

ELEVEN AMENDMENTS TO THE FUNDAMENTAL LAW OF HUNGARY AND THEIR JUSTIFICATIONS

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Introduction

The examination and criticism of the Fundamental Law of Hungary and some of its amendments has been a popular topic in constitutional law literature until recently.² As one of the world's newest constitutions, it has been in force for about ten years and has already been amended eleven times. This research aims to review these amendments by analysing the reasons given by the constituent power. I consider the amending power as a participant in the constitutional discourse, and thus I evaluate the justifications for the amendments in a comprehensive perspective: what effects each of the arguments responds to or refers to. Our first perception and hypothesis is that certain elements of the justifications show a particular dynamic with the passing of the years and the changing historical-political challenges the Hungarian government has faced.

The (first) eleven amendments to the Fundamental Law

Hungary's Fundamental Law entered into force on 1 January 2012, and under Article S) the rules for constitution-making and constitutional amendment have not changed substantially: a two-thirds majority of all Members of Parliament is required for both. At the opening of the exhibition in honour of the Constitution, the Prime Minister said that the Constitution had created a "granite solid foundation" for the political system. However, in the decade since its entry into force, Parliament has amended the text of the constitution eleven times.

The first amendment (18 June 2012) raised the "transitional provisions" opposed by the Constitutional Court to the "level" of the Fundamental Law, and extended the law on the remuneration of the President of the Republic to former heads of state. The second amendment (9 November 2012) sought to introduce the institution of voter registration into the Fundamental Law, which would have allowed voters to exercise their right to vote if they registered to vote not later than 15 days before the election or referendum. The

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² Here I refer only to the prominent and continuous attention that *Verfassungsblog* gives to the writings and discourse of high-profile authors. available at: <https://verfassungsblog.de/category/debates/restoring-constitutionalism/> (cited: 31.10.2023.)



third amendment took place just over a month later (21 December 2012). This amendment to Article P made the protection and maintenance of natural resources, in particular arable land, forests and reserves of water, and biodiversity, an obligation for the State and for everyone. The amendment stipulated as a cardinal law (requiring a two-thirds majority) the regulation of the acquisition of ownership and use of arable land and forests and of agricultural holdings.

A quarter of a year later (25 March 2013), the fourth amendment changed the text of the constitution in a more extensive way, and triggered a substantial international response.³ Among the most notable - and controversial - elements of the amendment were: the possibility to impose a special tax to pay fines for breaches of EU obligations; the possibility for the President of the National Office for the Judiciary to transfer cases from one court to another; the restriction of political advertising to public service media; and the clarification that the Constitutional Court can only review the form (procedural issues) and not the substance of constitutional amendments. Parliament also incorporated the parts of the transitional provisions that had been annulled by the Constitutional Court; as the Constitutional Court had expected the Fundamental Law to contain all provisions relating to the level of the constitution in a single document. The amendment also covered the definition of marriage (the relationship between one man and one woman), the possibility of a new sanction for hate speech, the legal status of churches, university students' contracts, the homeless, the disciplinary and police powers of the Speaker of the Parliament. Several provisions have been included in the Fundamental Law because they had previously been annulled by the Constitutional Court when they were due to be enacted into law. Much of the criticism was contained in a motion by the Commissioner for Fundamental Rights challenging the validity and constitutionality of the amendment, but the Constitutional Court rejected it on the grounds of lack of competence.⁴

The Fifth Amendment (26 September 2013), following objections from the European Commission, restored some of the issues in the Constitution. Campaign advertising is now allowed on commercial television and radio channels, but without remuneration. A religious community is recognised as a church, with which the state may cooperate, as decided by Parliament. The amendment gives the Hungarian National Bank the power to supervise the financial intermediary system. The possibility of transferring cases

³ The Venice Commission addressed the amendment in its opinion nr. CDL-AD(2013)012.

