

# The Evolution and Gestalt of the Hungarian Constitution

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## I. Origins of the Current Constitution

The current constitution, entitled the Fundamental Law of Hungary was passed by the Parliament on 18 April 2011.<sup>1</sup> The Fundamental Law, which entered into force on 1 January 2012, supersedes the previous constitution (hereinafter: 1989 constitution), which, in keeping with the requirements of democratic constitutionalism during the 1989-90 regime

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<sup>1</sup> For the official English translation of the Fundamental Law, see:  
<http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>

change, comprehensively amended the first written Constitution of Hungary (Act XX of 1949).

## **1. *The 1989 Constitution***

In 1989 formally the not democratically elected, illegitimate legislature enacted the comprehensive modifications of the 1949 constitution, but after peaceful negotiations between the representatives of the Communist regime and their democratic opposition. This process is called in the literature ‘post-sovereign’ or ‘pacted constitution-making,’<sup>2</sup> which also happened in Spain in the end of the 70s and in South Africa from the beginning through the middle of the 90s. The concepts of transforming the 1949, Stalin-inspired Rákosi-Constitution into a rule of law document were delineated in 1989 in the National Roundtable Talks by the participants of the Opposition Roundtable (OR), and the representatives of the state-party. Afterwards, the illegitimate Parliament only sealed the comprehensive amendment to the Constitution, which entered into force on 23 October, the anniversary of the 1956 Revolution and which has been till 2011 – with smaller-bigger changes – the basic document of the ‘constitutional revolution’.

As the immediate antecedent of the establishment of the OR in March 1989 the concept of the new constitution written by the Hungarian Socialist Worker’s Party (Magyar Szocialista Munkáspárt - MSZMP) had been submitted to the Parliament. Thus, the opposition was afraid that those being in power would create the ‘new’ constitutional framework themselves. During the National Roundtable talks, which started in mid-June, initially the OR tried to prevent this, and considered the adoption of the new constitutional order to be the task of the new Parliament set up after the Parliamentary elections. For example, they did not want to negotiate about creating the institution of the president of the republic at all; instead they recommended that the speaker of the Parliament should be vested temporarily with the powers of the president. Moreover, the participants of the OR had agreed on

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<sup>2</sup> See respectively A. Arato, *Post Sovereign Constitutional Making. Learning and Legitimacy*, Oxford University Press, 2016, and M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*, Routledge, 2009.

establishing the Constitutional Court prior to the new Constitution only three days before the negotiations were closed.

Giving up the idea of adopting a new constitution by the democratically elected new Parliament was influenced by various factors. One of them definitely was the fact that the opposition could not be sure that the MSZMP would not win by absolute majority against its rivals who were far less known among the voters. But several signs indicate that they could not exclude, even in case of a relative win, the MSZMP's ability to form a government. Of course, the MSZMP could not be sure of its success either, thus they were not able to ignore the possibility of the 'advance constitution-making', certainly in exchange of promises to guarantee some of their positions. Such a promise could be on the part of the parties at the end signing the agreement to directly elect the president before the parliamentary elections, which held forth the win of the communist reformer Imre Pozsgay. This was prevented by the success of the referendum initiated by the Alliance of Free Democrats (Szabad Demokraták Szövetsége – SZDSZ) and the Federation of Young Democrats (Fiatal Demokraták Szövetsége – Fidesz), that time a liberal party. As a result of this the president was elected only after the first democratic elections, by the new Parliament.

This shows that both the state-party and the opposition were motivated in not leaving the establishment of the transition's constitutional framework to a new constitution by the fear that they could lose the democratic elections. Thus the 1989 constitutional amendment inserted new content into the 1949 framework, which can be considered as a rule of law document, even if the Rákosist-Kádárist skeleton lolls out sometimes, especially concerning the unchanged structure of the chapters, starting with the state organization, following by the fundamental rights parts. Apparently the negotiations-based drafting explains that the old-new constitution principally followed the model of a consensual democracy widely accepted in the continental European systems. The system of government, which assumed the presence of more than two parties in the Parliament and a coalition-governance, at the same time meant that the parties knowingly rejected both the semi- or full presidential regime that was preferred by the MSZMP and is applied in many post-communist countries even today, and also the English Westminster-type of two-party parliamentarism. If

compared to the Western European solutions, the decision-making process set up in 1989-90 had another distinctive characteristic that obviously could be explained by the legacy of the forty-year long totalitarian regime: it is not only based on the consensus among the coalition parties, but in some cases it required the involvement of the opposition, and it significantly strengthened the checks on the governmental powers.

As regards the acts requiring two-third of majority, hence the support of the opposition, in their original forms as “acts with the force of the Constitution” practically called for a two-third quorum in all questions concerning the structure of the government and fundamental rights. The ‘pact’ in 1990 between the biggest governing and opposition party radically reduced the number of the qualified acts. In exchange of this and of the acceptance of the constructive vote of confidence the SZDSZ received the right to nominate a ‘moderately weak’ president of the republic. In 1989 the OR was able to prevent to include the institution of a ‘moderately strong’ president – a position designed for Imre Pozsgay – and with this a semi-presidential system in the Constitution, but the presidential powers of Árpád Göncz were undeniably stronger than those set out in the Act no. I of 1946 with its representative president serving as an example. The rather ‘neutral’ powers of the president meant that he belonged neither to the executive, nor to the legislative branch, but rather had an equilibrant role between those. The extremely broad powers of the Constitutional Court compared to other European solutions and the complicated system of parliamentary commissioners can also be traced back to the idea of limiting the executive.

The parties of the OR accepted the MSZMP’s plan to set up the Constitutional Court as an institution counterbalancing the executive, like it is prevalent in the consensual democracies of Europe, even for the temporary period prior to the elections. However, instead of a body for preserving the state-party’s power, the opposition insisted on a Court, which radically limits the Parliament and the government and the decisions of which cannot be overturned by the Parliament – as initially proposed by the MSZMP –, and where anyone is entitled to submit a petition to review the constitutionality of a piece of legislation (so-called popular action).

## ***2. Two Decades of Constitutional Democracy?***

In the second democratic term (1994-1998) the two new governing parties (the Hungarian Socialist Party (MSZP), successor of MSZMP with an absolute majority of the seats alone, together with its liberal coalition partner (SZDSZ)) had more than two-thirds of the parliamentary seats revived the threat that the governing parties could

monopolize the making of the Constitution. This danger, however, was warded off by the governing coalition itself with their self-restraining gesture: they decided that the parliamentary committee set up to draft the constitution could only adopt a resolution if it were supported by five out of the six parties, and in place of the proposed passages rejected by the committee, the provisions of the existing constitution would be left to prevail. In principle this policy could have guaranteed the consensual drafting of a new, up-to-date constitution. But in the summer of 1996 the new draft of the constitution did not get a two-thirds majority of the votes in the Parliament, because a part of the MSZP did not support it. The leftist wing of the Government's stronger party prevented the approval of the draft because it did not include the declaration of the social character of the state and mechanisms for the reconciliation of interests.

In the coming parliamentary period of 1998-2002 it seemed that the government would have gladly restricted the constitutional institutions of the consensus-based exercise of governmental powers, first of all that of the Parliament's means to control the executive. For instance the first Fidesz-led government decreased the frequency of the plenary sessions to every third week, and prevented the establishment of every ad-hoc investigating committee of the Parliament. However, they did not have neither the courage nor the necessary support to carry out the required constitutional amendments.

The Hungarian constitution making of 1989 was criticized by many authors. The American law professor, Bruce A. Ackerman states in his book published in 1992: the constitutional guarantees of a liberal rule of law state can be established only if a new constitution is adopted, and the possibility to adopt a new basic law fades as the time passes.<sup>3</sup> According to him, there would have been a possibility, and indeed a need, for the adoption of a new constitution in Hungary at the beginning of the political transition, which would have solved the legitimacy deficit of the 'system change', similar to what was done with respect to the German Basic Law (Grundgesetz) of 1949.

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<sup>3</sup> B. Ackerman, *The Future of Liberal Revolution*, New Haven, 1992. Andrew Arato also claims that in Hungary the constitution-making process was incomplete. Cf. A. Arato, 'What I Have Learned: Concluding Remarks', 26 *South African Journal of Human Rights*, 2010, 134-138.

