 1 October 2013.

51 At the moment the Constitution allows publishing political ads in all types of media, not just on public service broadcasts, but exclusively free of charge and with equal air time, or alternatively not at all. It is rather hypocritical solution, because if the commercial media is prohibited to charge for political advertisements and has to guarantee equal air time for all qualified parties during the campaign, the more economic choice may be to refrain from this activity.

52 See Article 29 of Transitional Provisions: "As long as the public debt exceeds 50% of the GDP, if the constitutional Court, the CJEU, other Court or other law applying that body's decision requires the State to pay a fine, and the Act on the central

pressed its serious concerns about the conformity with EU law of the new article on CJEU judgments entailing payment obligations, the Fifth Amendment repealed this rule.

The *European Parliament* has hosted regular debates on democracy and the rule of law in Hungary. It is evident that the Commission Communication on "A New EU Framework to Strengthen the Rule of Law" was inspired, in part, by Hungarian developments.[53] The new framework was not – yet – applied against Hungary, however, the European Parliament initiated it in 2015, because new Hungarian rules "unjustifiably criminalised refugees, migrants and asylum seekers", and the government uses "xenophobic rhetoric linking migrants to social problems or security risks".[54]

The *European Commission* initiated several infringement procedures as well, on the basis of which the *CJEU* issued two judgments on constitutional matters: one on the subject of a radical lowering of the retirement age of judges and another on the subject of bringing to an end the term served by the Data Protection Supervisor. Hungary had infringed EU law in both cases.[55]

The Europe 2020 country reports issued by the European Commission as a staff working document identified several shortcomings in the legal and regulatory environment in Hungary, e.g. an unpredictable and volatile regulatory environment and high regulatory and administrative burdens, a low quality of legislative and regulatory processes, and problems with the quality, independence and the efficiency of the judicial system.[56]

budget does not contain necessary reserves to pay the fine, and the amount of the fine cannot be allocated from the budget without undermining a balanced management of the budget or no other item from the budget may be eliminated to provide for the fine, a general contribution covering the common needs must be specified that relates in its name and content exclusively and explicitly to the above fine." This Article was annulled by the Constitutional Court in its Decision 45/2012.

53 <http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf>. The Council Conclusions on "Ensuring respect for the rule of law" adopted in response are careful not to refer to individual Member States, <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/146348.pdf>.

54 <http://www.europarl.europa.eu/news/en/news-room/20151210IPR06854/Hungary-MEPs-call-for-threats-to-the-rule-of-law-to-be-monitored>; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0227+0+DOC+XML+V0//EN>.

55 Case C-286/12, Commission v. Hungary, judgment of 6 November 2012; Case C-286/12, Commission v. Hungary, judgment of 8 April 2014.

The *ECtHR* also received Hungarian cases which had arisen from the elimination of the previous constitutionalism and from the arrangements based on the new Fundamental Law – such as the recognition of churches, dismissal from employment without reasoning, lifetime imprisonment without compulsory review, premature termination of the mandate of the President of the Supreme Court, and the ban of the parliamentary right of expression.[57] The State of Hungary had infringed the European Convention on Human Rights in every case.

VI. Conclusion

The European fora and especially the EU institutions are not able to effectively intervene when a member state does not observe voluntarily the rule of law. The infringement procedures are of a narrow scope, the parliamentary scrutiny is just a political tool of persuasion and the opinions of the Venice Commission are, although prestigious, not legally binding. The EU Commission had some successful actions in case of the Hungarian government but could not really restrain the systemic changes and the Hungarian government can easily circumvent the rule of law requirements by constitutional amendments and by chilling judiciary and constitutional review.

It is clear that the crisis chain started in 2008 with the credit crunch, and followed by economic depression, refugee crisis and exit strives of the member states, requires a deliberate and considered bailout mechanism. The Hungarian experience indicates the renewal of political constitutionalism and the rule by law solutions instead of the observance of rule of law. At the

56 E.g. Country Report Hungary 2016, SWD(2016) 85 final, <http://ec.europa.eu/europe2020/pdf/csr2016/cr2016_hungary_en.pdf>.

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

end of the day this pattern of member state disobedience can easily undermine the European community of law. The ideal way for change to occur would be a more effective Article 7 procedure, a generally binding bill of rights, and a more federalised structure – otherwise the constitutional identity claims of the member states will undermine the European community of law.

Freedom of Speech and Access to Public Information before and after Euromaidan

Darina Dvornichenko

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I. Introduction

Freedom of speech and access to information is the essential foundation of a democratic society and a basic condition for its progress and development. Freedom of speech and access to information ensures the rule of law and accountability of the public authorities.

Ukraine guaranteed freedom of speech to its citizens in 1996 having adopted a new constitution. Article 34 states that "everyone shall be guaranteed the right to freedom of thought and speech, and to free expression of his views and beliefs. Everyone shall have the right to freely collect, store, use, and disseminate information by oral, written, or other means at his discretion".