⁴ Decision 12/2013. (V. 24.) of the Hungarian Constitutional Court. In his dissenting opinion, Judge Stumpf, István discusses the relevance of the previous decisions of the Constitutional Court for the constitutional amending power: in his assessment, "*the review of the amendment of the Fundamental Law should have been conducted on the basis of the provisions of the Fundamental Law prior to the Fourth Amendment and the Constitutional Court's case law based on it.*" For a critical analysis of the scope of the constituent power to amend the Constitution, see DRINÓCZI, Tímea: *Újra az alkotmányozó, az alkotmánymódosító hatalomról és az alkotmányellenes alkotmánymódosításról – az Alaptörvény alapján.* [Revisiting the Matter of Constitution-making and Constitution-changing Power and Unconstitutional Constitutional Amendments – Fundamental Law.] in *„Jogtudományi Közlöny”,* Vol. 7-8. 2015. pp. 361-378. Strategies for judicial review over the amendments are traced by ALBERT, Richard: *Constitutional Amendments – Making, Breaking, and Changing Constitutions*, Oxford University Press, 2019. pp. 218-223.

between courts has been abolished, while the National Council of Judges has been established as a supervisory body of the National Office of the Judiciary.

The sixth amendment (14 June 2016) addressed the terrorist events in Europe by introducing the category of terrorist threat into the special legal order. The seventh amendment (18 June 2018) aimed to protect Hungary's constitutional identity in the context of EU migration policy.⁵ According to the amendment, the protection of Hungary's constitutional identity and Christian culture is the duty of all state bodies. The European Union's exercise of competences shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.. Among other elements, the amendment also introduced at constitutional level the administrative courts and the Supreme Administrative Court.

The Eighth Amendment (12 December 2019), the only one of the amendments to be adopted on the basis of an opposition motion, restored the provisions on courts to the conditions that existed prior to the Seventh Amendment, although the constitutive power had previously considered administrative adjudication to be a substantial part of the Hungarian constitutional identity.

The ninth amendment (22 December 2020), in the spirit of a new type of identity policy, stipulates that the mother is a woman and the father is a man; protects the right of children to self-identity according to their birth sex and ensures education according to values based on the constitutional identity and Christian culture of the country. Among the rules on public finance, it provides that public funds are the revenues, expenditures and claims of the State; and it establishes at the constitutional level the institution of a so-called public interest asset management foundation, which is regulated by a cardinal act and performs a public function in the public interest. The amendment reorganises the entire special legal order chapter with effect from 2023.⁶ At the same time, however, the tenth amendment of the Fundamental Law of Hungary (24 May 2022) has added a new case to the rules of the special legal order. Accordingly, a state of emergency may be declared not only in the event of "an elementary disaster threatening the safety of life and property", but also in the event of "armed conflict, war or humanitarian disaster in a neighbouring country". This act has also corrected the ninth amendment, which will enter into force in 2023 in accordance with the new text.

The Eleventh Amendment (19 July 2022) provides that from 2024 elections of municipal representatives and mayors will be held at the same time as elections of Members of the European Parliament. The

⁵ The Venice Commission dealt with the law on the administrative courts and the seventh amendment in its opinion nr. CDL-AD(2019)004.

⁶ The ninth amendment has again triggered an investigation by the Venice Commission, which summarised its criticisms in its opinion CDL-AD(2021)029.

amendment also changed the designation of counties from 'megye' to 'vármegye' ('castle-county', it is the former name for a territorial district used from the Middle Ages until the communist regime.).

On the justifications behind the amendments to the Fundamental Law

Constitution-changing power and constitutional identity

The Seventh Amendment of the Fundamental Law gives special importance to the justifications of draft bills prepared in the legislative procedure, because these sources are the tools for the interpretation of legal acts (Article 28 of the Fundamental Law). Moreover, these justifications are rarely presented to the international professional public, so our review can make a significant contribution to the understanding of recent Hungarian constitutional politics.

The justifications of constitutional amendments are discussed here in relation to the subject of constitutional identity that appears in the arguments of the constituent power. A brief outline of these subjects is worth presenting at the beginning.

The identity politics of the 21st century has had a major impact on the fundamental decisions of constitutional politics in particular (in fact, on the manifestations of constitutional power). In the drafting and amendments of the Fundamental Law of Hungary, we can observe a trend towards an increasing reference to the elements of constitutional identity. These references formulated by the constitution-making power can be included in the discourse on the definition of identity because constitutional politics has factually and explicitly perceived the Constitution as a political instrument.