Some developments raised the question already before the 2010 parliamentary elections and the subsequent illiberal turn: were the constitutional values widely recognized and could the Hungarian constitutional democracy be characterized as consolidated two decades after the regime change? The loss of a constitutional consensus among the political players namely had the effect that a large segment of these political actors, or their successors, no longer subscribe to the constitutional values that were accepted at the time of the regime's transition and, partly owing to this development, their supporters and a significant portion of society also no longer hold the principles underlying constitutional democracy in high regard. In other words, it appears that the Constitutional Court's vision, expressed early in the transition process, never materialized: "It is not only legal statutes and the operations of state organs that need to be in strict compliance with the Constitution, but the Constitution's conceptual culture and values need to fully suffuse society".<sup>4</sup>

Indeed, the Constitutional Court led by László Sólyom aimed at building up such a constitutional culture by following an activist approach in the interpretation of the Constitution, which was laid down in the concept of the 'invisible constitution' elaborated in his concurring opinion to the decision on the death penalty: "The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an 'invisible Constitution' provides for a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interest; therefore this coherent system will probably not conflict with the new Constitution to be adopted or with future Constitutions".<sup>5</sup> Therefore Sólyom, and many academics argued that the text of the 1989 constitution and the jurisprudence of the Constitutional Court make a new constitution unnecessary.

Fidesz' first term in power between 1998-2002 was followed by eight years of the Socialist-liberal coalition government of MSZP and SZDSZ. This period can be characterized with corruption, economic and moral failures of the governing parties. The symbolic event of this was Prime Minister Ferenc Gyurcsány's speech to his Socialist Party fraction members, made in May 2006, weeks after his governing coalition won the Parliamentary elections, and broadcasted from a tape by the Hungarian Public Radio on September 17, 2006. In the speech

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<sup>4</sup> Decision 11/1992. (III. 5.) AB.

<sup>5</sup> Decision 23/1990. (XII. 31.) AB.

he admitted that his party has made a mess of Hungary's economy, and that "We lied morning, noon and night". There were immediate protests, organized by the main opposition party, Fidesz, who lost the elections in April. Thanks to the situation the governing coalition suffered large setbacks in the October's nationwide municipal elections, after which the Prime Minister – also upon the request of the President of the Republic — had requested the vote of confidence to reinforce political support for his austerity package and the transformation of the inefficient public sector. Even as Parliament voted, however, tens of thousands of people gathered on Kossuth Square just outside the legislature and demanded Gyurcsany's dismissal. But lawmakers from Hungary's two coalition parties signalled their near unanimous support for the Prime Minister, in the confidence vote. After the opposition failed to dismiss the government both in the Parliament and on the streets, they initiated national referendums on issues related to the budget and the government's program on certain reforms concerning the health care and higher education system. According to the constitution these questions cannot be subject of a referendum, but the majority of the Constitutional Court approved them. With its more than 80% success the referendum held in 2008 finally destroyed the popularity of the governing parties, and even though in 2009 they decided to replace Gyurcsány with Gordon Bajnai, another Socialist politician by another vote of confidence, it was too late.

Before the 2010 elections the majority of voters was already dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country.<sup>6</sup> Fidesz strengthened these feelings by claiming that there were no real transition in 1989-90, the previous nomenclature just converted its lost political power to an economic one, exemplifying with the two last prime ministers of the Socialist Party, who both became rich after the transition due to the privatization process.

The disappointment with regime transition was obviously exacerbated by the perfunctory nature of confronting the past, specifically the fact that even as for the most part the new regime failed to hold the leaders of the party state accountable or to screen for persons who had cooperated with the clandestine services of the old regime, many of those falling into these categories managed to convert their previous political influence into economic clout

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<sup>6</sup> In 2009 51% of Hungarians disagreed with the statement that they are better off since the transition, and only 30% claimed improvements. (In Poland 14% and in the Czech Republic 23% detected worsening, and 70% and 75% respectively perceived improvement.). Eurobarometer, 2009.



under the new regime, while the restitution provided to the victims of the former regime, be it in material or informational terms, was largely symbolic. The Hungarian legislature was incapable of ensuring what the Czech, Slovak, and Polish parliaments had provided for in the early 2000s, namely to offer access to the documents of the former secret services - thereby recognizing everyone's right to learn about public interest documents stored in archives - so that society can learn about its own history.

Populism, nationalism, anti-Europeanism, and anti-secularism spread more easily among those who were disillusioned with regime transition, as did racism, anti-Semitism, and homophobia; especially since, in order to maximize votes, certain political forces failed to reject the support of those who held such views. The fact that, similarly to other Central European regime transitions, the establishment of the constitutional system in Hungary was also concluded rapidly held out the hope that the process of consolidation would be considerably quicker here. In light of the current situation in Hungary, however, one might well conclude that the current political and social consensus regarding democratic values is considerably more fragile than two decades ago, in the early stages of regimes transition. The state of democratic and human rights culture and the lack of trust in democratic institutions - especially Parliament and the political parties - make it harder to avoid the road that leads back to the totalitarian regime. In part, the underlying reason is that the Hungarian institutions created at the beginning of regime transition, including the Constitutional Court, no longer constitute substantial guarantees for asserting constitutionalism - as we will see in more detail below -, but also because the international, and above all the European, environment no longer appears fully willing and able to enforce international democratic standards.

The constitutional system without the second step of a post-sovereign constitution-making process, namely a final constitution seemed to work for more than 20 years, until Fidesz' overwhelming electoral victory in 2010. How the stage was set for Fidesz to win such a high percentage of the votes, and change the entire constitutional setting without much resistance from the side of the citizens? For this, besides the unsuccessful and unpopular policy of the Socialist-liberal governments, also Fidesz' populism was needed. The two key characteristics of this populism are anti-elitism and anti-liberalism. Fidesz' anti-elitism – which is of course odd coming from a key representative of the transition elite – rests on the assumption that society's wise majority is behind the 2010 electoral victory, and that through the "revolution

at the voting booths" this majority has delegated its power to the government representing it. Consequently, no other mediating institution - banks, multinational corporations, political parties or civic organizations - can be authentic expressions of the popular will. The latter is manifested by the "National System of Cooperation" rather than elite bargains. This populist version of conservative politics is at the same time anti-liberal, which is rather surprising considering that it comes from a party that used to consider itself liberal. This anti-liberalism puts great faith in the state's central organizing role in the economy, education, and culture.<sup>7</sup>

### ***3. The Fundamental Law of Hungary***

The populism of Fidesz was directed against all elites, including the one, which designed the 1989 constitutional system (of which FIDESZ was part too), claiming that it is time for a new revolution. That is why he characterized the results of the 2010 elections as a „revolution of the ballot boxes”. Orbán’s intention with this revolution was to eliminate any kind of checks and balances, and even the parliamentary rotation of governing parties. In a September 2009 speech, Viktor Orbán predicted that there was “a real chance that politics in Hungary will no longer be defined by a dualist power space. . . . Instead, a large governing party will emerge in the center of the political stage [that] will be able formulate national policy, not through constant debates but through a natural representation of interests.” Orbán’s vision for a new constitutional order - one in which his political party occupies the center stage of Hungarian political life and puts an end to debates over values - has now been entrenched in a new constitution, enacted in April 2011. The new constitutional order was built with the votes of his political bloc alone, and it aims to keep the opposition at bay for a long time. The new constitutional order of the Fundamental Law and the cardinal laws perfectly fulfils this plan: it does not realize separation of powers, and does not guarantee fundamental rights. Therefore the new Hungary (not even a Republic in its name anymore) cannot be deemed as a state governed by the rule of law.

The center-right government of FIDESZ, the Alliance of Young Democrats, with its tiny Christian democratic coalition partner received more than 50 % of the actual votes, and due to

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<sup>7</sup> See Fidesz' populist conservatism in more detail: U. Korkut, *Liberalization Challenges in Hungary. Elitism, Progressivism, and Populism*, Palgrave and Macmillan, 2012, 162-176.

the disproportional election system with this two-third of the seats in the 2010 Parliamentary elections. With this overwhelming majority they were able to enact a new Constitution without the votes of the weak opposition parties. But this constitutionalist exercise aimed at an illiberal constitutional sort<sup>8</sup>.

The drafting of the Fundamental Law took place without following any of the elementary political, professional, scientific and social debates. These requirements stem from the applicable constitutional norms and those rules of the House of Parliament that one would expect to be met in a debate concerning a document that will define the life of the country over the long term. The debate — effectively— took place with the sole and exclusive participation of representatives of the governing political parties. In its opinion approved at its plenary session of 17-18 June 2011, the Council of Europe’s Venice Commission also expressed its concerns related to the document, which was drawn up in a process that excluded the political opposition and professional and other civil organisations.<sup>9</sup> The document – according to the declaration set forth in article B) – seeks to maintain that Hungary is an independent, democratic state governed by the rule of law, and furthermore – according to article E) – that Hungary contributes to the creation of European unity; however, in many respects it does not comply with standards of democratic constitutionalism and the basic principles set forth in Article 2 of the Treaty on the European Union [hereinafter: TEU].