When defining the subject of constitutional identity, it is an acceptable idea to consider each of the constitutional text, the constitutional power and the political community as a subject in the sense that identity can be formed from their dialogue, conflicts and interaction.⁷ In this way, we can describe the formation of identity as a process, which at a given moment can be considered as a particular stage in its development.

Accordingly, the Hungarian constitutional identity can also be known from the cultural-historical values of the political community, from its historical constitution⁸ and constitutional history, and from the will of

⁷ TRIBI, Norbert: *Az alkotmányos identitás funkciója és alkalmazhatósága a szupranacionális térben.* [The function and applicability of constitutional identity in the supranational space.] Szeged, Jurispermis, 2021, intends to offer a comprehensive concept based on (inter alia):

DRINÓCZI, Tímea: *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach*, in: „German Law Journal”, Vol. 21, 2020, pp. 105-130. and ROSENFELD, Michel: *The Identity of the Constitutional Subject*, in: „Cardozo Law Review”, Vol 16, 1995, pp. 1049-1109.

⁸ See explained: EGRESI, Katalin: *Role of the Holy Crown Doctrine and 'Historical Constitution' in the Hungarian Constitutionalism*, in *Studia Juridica et Politica Jaurinensia* Vol. 1. 2014

the National Assembly (qualified majority of two-thirds of the legislative representatives), which has the constitutional power at any given time. All these constitutional systems and political narratives do not, of course, exist in a vacuum, but in the European Union in particular. Furthermore, it is clear that, although the constitutive power has been manifested several times in the last decade (and in each parliamentary term since the system change in 1989), we can now only judge the current historical state of dialogue and interaction. For example, if, by changing the text of the constitution, the representatives of the constituent power wish to influence the values of society, we cannot necessarily document the achievement of this influence (for the time being).

References of the Hungarian constitution-making power – constitutional identity and other influences

However, there is already sufficient data to examine the argumentation of Hungarian constitution-making and constitutional amendments in this field of discourse; since 2011, with the adoption of the Fundamental Law and its amendments, when and to what extent the constitution-maker has referred to certain possible sources or subjects of constitutional identity:

the national, political community,⁹ or

historical or other manifestations of constitutionalism,¹⁰ or

the constitutive power's own political will, or

the 'external' participants in the dialogue¹¹ (mainly the Hungarian Constitutional Court, international law or the EU).

From the frequency and coherence of the references in the explanatory parts of the parliamentary papers¹², we can expect to discover whether there is an obvious trend and a discernible subject of Hungarian

⁹ The concept of the political community is discussed by: PAP, András László: *Who are "we, the people"? Biases and preferences in the Hungarian Fundamental Law*. Available at: http://real.mtak.hu/18617/1/pap_rome_preferences_fin.pdf (cited: 31/07/2023.); and SMUK, Péter: *The Concept of the Nation in the Fundamental Law of Hungary* in „*Politeja*” Vol. 12. 2015. No. 8. pp. 93-110.

¹⁰ The applicability of the historical constitution in modern adjudication is rather controversial, see for the debate: GÁRDOS-OROSZ, Fruzsina: *The reference to constitutional traditions in populist constitutionalism – The case of Hungary*, in „*Hungarian Journal of Legal Studies*” Vol. 1. 2021. pp. 23-51.; SÜLYÖK, Tamás– DELI, Gergely: *A magyar nemzeti identitás az Alkotmánybíróság gyakorlatában. [Hungarian national identity in the Constitutional Court's practice]*, in: „*Alkotmánybírósági Szemle*” Vol.1. 2019. pp. 57-59.; SZENTE, Zoltán: *A historizáló alkotmányozás problémái - a történeti alkotmány és a Szent Korona az új Alaptörvényben [Problems of the quasi historical approach - The Historical constitution and the Holy Crown in the Fundamental Law]*, in „*Közjogi Szemle*” Vol.4. 2011. pp. 1–13.

¹¹ DRINÓCZI, Tímea: *Constitutional Dialogue and Legislation on Parliamentary Election in Hungary – 2010-2014*, in „*Osteuropa Recht*” Vol.4. 2014. pp. 452-467.