## II. The Evolution of the Constitution

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<sup>8</sup> In an interview on Hungarian public radio on July 5, 2013 Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal constitution. He said: “In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection more than 80% of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there”. See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, July 5, 2013. Kossuth Rádió.

<sup>9</sup> Fidesz’ counter-argument was that the other Parliamentary parties excluded themselves from the decision-making process with their boycott, with the exception of Jobbik, which voted against the document.

## **1. Cardinal Laws and Amendments to the Fundamental Law**

Before 1 January 2012, when the new constitution became law, the Hungarian Parliament has been preparing a blizzard of so-called cardinal – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These cardinal laws included the laws on freedom of information, the Constitutional Court, the prosecution, the nationalities, the family protection, the independence of the judiciary, the status of churches and elections to Parliament. In the last days of 2011, the parliament has also enacted the so called Transitory Provision to the Fundamental Law with a claimed constitutional status, which partly supplemented the new constitution even before it went into effect.

These new laws have been uniformly bad for the political independence of state institutions, for the transparency of lawmaking and for the future of human rights in Hungary.

Ignoring serious warnings from then European Commission President José Barroso<sup>10</sup>, the Fidesz government just pushed through two cardinal laws on financial matters. The new law<sup>11</sup> on the central bank (the Magyar Nemzeti Bank or MNB) gives the prime minister the right to appoint all vice-presidents of the bank, when previously the president of the central bank initiated the nominations process himself. The law creates a new third vice-president for the bank and Prime Minister Viktor Orbán can name one of these vice-presidents immediately. The new law also expands the number of members on the monetary council. The monetary council, which – as the name suggests – sets monetary policy and interest rates, will grow to nine members, of which fully six already were or soon will be put into office by the Fidesz government.

On the same day it passed this law, the Parliament passed a constitutional amendment that also affects the status of the central bank. According to the amendment, the parliament may merge the central bank with the existing Financial Supervisory Authority to create a new agency, within which the central bank would be just one division. The government would

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<sup>10</sup> On Barroso's letter to Orban: <http://www.bloomberg.com/news/2011-12-20/barroso-calls-on-hungary-s-orban-to-withdraw-laws-origo-says.html>

<sup>11</sup> Contents of the new national bank law: [http://www.nytimes.com/2011/12/31/business/global/hungary-passes-central-bank-rules-despite-risk-to-bailout.html?\\_r=2](http://www.nytimes.com/2011/12/31/business/global/hungary-passes-central-bank-rules-despite-risk-to-bailout.html?_r=2)

then be able to name the head of this new agency who would effectively become the boss of the president of the central bank, reducing the bank president to a mere vice-president in the new agency. The constitutional amendment doesn't actually complete the merger – it just lays the constitutional groundwork for the later disappearance of the free-standing bank. The new Economic Stability Law – also a target of EU criticism – creates a permanent flat tax, requiring all personal wage income to be taxed at the same rate, starting in January 2013.

The independence of the judiciary was dealt with the constitutional amendment that also passed on 30 December, the last day of the parliamentary session. In it, both the head of the National Judicial Office and the public prosecutor, both people very close to the governing party and elected by the Fidesz parliamentary supermajority, can choose which judge hears each case. A prior decision of the constitutional court had found unconstitutional a law that permitted political officials to assign cases like this. To avoid constitutional questions, the government simply put the new powers to assign cases directly into the constitution itself.

The constitutional reforms have also seriously undermined the independence of the ordinary judiciary through changing the appointment and reassignment process for judges. According to the Cardinal Acts on the Structure of the Judiciary and the Legal Status of Judges,<sup>12</sup> the head of the National Judicial Office can select either any judge from among the top three candidates recommended by the judicial council of the court where the appointment would be made or none of them at all. If she decides against the top candidate, or against any of the candidates listed, she only has to report the reasons to the National Judicial Council, a new body that has a merely advisory role in this matter. While formally, the President of the Republic must sign off on all new judicial appointments, the decision of the head of the National Judicial Office alone is necessary in order to promote or demote a judge presently sitting anywhere in the judiciary. The new law contains no procedures through which a sitting judge can contest such a reassignment. The nomination process for new judges became quite salient because the Transitory Provisions to the Fundamental Law, an omnibus constitutional addendum passed also at the very end of 2011, reduced the retirement ages for judges on ordinary courts from 70 to 62, starting on the day the new constitution went into effect. This change forced somewhere between 274 judges into early retirement. Those judges include six of the 20 court presidents at the county level, four of the five appeals court presidents and 20

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<sup>12</sup> Act CLXI of 2011 on the Organization and Administration of the Judiciary and Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

of the 80 Supreme Court judges. In July 2012, the Constitutional Court declared that the suddenly lowered retirement age for judges was unconstitutional.<sup>13</sup> But by the time the Court ruled, the 274 judges had already been fired. President Áder said he would not withdraw the orders firing the judges and the head of the National Judicial Office said that the newly hired and promoted judges would not be displaced even if the unconstitutionally fired judges were reinstated by order of the labour courts. The European Commission requested the European Court of Justice to expedite its decision in the infringement proceeding launched on this issue and the Court in November 2012 ruled that Hungary's reduced retirement age for judges is discriminatory.<sup>14</sup> Despite these decisions the fired judges were not reinstated<sup>15</sup>.

Many other cardinal laws were passed in the last two weeks before the Fundamental Law entered into force as well. According to the cardinal law on the status of the churches, as well as a separate law on the Transitional Provisions of the Fundamental Law - both enacted with the two-third majority in the end of 2011 - the power to designate legally recognized churches is vested in the Parliament itself. The law has listed fourteen legally recognized churches and required all other previously registered churches (some 330 religious organizations in total) to either re-register under considerably more demanding new criteria, or continue to operate as religious associations without the legal benefits offered to the recognized churches (like tax exemptions and the ability to operate state-subsidized religious schools). As a result, only eighteen have been able to re-register, so the vast majority of previously registered churches have been deprived of their status as legal-entities. Because registration requires an internal democratic decision-making structure, the majority of previously registered churches were not able to continue to operate with any legal recognition under the new regime. Non-traditional and non-mainstream religious communities – which had not faced legal obstacles between 1989 and 2011 – are now facing increasing hardships and discrimination as a result.

On 23 December 2011 the Parliament also was set to vote on the controversial election law with its gerrymandered electoral districts, making the electoral system even more disproportional, which favours the current governing party in the elections to come. The main changes in the system are as follows: shift to the majoritarian principle, by increasing the

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<sup>13</sup> Decision 33/2012 (VII.17) AB

<sup>14</sup> ECJ, 6 November 2012, Case C—286/12, *Commission v. Hungary*. C-286/12.

<sup>15</sup> See the details of the case in G. Halmai, 'The Early Retirement of the Hungarian Judges', in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (eds., Fernanda and Davis), Cambridge University Press, 2017.

proportion of single-member constituency mandates, eliminating the second round, introducing relative majority system instead of the absolute majority, and introducing “winner-compensation”.

In the end of 2012 the Parliament amended the Fundamental law, and also passed a new cardinal law on Election Procedures, introducing a new system of voters registration. The most important change is the abolition of the system of automatic voter registration.

Hungarian citizens are no longer automatically entitled to vote but must register every four years to be allowed to vote. This is extremely unusual in European comparison, but even the very few countries that require registration strive to make it easier on their citizens. While the original bill contained a provision giving citizens in Hungary proper a brief window of two weeks to register by mail, the version finally adopted scrapped this option. Registering by mail will only be open to citizens abroad. The new law is also limiting both the time for campaigning as well as spaces where advertisements may be displayed, thus placing even greater restrictions on the opposition’s already limited communication channels to the public. Even what was anticipated to be slight progress, i.e. the number of signatures necessary for placing candidates on the ballot, ultimately turned out to be far less generous than originally suggested.

## ***2. The Fourth and the Fifth Amendments***

On 11 March the Hungarian Parliament added the Fourth Amendment<sup>16</sup> to the country’s 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The Fourth Amendment also added new restrictions on the Constitutional Court, inserted provisions that limit the application of constitutional rights and raises questions about whether concessions that Hungary made to European bodies last year in order to comply with European law are themselves now unconstitutional. These moves reopened serious doubts about the state of liberal constitutionalism in Hungary and Hungary’s compliance with its international commitments

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<sup>16</sup> See the ‘official’ English text of the amendment provided by the government here: <http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF%282013%29014-e>

under the Treaties of the European Union and under the European Convention on Human Rights.

This amendment was submitted as a “private member’s bill” in the Parliament. According to Hungarian parliamentary procedure, government bills must go through a stage of social consultation before the bill is voted on. Social consultation requires the government to seek the views of interested civil society groups as well as with relevant government ministries about the effects of the proposed law. But private member’s bills skip that requirement and can go straight to the floor of the Parliament for a vote. Even though the Fourth Amendment was introduced by all of the MPs in the government’s parliamentary fraction and was voted on along strict party lines – with every member of the governing party’s bloc voting yes and everyone else either voting no or boycotting the vote – the government avoided open political debate on the bill by using the private member’s bill procedure.

The government has said that this fifteen-page comprehensive amendment to the still-new constitution was necessary because of previous decisions by the Hungarian Constitutional Court, in particular a ruling issued at the very end of 2012. This decision held that those parts of the Transitional Provisions of the Fundamental Law that are not transitional in nature could not be deemed part of the constitution, and were therefore invalid.<sup>17</sup> (Some elements of the Transitional Provisions were previously reviewed and criticized by the Venice Commission.<sup>18</sup>) In his letter to Mr. Thorbjørn Jagland, Secretary General of the Council of Europe, dated 7 March 2013, Mr. Tibor Navracsis, the Hungarian Minister of Public Administration and Justice argued that the main aim of the Fourth Amendment was to formally incorporate into the text of the Fundamental Law itself the provisions that were annulled for formal procedural reasons. He argued that the amendment is therefore, “to a great extent, merely a technical amendment to the Fundamental Law, and most of its provisions do not differ from the former text of the Transitional Provisions or they are directly linked thereto. Accordingly, the significance and novelty of this Proposal should not be overestimated.” Mr. József Szájer, the Fidesz member of the European Parliament who served as the official representative of the Hungarian government at the hearing before the Commission on Security and Cooperation in Europe (U.S. Helsinki Commission) on 19 March 2013 went even further, claiming that the

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<sup>17</sup> Decision 45/2012. (XII. 29.)

<sup>18</sup> See Opinion 664/2012 on the Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and legal Status of Churches, Denominations and Religious Communities



amendment was “basically a copy-paste exercise of a purely technical nature” done at the request of the Court itself.<sup>19</sup>

These statements are misleading. In its decision of 28 December 2012, the Constitutional Court did not review the substance of the Transitional Provisions, since the petition of the ombudsman had not requested such a review. Instead of requesting that the nullified provisions be reinserted into the constitution as an amendment, the Court only said that, if the Parliament wanted a provision to be part of the constitution, it was not enough to declare that the Transitional Provisions had constitutional status. Instead, the Parliament had to use the formal procedure laid out in the constitution to make a constitutional amendment. The Court did not tell the government to put the annulled provisions back into the constitution.

In fact, the ruling on the Transitional Provisions made it possible for the Constitutional Court to review the substance of some of the cardinal laws that said the same thing as the corresponding parts of the Transitional Provisions. Most of the provisions struck down by the Constitutional Court when it reviewed the Transitional Provisions were also embedded in cardinal laws that the Parliament had passed earlier, and with these provisions now “demoted” from constitutional status by the Court’s ruling, the Court then undertook to review the almost identical provisions in the cardinal laws. Among these reviewed and annulled laws was one on voter registration, which the Court found unconstitutional on substantive grounds because it constituted an unnecessary barrier to voting.<sup>20</sup>

At the time that the Fourth Amendment was submitted to the Parliament, a decision on the constitutionality of the cardinal law on the status of churches was expected and the Court did in fact issue its ruling on 26 February 2013<sup>21</sup> declaring unconstitutional parts of the law regulating the parliamentary registration of churches. These provisions had been first enacted as a law in 12 July 2011, were struck down by the Constitutional Court on procedural grounds in December 2011<sup>22</sup>, and then reinserted into the Transitional Provisions one week after the Constitutional Court struck down the law. This section of the Transitional Provisions was then struck by the Court again in December 2012 because the provision failed to guarantee

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<sup>19</sup> Mr. Szájer’s testimony can be found at [http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord\\_id=539&ContentType=H,B&ContentRecordType=H&CFID=22872555&CFTOKEN=58422914](http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord_id=539&ContentType=H,B&ContentRecordType=H&CFID=22872555&CFTOKEN=58422914) .

<sup>20</sup> Decision 1/2013. (I. 5.). *AB*

<sup>21</sup> Decision 6/2013. (III. 1.) *AB*

<sup>22</sup> Decision 164/2011. (XII. 20.) *AB*

procedural fairness in the parliamentary process through which churches were certified. Within a week, the annulled provisions were again added to a constitutional amendment, the Fourth Amendment, and this time it was insulated from Constitutional Court review by the section of the Fourth Amendment that prohibits the Court from substantively evaluating constitutional amendments.

The fact that the government was defeated in the voter registration and church registration cases shows that, even though the Fidesz government by that time had elected seven of the 15 judges with the votes of their own parliamentary bloc, these judges were still not in a reliable majority within the Court.<sup>23</sup> That may have provided a reason for the government to want to limit the Court's influence even further.

In response to these decisions, the Fourth Amendment elevated the annulled permanent provisions of the Transitional Provisions into the main text of the Fundamental Law, with the intention of excluding further constitutional review, while the amendment also prohibited the Constitutional Court from reviewing the substantive constitutionality of constitutional amendments. The Fourth Amendment therefore contained all of the annulled sections of the Transitional Provisions except the section on voter registration. Even though the Constitutional Court argued that the registration of churches by the Parliament does not provide a fair procedure for the applicants, this procedure will be constitutional in the future as the Fourth Amendment puts this procedure, previously declared unconstitutional, directly into the constitution itself and beyond the reach of the Constitutional Court. That effectively means a very serious restriction on the freedom to establish new churches in Hungary.

The Fourth Amendment also put into the constitution and beyond the reach of the Constitutional Court the power of the President of the National Judicial Office (NJO) to move cases from the court to which a case is assigned by law to a different court anywhere in the country that is less crowded. While the Constitutional Court did not have the opportunity to review the substance of this provision for constitutionality, the Court had previously struck

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<sup>23</sup> When it came to power in 2010, the Fidesz government changed the rules for nominating judges to the Court so that all of the recently elected judges were elected by the Fidesz two-thirds majority in the parliament without needing (and generally without getting) the support of any opposition parties. The government expanded the number of judges on the Court from 11 to 15 to give themselves even more seats to fill. When the Transitional Provisions and the Law on the Status of Churches were struck down by the Court in December 2012 and February 2013 respectively, seven of the 15 judges had been named by Fidesz since 2010. In February 2013, an eighth judge was added and in April 2013 a ninth Fidesz judge joined the bench.

down a similar provision giving that power to the Prosecutor General.<sup>24</sup> The Venice Commission had criticized the power of the president of the NJO to move cases<sup>25</sup> and the Hungarian government had added some restrictions on this power through amendments to the relevant cardinal law in summer 2012.

A number of statutory provisions that were previously annulled by the Constitutional Court have also become part of the Fourth Amendment. One of them authorizes the legislature to set conditions for state support in higher education, such as requiring graduates of state universities to remain in the country for a certain period of time after graduation if the state has paid for their education. The Constitutional Court had declared this unconstitutional in December 2012 because it violates both the right to free movement and the free exercise of occupation. The European Commission has expressed its concern over this restriction on the movement of Hungarian students in an “EU Pilot” letter to the government of Hungary in November 2012.<sup>26</sup>

Another reversal of a declaration of unconstitutionality is the authorization for both the national legislature and local governments to declare homelessness unlawful in order to protect “public order, public security, public health and cultural values.”<sup>27</sup> The Constitutional Court had declared the prohibition of homelessness as a status unconstitutional because it violated the human dignity of people who could not afford a place to live.<sup>28</sup> But the power to make homelessness unlawful has now been placed into the constitution and beyond the reach of the Constitutional Court so it cannot be reviewed again.

At the end of 2012, the Court had annulled the definition of the family in the law on the protection of families because it was too narrow, excluding all families other than very traditional ones consisting of opposite sex married parents with children.<sup>29</sup> Now the Fundamental Law will define marriage as taking place only between men and women. It will also establish the parent-child relationship as the basis of the family, excluding not only same-

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<sup>24</sup> Decision 166/2011 (XII. 20.) AB

<sup>25</sup> See Opinion 663/2012 on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts.