¹² We will only look at the written reasons for the legislative (constitution-making) proposals submitted, and not the arguments that have been made in parliamentary debates or public (media) discourse. Source: Parliament's database, available at: www.parlament.hu (cited: 31/07/2022)

constitutional identity. In the following overview, we have collected striking quotations from the justifications of the constitutional power - but for the purposes of this paper, we focus only on the references to the subjects of the identity discourse.

a) Reference to the nation and political community

Fundamental Law, 2011	"The National Avowal¹³, which, similarly to our national prayer, is a creed, a testimony to the values that unite us, the members of the Hungarian nation." "The National Avowal, which defines the Fundamental Law as the expression of the will of the nation and which can be most personally experienced by the people..." "Hungary considers the Hungarian nation as a nation united"
Third Amendment, 2012	"According to the Fundamental Law, arable land and forests are part of the common heritage of the Hungarian nation"
Seventh Amendment, 2018	"In the parliamentary elections on 8 April, the Hungarian people once again made it clear that they do not want Hungary to become an immigrant¹⁴ country." "The definition of the national identity of a Member State is, by definition, the most fundamental, inalienable right of the State and its constituent political community, which is primarily, but not exclusively, reflected in its Constitution. It is therefore appropriate that the political community of a State, through the constitutive power, should enshrine in its constitution certain elements of its national identity."
Ninth Amendment, 2020	"the Fundamental Law is a living framework that expresses the will of the nation" "It ensures that children are educated according to values based on Hungary's constitutional identity and Christian culture, creating a clear basis for all members of the rising generation to learn about and protect Hungary's Hungarian identity, sovereignty and the role of Christianity in preserving the nation."

¹³ FEKETE, Balázs: *The National Avowal: More than a Conventional Preamble to a Constitution*. In: *Challenges and Pitfalls in the Recent Hungarian Constitutional Development*. [In:] Eds. Zoltán Szente, Fanni Mandák and Zsuzsanna Fejes. Éditions L'Harmattan, 2015, Paris, pp. 11-24.

¹⁴ Available at: <https://miniszerelnok.hu/hungary-will-never-be-an-immigrant-country/> (cited:31/07/2023)

Tenth Amendment, 2022	"...to protect the Hungarian people to the fullest extent possible from adverse economic impacts"
Eleventh Amendment, 2022	"...the use of the word 'vármegye' strengthens the idea of national unity, the preservation of our common historical memories and the national character of Hungarian democracy."

b) Historical or other forms of constitution(ality)

Fundamental Law, 2011	"...fits into the thousand year-old history of the Hungarian historical constitution" "...neither the last parry-state parliament nor the National Round Table has the legitimacy to draw up a consolidated constitution for a democratic Hungary." "Act XX of 1949 suffers from several disabilities." "...the second sentence of the Twelve Points of the 1848 Revolution. Through this sentence, which is also a message for today, the text of the Fundamental Law is linked to the great moment in our history, 15 March 1848."
Transitional Provisions, 2011	"Hungary's new Fundamental Law opens a new chapter in history after decades of moral decay in the twentieth century"
Fourth Amendment, 2013	"The aim of the proposal is to strengthen the protection of the family as a fundamental institution of society at the level of the constitution, in accordance with historical tradition." "Parliament, as the constitution-making power, makes it clear that the Constitutional Court is not bound by its decisions adopted under the previous Constitution."
Seventh Amendment, 2018	"In line with Hungarian historical traditions, the possibility of setting up the Supreme Administrative Court with the same legal status as the Curia is once again open."

	"The separation of the administrative judiciary, in particular the existence of an independent Supreme Administrative Court, is an achievement of our historical constitution."
Ninth Amendment, 2020	"The constitutional will expressed in the National Avowal provides the provisions of the Constitution with a common set of values"
Eleventh Amendment, 2022	"Restoring the use of the word <i>vármegye</i> to the present-day Hungarian legal order will ensure that the constitutional traditions of the thousand-year-old Hungarian statehood will continue to live on in this form. ... By using the term <i>vármegye</i> it can be better emphasised that the central idea behind the organisation and structure of the Hungarian state is the defence of national sovereignty and, through it, the cornerstones of European civilisation. ... In view of the achievements of our historical constitution, the amendment changes the name of the counties [<i>megye</i>] to castle-counties [<i>vármegye</i>]."

c) When the constituent power declares its own or political determination

Fundamental Law, 2011	"...in twenty years, the Hungarian political elite has failed to adopt a constitution worthy of the Hungarian nation"
Transitional Provisions, 2011	"The Proposal contains the Transitional Provisions of the Fundamental Law of Hungary, which the Parliament, in accordance with point 3 of the Final Provisions of the Fundamental Law, adopts as a constitutive power."
First Amendment, 2012	"The decision [...] whether to adopt these transitional provisions formally annexed to the new Constitution or to adopt them separately, without burdening the basic document, in view of their transitional nature, was also a matter for the free discretion of the constitutive power."

Second Amendment, 2012	n. a. ¹⁵
Fourth Amendment, 2013	"The National Assembly, as constitutive power, exercised this discretion when it divided up the Fundamental Law as described above, while at the same time fully complying with the mandatory provisions of the Constitution and the Fundamental Law for the drafting of the Fundamental Law and the Transitional Provisions: it adopted the two documents in its constitutive capacity, with the vote of two-thirds of all the Members of Parliament."
Sixth Amendment, 2016	"Parliament as a constitution-making power..."
Seventh Amendment, 2018	"It is the duty of the National Assembly - as the supreme body of people's representation - to enforce the will of the Hungarian people."
Ninth Amendment, 2020	"The constant threat to concepts derived from the order of Creation and, in some cases, the attempt to formulate them in a way that contradicts the original content, raises doubts as to whether the interests, rights and well-being of future generations can be protected in the context of the values of the Fundamental Law."
Tenth Amendment, 2022	"Our country must ensure that we can develop effective, rapid national responses."
Eleventh Amendment, 2022	"conducting the electoral procedures at the same time results in significant cost savings"

¹⁵ In the absence of any other explicit reference, it can be considered as a political decision of the Parliament.

d) Reference to 'external' participants and factors in the constitutional dialogue

Fundamental Law, 2011	"The application of Law XX of 1949 [...] required frequent interpretation by the Constitutional Court"
Fourth Amendment, 2013	"The Constitutional Court annulled several provisions of the Transitional Provisions on formal grounds of invalidity in its Decision 45/2012 (XII. 29.) AB." "The previous case law of the Constitutional Court has made it clear that effective action against hate speech cannot be ensured at the level of the law, and therefore it is justified to provide a basis for such action by amending the Fundamental Law." "In this context, the Proposal also took into account the fact that several elements of previous Constitutional Court case law had already been elevated to the level of Fundamental Law by the constitution-making power."¹⁶
Fifth Amendment, 2013	"As a result of the decision 12/2013 (V. 24.) of the Constitutional Court, the period of debates on the new Fundamental Law has come to an end in Hungary. Accordingly, it is appropriate that the constitutional debates should be concluded in accordance with our international obligations. Therefore, in order to ensure that certain constitutional issues can no longer be used as a pretext for attacks against Hungary, the Government proposes a different solution, not deviating from its original intentions, in order to ensure the country's economic stability and the reduction of public debt, in line with our obligations of European cooperation." "In response to the European Commission's request, the Government proposes to abolish the possibility of transferring cases between courts."
Sixth Amendment, 2016	"Following the adoption of the Fundamental Law, the security environment in the transatlantic region, in Europe and in Hungary has changed radically."

¹⁶ However, there is no reference to this in the specific cases of „constitutionalisation“. This „pattern of ‘constitutionalisation’ of provisions of ordinary law excludes the possibility of review by the Constitutional Court“ argues the Venice Commission in CIDL-AD(2013)012, 81.; and the way „restoring the supremacy of the elected parliament“ is introduced by Stumpf (2014) p. 299–317.