<sup>26</sup> <http://www.freehungary.hu/component/content/article/1-friss-hirek/1510-another-infringement-procedure-against-hungary.html>

<sup>27</sup> Fourth Amendment, Article 8.

<sup>28</sup> Decision 38/2012. (XI. 14.) AB

<sup>29</sup> Decision 43/2012. (XII. 20.) AB

sex marriage, but also all non-marital partnerships. The Fourth Amendment therefore overruled yet another Constitutional Court decision.

Under the old Constitutional Court jurisprudence, group libel laws were found to be an unconstitutional restriction on free speech.<sup>30</sup> The Fourth Amendment entrenched in the constitution those parts of the new Civil Code that permit private actions to remedy group libel, not only in the case of the protection of racial, religious and other minorities, but also where there are offenses “against the dignity of the Hungarian nation.” Since the Fourth Amendment annulled all of the case law of the Constitutional Court from 1990-2011, the addition of this provision to the constitution is not a direct contradiction of a recent case, but it is a jarring reversal of something that had been taken for granted in Hungarian constitutional law.

As part of the Fourth Amendment to the Fundamental Law, a new Article U has been adopted, which supplements detailed provisions on the country’s communist past and statute of limitations in the body text of the constitution. This new article, passed after 23 years of solid democracy and a working system of the rule of law, revisits the settlements made during the immediate transition from communist dictatorship to democracy by reopening possible cases against former communist officials. While the law could possibly serve the aim of accountability, in the only case opened so far (the Biszku case)<sup>31</sup>, it in fact represents victors’ justice, by weakening the ruling party Fidesz’s political rival, the Socialist Party (the successor of the Communist Party).

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<sup>30</sup> Decision 96/2008. (VII. 3.) AB

<sup>31</sup> Béla Biszku, who had played a key role as Minister of Interior between 1957 and 1961 in the reprisals against the participants of the 1956 revolution was charged with crimes, which were subject to the statute of limitations. Therefore, the Parliament enacted a law, called in the media “Lex Biszku”, which translated the definition of crimes against humanity of the Nuremberg Statute into Hungarian and explicitly authorized the Hungarian courts to prosecute them, without defining the contextual elements of crimes against humanity and also criminalizing the violation of common Article 3 of the Geneva Conventions in contravention to the nullum crimen principle. Moreover, the law introduced the category of “communist crimes” and declared that the commission or aiding and abetting of serious crimes such as voluntary manslaughter, assault, torture, unlawful detention and coercive interrogation is not subject to a statute of limitations when committed on behalf, with the consent of, or in the interest of the party state. This provision clearly replicates the one that was found unconstitutional by the Constitutional Court in 1992. Based on the new law Béla Biszku was the only person convicted for being a member of the interim executive committee of the communist party which set up a special armed force in order to “maintain order” and act with force against civilians if need be. The court acquitted the defendant regarding the most serious charge, and found him guilty only of complicity and two unrelated petty crimes: abuse of ammunition and the denial of the crimes of the communist regime. For these minor crimes, he was sentenced for two years imprisonment suspended for three years. The verdict was still not final, because the prosecution appealed for a heavier judgment, while the defendant asked for total acquittal, but after the verdict was made public the defendant died.

Article U(1) states that the pre-1989 Communist Party (the Hungarian Socialist Workers' Party) and its satellite organizations that supported the communist ideology were "criminal organizations" whose leaders carry a liability that is "without a statute of limitations." In sections 7 and 8, however, that broad statement is contradicted by provisions that define a mechanism for the interruption and tolling of the statute of limitations for communist-period crimes that had not been prosecuted.

Furthermore, the Fundamental Law includes a very broad and general liability for a number of past acts, including destroying post-WWII Hungarian democracy with the assistance of Soviet military power; the unlawful persecution, internment, and execution of political opponents; the defeat of the 1956 October Revolution; destroying the legal order and private property; creating national debt; "devastating the value of European civilization"; and all criminal acts that were committed with political animus and had not been prosecuted by the criminal justice system for purely political motives.

Article U(2) and U(3) call for the remembrance of the communist past and create a new national committee to document national memory in this regard. New Article U(4) provides that former communist leaders are public persons in respect to their past political actions and as such must tolerate public scrutiny and criticism, except for deliberate lies and untrue statements, as well as disclosure of personal data linked to their functions and actions. New Article U(5) provides grounds for new legislation that reduces the pensions and other benefits of specific leaders of the communist dictatorship. This provision appears to contradict Constitutional Court decision 43/1995, which held that people could not be denied pension payments after they had paid, as they were required to do, into the state pension scheme. But that decision, together with all others made prior to the coming into force of the Fundamental Law, has been annulled by the Fourth Amendment.

Article U(6) through (8) relate to the tolling and interruption of the statute of limitations for specific serious crimes that Article U(1) seems to say are not time barred. There is as of yet no law that defines which crimes are serious enough to justify removal of all time limitations on prosecutions and which are subject to the newly reset clock for prosecutions. These provisions contradict the Constitutional Court's declaration in its decision 11/1992 that this sort of extension of the statute of limitations is unconstitutional. Yet, Article U(9) bars

compensating victims of the communist period, by ruling out passage of any new laws that might provide compensation to individuals for harms caused to them during the period that will be reexamined through cases. To reverse course after 23 years puts those who may be prosecuted long after the fact at a very distinct disadvantage. More than two decades is a very long period of time after which to question the legal framework of the statute of limitations for the types of criminal acts in question. Such provisions may not run afoul of the time-honored doctrine of *nullum crimen sine lege*, but they may nonetheless constitute violations of rights to due process of law.

Due to international pressure the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the Council of Europe and the European Parliament. The changes left in place provisions that undermine the rule of law and weaken human rights protection. The Hungarian Parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013.<sup>32</sup> Hungary's reasoning stated that the amendment aims to "finish the constitutional debates at international forum". A statement from the Prime Minister's Office said: "The government wants to do away with those... problems which have served as an excuse for attacks on Hungary," Here are the major elements of the amendment:

- a) Regarding political campaigns on radio and television, commercial media broadcasters are able to air political ads, but they must operate similar to public media channels – i.e., distribution of air time for political ads should not be discriminatory and should be provided free of charge. But since commercial media cannot be obliged to air such ads, it is unlikely that commercial outlets would agree to run campaign ads without charge.
- b) Regarding recognition of religious communities (in line with the relevant cardinal law), the amendment emphasized that all communities are entitled to operate freely, but those who seek further cooperation with the state (the so-called 'established churches') must still be voted upon by Parliament to receive that status. This means that the amendment did not address discrimination against churches the government

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<sup>32</sup> Both the foreign and Hungarian Human Rights NGOs said that the 'amendments show the government is not serious about fixing human rights and rule of law problems in the constitution'. See the assessment of Human Rights Watch: <http://www.hrw.org/news/2013/09/17/hungary-constitutional-change-falls-short>, and the joint opinion of three Hungarian NGOs: <http://helsinki.hu/otodik-alaptoerven-modositas-nem-akarsnak-nyoges-a-vege>

has not recognized. Parliament, instead of an independent body, confers recognition, which is necessary for a church to apply for government subsidies.

- c) The provision that enabled the government to levy taxes to settle unforeseen financial expenses occurring after a court ruling against the country – such as the European Court of Justice – was also removed, but the reasoning added that the government is always free to levy new taxes, and this amendment will cost Hungarian taxpayers at least 6 billion Forints in the next 5 years.
- d) The amendment created a chance for the merger of the central bank (MNB) and the financial watchdog institution (PSZÁF).
- e) Although the amendment elevated some provisions of a self-governing supervisory body, the National Judicial Council, to the level of the constitution, and slightly strengthened the Council's powers, it still left key tasks of administering the courts with the National Judicial Office.
- f) One positive amendment removed the power of the president of the National Judicial Office to transfer cases between courts – a change already made on the statutory level, but since the head of the Office was already able to appoint new judges loyal to the government all over the country, the transfer power is no longer necessary to find politically reliable judges.

### **3. The Sixth and the Seventh Amendments**

1. In June 2016, as part of the Hungarian government's anti-migration policy the National Assembly representatives of the Fidesz-KDNP governing alliance and the radical-nationalist opposition party Jobbik approved the *Sixth Amendment* to the Fundamental Law. This amendment authorizes the National Assembly to declare, at the initiative of the government, a "terrorism state of emergency" (terrorveszélyhelyzet) in the event of a terrorist attack or a "significant and direct danger of a terrorist attack" (terrortámadás jelentős és közvetlen veszélye). In March 2017, the Hungarian Parliament passed an amendment to the Asylum Act that forced all asylum seekers into guarded detention camps. While their cases are being decided, asylum seekers, including women and children over the age of 14, will be herded

into shipping containers surrounded by a high razor-fence on the Hungarian side of the border<sup>33</sup>.

With these legislative measures adopted, the government started a campaign against the EU's relocation plan. The first step was a referendum initiated by the government. On 2 October 2016, Hungarian voters went to the polls to answer one referendum question: "Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?". Although 92 % of those who casted votes and 98 of all the valid votes agreed with the government, answering 'no' (6 % were spoiled ballots), the referendum was invalid because the turnout was only around 40 percent, instead of the required 50 percent.

Despite the fact that at the time of the referendum the idea of a constitutional amendment was not on the table, arguing with the 3.3 million Hungarians who voted in favor of the anti-EU referendum, Prime Minister Orbán introduced the Seventh Amendment to defend Hungarian constitutional identity to politically legitimise non-compliance with EU law in this area. The draft amendment touched upon the National Avowal, the Europe clause and the provision on the interpretation of the Fundamental law in the Foundation part, and the provision on prohibition of expulsion of Hungarian citizens and the collective expulsion of foreigners in the part on Freedoms and Responsibilities.<sup>34</sup>

The proposal was to add a new sentence to the National Avowal, following the sentence, "We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation". The new sentence would read: "We hold that the defence of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state."

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<sup>33</sup> On March 14 2017 the European Court of Human Rights found that the detention of two Bangladeshi asylum-seekers for more than three weeks in a guarded compound without any formal, reasoned decision and without appropriate judicial review had amounted to a de facto deprivation of their liberty (Article 5 of the Convention) and right to effective remedy (Article 13). The Court also found a violation of Article 3 on account of the applicants' expulsion to Serbia insofar as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman and degrading treatment (Judgment of 14 March, 2017 in the case of Ilias and Ahmed v. Hungary, Application no. 47287/15). We should take into account that this unlawful detention of the applicants in the transit zone was based on less restrictive rules enacted in 2015.

<sup>34</sup> The National Avowal is the preamble of the 2011 Fundamental Law of Hungary, the Foundation part contains the main principles, while the Rights and Responsibilities part contains the fundamental rights and obligations.



Paragraph 2 of the Europe clause (Article E) of the Fundamental Law would be amended to read: “Hungary, as a Member State of the European Union and in accordance with the international treaty, will act sufficiently in accordance with the rights and responsibilities granted by the founding treaty, in conjunction with powers granted to it under the Fundamental Law together with other Member States and European Union institutions. *The powers referred to in this paragraph must be in harmony with the fundamental rights and freedoms established in the Fundamental Law and must not place restrictions on the Hungarian territory, its population, the state, or its inalienable rights.*” (new sentence in italics)

A new paragraph 4 would be added to Article R: “(4) It is the responsibility of every state institution to defend Hungary’s constitutional identity.”

The following new Paragraph 1 was planned to be added to Article XIV: “(1) No foreign population can be settled into Hungary. Foreign citizens, not including the citizens of countries in the European Economic Area, in accordance with the procedures established by the National Assembly for Hungarian territory, may have their documentation individually evaluated by Hungarian authorities”.

All 131 MPs of the Fidesz-KDNP governing coalition voted in favour of the proposed amendment, while all 69 opposition MPs either did not vote (66 representatives) or voted against the amendment (3 representatives). The proposed amendment thus fell two votes short of the two-thirds majority required to approve amendments to the Fundamental Law. Although Jobbik in principle supported the proposed Seventh Amendment, the party’s MPs did not participate in the vote because the government had failed to satisfy Jobbik’s demand that the Hungarian Investment Immigration Program, which grants permanent residence in Hungary to citizens of foreign countries who purchase 300,000 euros in government ‘residency bonds’, be repealed.<sup>35</sup>

After the failed constitutional amendment, the Constitutional Court, loyal to the government, came to the rescue of Orbán’s constitutional identity defence of its policies on migration. The Court carved out an abandoned<sup>36</sup> petition of the also loyal Commissioner for Fundamental

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<sup>35</sup> During the vote on the amendment, Jobbik MPs displayed a sign referring to the program reading “He [or she] Is a Traitor Who Lets in Terrorists for Money!”

<sup>36</sup> The Constitutional Court has no deadline to decide on petitions.

Rights, filed a year earlier, before the referendum was initiated. In his motion, the Commissioner asked the Court to deliver an abstract interpretation of the Fundamental Law in connection with the Council Decision 2015/1601 of 22 September 2015<sup>37</sup>. (A more detailed analysis of the Constitutional Court's decision see below, under chapter IV.)

2. After the April, 2018 parliamentary elections, when Fidesz regained its 2/3 majority, on 20 June the government finally enacted the *Seventh Amendment*, this time with the votes of Jobbik. Besides the failed provisions on constitutional identity the Amendment contains other topics as well from freedom of assembly though establishing special administrative courts till the entrenchment of 'Christian culture' to be protected by state authorities.

2. 1. One of the issues of the amendment is the continued struggle against immigration by forbidding settlement of foreigners in the country en masse: "No alien population shall be settled in Hungary". (New Article XIV Section (1) of the Fundamental Law). For this reason, the 'Stop Soros' legislative package, named after Hungarian-American philanthropist George Soros enacted together with the amendment criminalizes NGOs and activists aiding 'illegal migrants in any way.'<sup>38</sup> According to Justice Minister László Trócsányi migration threatens the 'self-identity' of Hungarians the Seventh Amendment supplemented the preamble of the constitution, called National Avowal with the following text: "We hold that it is a fundamental obligation of the state to protect our self-identity rooted in our historical constitution."<sup>39</sup> Also Article R was supplemented with the following Section (4): "All bodies of the State shall protect the constitutional identity of Hungary." In order to make any further European Union joint effort, similar to the relocation plan of the Council to solve the migration constitutionally questionable Section (2) of Article E (the so-called EU clause) was

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<sup>37</sup> The petition was based on Section 38 para. (1) of the Act CLI of 2011 on the Constitutional Court, which reads: "On the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a concrete constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law".

<sup>38</sup> In its Opinion, adopted on 22-23 June, two days after the enactment of the 'Stop Soros' bill, but leaked to the BBC prior to the vote in the Hungarian Parliament the Council of Europe's Venice Commission recommended to repeal the provision of the law on illegal migration, because it „criminalizes organizational activities which are not directly related to the materilaization of the illegal migration.” CDL-AD(2018)013-e Hungary - Joint Opinion on the Provisions of the so-called "Stop Soros" draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018).

<sup>39</sup> As I will show in chapter IV, the Hungarian historical constitution did not follow the English example, which was the model of an organic, progressively reformed basic law, but its dominant approach was rather authoritarian.

replaced with the following wording: the joint exercise of certain powers with the EU “shall not limit Hungary’s inalienable right of disposal related to its territorial integrity, population, form of government and governmental organisation.”

2. 2. The original provision of Article R Section (3) already prescribed that “The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievement of our historical constitution.” Due to the Seventh Amendment the constitutional self-identity and the Christian culture of Hungary will already be a binding element of constitutional interpretation, but the new text of Article 28 commits the courts to use of the legal reasoning of laws and their amendments. Since it isn’t the legislature itself, but the initiator of bills, in most of the cases the government who encloses reasoning to the drafts, their reasoning binds the courts while interpreting the Fundamental Law.