Seventh Amendment, 2018	"The mass immigration and the activities of pro-immigration forces in Europe threaten Hungary's national sovereignty. Brussels [...] threatens the security of our country and would forever change the population and culture of Hungary." "The expression of the general right to privacy in the Fundamental Law provides the highest level of legal recognition, which also corresponds to the protection guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union." "In its Decision No 13/2016 (VII.18.) the Constitutional Court emphasised..." "The Constitutional Court also concluded in its Decision 1/2017 (I. 17.) ..." "the decision of another State or a supranational organisation may not result in the resettlement of persons belonging to a foreign population."
Eighth Amendment, 2019	"Both in the domestic professional circles and in the European Union, the project has been severely criticised. [...] The present proposal would, in line with the government's statements, restore the paragraphs of the Fundamental Law relating to the courts to the situation prior to the Seventh Amendment to the Fundamental Law."
Ninth Amendment, 2020	"However, the new, modern ideological processes in the Western world, which raise doubts about the gender identity of men and women, threaten children's right to healthy development as enshrined in the Fundamental Law." "The proposal defines the concept of public money in order to replace the divergent approaches in the practice of constitutional bodies by a uniform one." "The framework for the interpretation is provided by Act XLIII of 1913 and the related public international law precedents."
Tenth Amendment, 2022	"The war between Russia and Ukraine has created a humanitarian situation not witnessed since the Second World War and has changed the economic situation in Europe."

Conclusions

In its 2011 manifestation, the constituent power used the term nation and the reference to the nation extensively both in the text of the constitution and in the justification, which is a significant indication of the need for a source of legitimacy for the constitution-making process, but also of the intention to designate the subject of the constitution-making process. Although this was accompanied by a formal legal reference (to the competence of the National Assembly as the constitutive power), at the historic moment of constitution-making, the government majority in the National Assembly sought to ensure the widest and deepest legitimacy for the opening of a 'new chapter in history' by referring to the political community. The reference to the historical constitution and to tradition is similarly strong in the 2011-12 manifestations. This returns later only in one strong case, the creation of the Supreme Administrative Court. The latter is severely degraded by the fact that, although it is called an achievement of our historic constitution by the drafter (and should have been given special protection as such), it is simply removed from the constitutional text by the Eighth Amendment, in the midst of domestic and especially European criticism. The restoration of the name 'castle-county' in 2022 is also intended to take account of the historic constitutional foundations.

As the series of amendments progresses, following the re-election of the (same) governing political majority, the references of the subject of constitution-making to other actors in the constitutional dialogue multiply. First to the decisions of the Constitutional Court, and then increasingly to influences outside the Hungarian political system (the European Union, the security situation, Western ideological trends). It can be observed that, while references to the practice of the Constitutional Court are generally more precise, international references are more political in nature. However, references to the practice of the Constitutional Court are generally absent in cases where the Constitutional Court has annulled certain legal provisions by a previous decision and the qualified majority in Parliament has introduced certain provisions into the Fundamental Law in response to this.

In recent manifestations of the constituent power, the reference to national values and the values of the political community seems to be growing (and even exceeding the intensity seen when the Fundamental Law was drafted). Even if the definition of the political community and the democratic legitimacy based on it have a number of problems of principle. There are also elements here that could be said to be specific to the constitution-maker's desire to preserve values in the constitutional text, and thus to make them part of the constitutional identity, in contrast to the tendencies emerging in the political community/society.

Whether these efforts can really be 'value-savers', and what impact¹⁷ they have on society, is a matter for later analysis.

¹⁷ „Is the Fundamental Law worthy of the Christian heritage bequeathed to us? The Fundamental Law has taken up this ambition, but it does not undertake the impossible. It reflects the values of society, from which the law cannot permanently depart on serious issues. It is capable of anchoring a consensus in the face of threats, but it is not capable of replacing the missing consensus. Legal propositions behind which consensus disappears cannot be sustained for long. The real question, therefore, is whether there is, can be, and can be renewed, a public consensus behind the values indicated by the Fundamental Law...” SCHANDA, Balázs: *Az Alaptörvény 50. jubileumának esélye. Szent István öröksége és az Alaptörvény*. [A chance to celebrate the 50th anniversary of the Fundamental Law. The legacy of Saint Stephen and the Fundamental Law.], in: „Iustum Acquum Salutare”, Vol.4. 2016. p. 71, 73.