2. 3. The amended text of Article VI limits freedom of assembly and freedom of expression by defending the private and family life of others: “Everyone shall have the right to have his or her private and family life, home, communication and good reputation respected. The exercise of freedom of expression and the right of assembly shall not harm others’ private and family life and their homes.” Shortly after the adoption of the amendment the Parliament also enacted a new law on the Protection of Private Life. The antecedent of these limitations was a planned demonstration in front of Prime Minister’s Orbán residency in December 2014 by a group of people dissatisfied with the government’s action regarding the losses of those taken mortgages in foreign currencies. Despite the fact that the that time law did not explicitly proscribed demonstrations in front of politicians’ houses, both the ordinary and the Constitutional Court concurred with the police’s ban. However, the Constitutional Court in its decision instructed Parliament to harmonize regulations of privacy and freedom of assembly.<sup>40</sup>

2. 4. Due to a last minute addendum to the draft Seventh Amendment by a group of Fidesz MPs, another new provision of the Fundamental Law makes homelessness illegal: “It is forbidden to live in public places on a permanent basis.” The explanation to the provision says that the state “must safeguard to use of public places”, and that the municipalities “will

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<sup>40</sup> Decision 13/2016. (VII. 18.) AB

attempt to offer accommodation to all homeless persons.” This provision also has a special precedent in the history of Fidesz’ illiberal agenda. Following a Fidesz-majority Budapest city council’s local ordinance that banned homelessness from public places, the Orbán government extended the ban to the entire country. In November 2012 the Constitutional Court found the law unconstitutional<sup>41</sup>. The already mentioned Fourth Amendment added the following Section 3 to Article XXII of the Fundamental Law: “In order to protect public order, public security, public health and cultural values, an Act or a local government decree may, with respect to a specific part of public space, provide that staying in public space as a habitual dwelling shall be illegal.” The new provision gives an authorization also to national bodies even to criminalize homelessness in a country of ‘Christian culture.’

2. 5. In the future all cases concerning demonstrations and homelessness, as well other issues important for the government, such as access to information of public interest, or electoral law disputes will be handled by the administrative courts, also established by the Seventh Amendment to the Fundamental Law. The amendment establishes the Administrative High Court as a new supreme court for administrative cases, parallel to the Curia, the supreme judicial organ of regular courts. Establishing a parallel judicial structure for administrative issues is of course not unprecedented but the actual cause of the change and the increased chance made possible by a ministerial decree from 2017 of former civil servants to be appointed for administrative court judges makes the government’s true intention suspicious. During the 2018 election campaign PM Orbán harshly criticized an electoral law judgment of the Curia being disadvantageous for Fidesz, claiming that “the Curia was not up to its task intellectually.”<sup>42</sup>

#### **4. No Judicial Review of Constitutional Amendments**

1. In July 2010, the new Hungarian government elected in April adopted a law<sup>43</sup> that imposed a so-called ‘special-tax’ on severance, bonuses and other rewards for state employees who left the public service and received such financial benefits in excess of 2 million forints (~\$9,000).

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<sup>41</sup> Decision 38/2012. (XI. 14.). AB

<sup>42</sup> See D. G. Szabó, ‘Criminalizing Migrants’ Helpers and Establishing Special Administrative Courts in Hungary’, *Diritti Comparati*, June 22, 2018.

<sup>43</sup> Act XC on the creation or amendment of certain economic and financial laws (2010. XC. tv. Egyes gazdasági és pénzügyi tárgyú törvények megalkotásáról, illetve módosításáról).

The tax rate was set at 98% and was to be retroactively applied to all money paid out over the preceding year. The government argued that its predecessor had used severance payments as an instrument for rewarding political loyalists in the public service. At the same time, the punitive tax rate applied not only to the presumed target group of high level former civil servants but also to teachers, doctors and other professional groups who had received such benefits after decades of service.

In October the Constitutional Court struck down the special tax in a unanimous decision.<sup>44</sup> Noting that justice demands the measure, the government at the very day of the decision introduced amendments to the Constitution allowing retroactive legislation in certain cases, and removing the Constitutional Court's jurisdiction to review laws pertaining – among other things – to budgetary and tax policy. According to the latter amendment the constitutional court judges can only review these financial laws from the perspective of those rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship), that they typically cannot breach. This withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been restricted based on the object of the legal norms to be reviewed. Therefore, in the case of laws that are not reviewable by the court, the requirement that the constitution be a fundamental law, and that it be binding on everyone, is not fulfilled.

Together with the constitutional amendment the government also reintroduced the nullified law with unchanged provisions, even expanding its retroactive application to the preceding five years.<sup>45</sup> In response to various petitions seeking to invalidate both of the government's constitutional amendments, the Court soon came to face with the question of whether these

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<sup>44</sup> Constitutional Court decision 184/2010. (X. 28.)

<sup>45</sup> Ultimately, the Court found a 'loophole' in the constitutional amendment limiting its jurisdiction and nullifying the act again in May 2011, citing a violation of human dignity. At the same time, in the context of many other laws its diminished jurisdiction did stop the Court from intervening. Ultimately, the retroactive effect of the law was greatly reduced, as it only applied to the beginning of 2010 rather than to 2005, as the government's second proposal on the issue intended (Constitutional Court decision 37/2011. (V. 10.)). One of the civil servants also filed a petition with the European Court of Human Rights, complaining in particular that the imposition of a 98 per cent tax on part of her severance pay under a legislation entered into force ten weeks before her dismissal had amounted to an unjustified deprivation of property. In its Chamber judgment of May 14, 2013 in the case of *N.K.M. v. Hungary* (application no. 66529/11), the European Court of Human Rights held, unanimously, that the 98 per cent tax on part of the severance pay of a Hungarian civil servant violated her right to peaceful enjoyment of property, and therefore there had been a violation of Article 1 of Protocol No. 1 (protection of property) of the European Convention on Human Rights.

measures were unconstitutional and if it had the authority to review it. It issued a decision in July 2011, a year after the retroactive special tax was first adopted.

After a presentation of the wide-ranging package of petitions and of the constitutional amendments impugned by the latter, as well as the legal and constitutional provisions that the petitions cited in support of their arguments, the opinion of the majority decision issued by the Hungarian Constitutional Court, written by Judge Mihály Bihari, begins with the Constitutional Court's jurisdiction to review constitutional amendments. The reasoning on this issue is introduced by a comparative analysis that is meant to buttress the majority position, but is tendentious, one-sided, and lacking in any type of scientific foundation.<sup>46</sup> The selectiveness of the examples in the comparative framework is best demonstrated by the fact that even though the analysis focuses on the "constitutional courts of countries following the so-called European model of (centralized) judicial review," it conveniently 'forgets' to mention the Italian and Czech constitutional courts, and from outside Europe also the Indian Supreme Court, which – as we saw – has the most expansive jurisprudence in this area, as well as the South African and Columbian Constitutional Courts, and the Peruvian, Brazilian, Sri Lankan and Nepalese Supreme Courts. But the analysis also might have mentioned Azerbaijan, Kyrgyzstan, Moldova and the Ukraine among the successor states of the USSR.<sup>47</sup> If the judge who delivered the opinion had understood the concept of unconstitutional constitutional amendments, and the closely related issue of the function of eternal constitutional clauses, then he would have realized that it makes more sense to look for examples in the those Asian, African, Latin American and European countries that – like Hungary – seek to prevent the return of a totalitarian regime by limiting total sovereignty when it comes to amending or drafting a constitution. (That is why it should be hardly surprising to find that such legacies are absent in the Western European states that are fortunate enough not have such a historical background.)

The second serious distortion in the comparative analysis is the argument that – according to the judge delivering the opinion – is meant to substantiate the majority position and claims that

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<sup>46</sup> This is not the first time that the Constitutional Court has employed selective comparisons to bolster its position. This is what happened in decision 154/2008. (XII. 17.), which struck down registered partnership for heterosexuals partners. For a critical analysis see G. Halmai & E. Polgári & P. Sólyom & R. Uitz & M. Verman, 'Távol Európától. Kiemelt védelem alacsony színvonalon' ['Far from Europe. A low level of preeminent protection'], *Fundamentum*, 2009/1, pp. 89-108.

<sup>47</sup> On the solutions employed by the successor states of the former USSR, see the Venice Commission's report: *Report on Constitutional Amendment*. Adopted by the Venice Commission at its 81<sup>st</sup> Plenary Session (Venice, December 11-12, 2009); [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)001-e.asp#P310\\_43455](http://www.venice.coe.int/docs/2010/CDL-AD(2010)001-e.asp#P310_43455).

the German Federal Constitutional Court has never reached a conclusion of unconstitutionality as a result of judicial review, while the others also have only rarely arrived at such a determination. Apart from the fact that this is not even true with regard to the Indian Supreme Court – left out of the analysis –, which has found Prime Minister Indira Gandhi’s comprehensive constitutional reforms antithetical to the basic structure of the Indian Constitution, it is also irrelevant with regard to examining the issue of jurisdiction. Even if no constitutional amendment had ever been nullified, the underlying constitutional issue to be decided would still be whether and how the judicial limitation of the power to amend the constitution could be substantiated. Obviously the Court needs not ‘strain itself’ with investigating this if the constitution were to expressly grant it such powers. In the absence of these, however – for example in the case of the Hungarian Constitution – the body performing judicial review must itself find a solution to this dilemma by interpreting the constitution.<sup>48</sup> The simplest method for so doing – which was a possibility that was open to the Constitutional Court judges – is the Austrian solution, which posits that since the constitutional court’s right of review extends to all laws, and since laws of a constitutional rank (and in the Hungarian domestic context acts amending the Constitution) are also laws, the jurisdiction is evident.

The majority opinion on the merits begins with an examination of procedural validity, in other words with the investigation of the eventual failures of the law-making process. In so doing, the body subjected to intense criticism the constitutional amendment practices of the Parliament constituted on 14 May 2010. Up to the point when the decision in question was handed down by the Court, Parliament had adopted ten constitutional amendments within 13 months (and nine within seven months), which affected 33 provisions of the Constitution. (In other words it would be no exaggeration to say that even before adopting the Basic Law (i.e. the new constitution) on 18 April 2011, and in fact partially even subsequently, Parliament substantially transformed the state’s constitutional order.) Of these amendments only two were proposed by the government – or rather the Minister for Public Administration and Justice acting in the government’s name, the rest – including the restriction of the powers of the Constitutional Court, the special tax that was to be effective retroactively covering a five-year period, the reduction in the number of MPs, the elevation of the National Media and Infocommunications

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<sup>48</sup> That is why it is difficult to understand why the opinion of the majority decision says “it needs to be emphasized, however, that in all these cases it is either the given state’s constitution that determines the constitutional court’s right to undertake constitutional (amendment) review, or the judicial body protecting the constitution itself expands – without express constitutional authorization to do so – its jurisdiction to include constitutional review.” Indeed. *Tertium non datur*.

Authority to a constitutional level – were adopted in response to bills presented by individual MPs, and were in several cases passed with high priority, resulting in a shorter than usual procedure of law-making.

As far as the legal basis for the jurisdiction to determine the unconstitutional nature of the constitutional amendment process is concerned, the majority reasoning does not waste much space on explaining why it changes – as it happens, fortuitously – its hitherto generally rejecting jurisprudence, it merely notes: “[I]t is not possible to rule out the Constitutional Court’s jurisdiction with regard to the review of the procedural invalidity of constitutional provisions, since unlawfully or even unconstitutionally adopted legal provisions that suffer from constitutional invalidity are considered automatically void, as if they had never been created in the first place.”

The only question the opinion fails to clarify is the following: if from a procedural angle a constitutional amendment is considered a law, then why is it not considered a law in terms of substance, that is if it may be reviewed as a law in one respect, then why not in the other. Two voices coming from opposite ends point out this contradiction, or more specifically this lack of real reasoning. In his concurring opinion joined by the Court’s president, Péter Paczolay, Judge István Stumpf recommends dismissing the examination of both, procedure and merits, while in his dissent András Bragyova proposes that both should have been undertaken,

In the examination of procedural unconstitutionality, the majority notes that the amendment procedures raise ‘problems of legitimacy’ because the necessary consultations (for example with the Constitutional Court regarding the consequences of limiting its powers) failed to take place, and even goes as far as to say that the successive amendment of the Constitution, performed with the aim of realizing or achieving current political interests and ends, is highly disconcerting with respect to the requirements of democratic rule of law because it jeopardizes the stability of the Constitution. Based on the above, the majority notes: the procedure “obviously fails to fully satisfy the requirements of democratic rule of law.” This formulation is somewhat reminiscent of Mikhail Bulgakov’s ‘sturgeon of second freshness’ at the buffet in *The Master and Margarita*; according to the majority of the Hungarian Constitutional Court’s judges, however, this fish is edible, as the final verdict ends up saying that “formally the procedure has meet the procedural rules laid out in the Constitution and the Act on legislation.” Hence the judicial body denied the petition seeking to obtain a judgment of invalidity on



procedural grounds. As far as satisfying the requirements of the Act on legislation, for instance, the opinion itself states that the consultations prescribed by said act have failed to take place. Thus a more thorough, circumspect reasoning might have at least touched upon the question of why the procedural requirements of the Act on legislation are not constitutional requirements. For example in a rather extreme situation in which an MP introduced a constitutional amendment on a Wednesday without a preliminary process, without previous consultations or an impact study, etc., the amendment was adopted in a vote on Thursday, was promulgated on Friday, and entered into effect on Monday.

This lack of intellectual depth also extends to the substantive constitutional examination, which is to a significant degree based on the fallacious thesis that since the Hungarian Constitution does not contain any immutable provisions, the Constitutional Court does not have a standard against which to assess the substance of the constitutional amendments. Only few constitutions contain explicit ‘eternal clauses,’ however. The most famous is undoubtedly the German *Grundgesetz*’s Article 79 (3), but as we saw above even this provision lacks an explicit jurisdictional rule that would authorize the Federal Constitutional Court to protect the immutable constitutional provisions during the process wherein constitutional amendments are enacted. It was the judges of the Court in Karlsruhe who endowed themselves with this power by construing the *Grundgesetz* accordingly. The same was true of most judicial bodies which – acting as guardians of their respective constitutions – in the process of reviewing constitutional amendments derived this jurisdiction for themselves even without an ‘eternal clause.’ The most prominent example is the Indian Supreme Court’s doctrine on the ‘basic structure’ of the Constitution, which the Court used for the purposes of providing a basis for conducting a review even without an unchangeable rule and without express constitutional authorization to do so. Naturally, those who – like the author of the majority opinion – use the instrument of comparative law selectively from the start by acknowledging only solutions that buttress their thesis could easily arrive at the conclusion – which is completely divorced from the facts – that “constitutional courts generally tend to refrain from establishing for themselves the jurisdiction to review the constitution.” (Another distortion is manifest in the terminology employed by the majority reasoning, which consistently refers to reviewing the constitution, rather than reviewing constitutional amendments, even though a review is possible before these amendments enter into effect; indeed, even a deferment of their entry into effect is conceivable in the interest of conducting a review.) Thus in spite of the fact that the petitioners offered

several standards for review, from the ‘invisible constitution’<sup>49</sup> over the essence and the fundamental values of the democratic state on the rule of law all the way to the *ius cogens* norm and fundamental principle – generally recognized legal principle – of international law, the majority – at least in the context of reviewing the substance of the amendments – has adhered to its previous jurisprudence. They dismissed the petitions even though the Court’s reasoning contains the following passages: “Based on the principles enshrined in international agreements, the Hungarian Constitution has immutable parts whose immutability is not based on the will of the Constitutions’ creators, but rather on *ius cogens* and those international agreements to which the Republic of Hungary is party. [...] The norms, principles and fundamental values of *ius cogens* together constitute a standard that all future constitutional amendments and constitutions need to satisfy.”

In these words the majority binds not only the constitutional amendments reviewed here to these standards, but even the Basic Law adopted on 18 April 2011. At the same time it appears that the majority believes that it is not within the powers of the Constitutional Court to ensure that the constitutional amendment (or the new constitution) satisfy these standards, meaning that there is effectively no way to enforce them. Judge Péter Kovács – and he is joined by Mihály Bihari, the Constitutional Court judge who delivered the decision –, however, notes that

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<sup>49</sup> The concept of an invisible constitution was developed by the former president of the Constitutional Court, László Sólyom. The idea behind it is that the Court’s jurisprudence offers a theoretical framework for evaluating the question of constitutionality, thus complementing the text of the Constitution, and in fact, superseding it when the latter is amended in a way that violates crucial constitutional values. In introducing the notion, Sólyom wrote the following in his concurring opinion on the death penalty in 23/1990. (X. 31.): “The Constitutional Court must continue the work of laying down the theoretical foundations of the Constitution and the rights enshrined therein, and to create a coherent system through its decisions. This system may stand above the Constitution – which is still often amended to satisfy current political interests – as an ‘invisible constitution,’ serving as a stable measure of constitutionality. In so doing, the Constitutional Court enjoys a latitude as long as it remains within the conceptual confines of constitutionality.” ...While it is true that the comments irritating politicians were not repeated by Sólyom, the content has never been negated. In an interview he said: “I have never denied that our constitutional jurisdiction, especially in the ‘hard cases’.... is at the borderline of constitution writing.” (G. A. Tóth, ‘A ‘nehéz eseteknél’ a bíró erkölcsi felfogása jut szerephez. Beszélgetés Sólyom Lászlóval, az Alkotmánybíróság elnökével’ [In the ‘difficult cases’ the judge’s moral views come into play. A conversation with László Sólyom, the president of the Constitutional Court], *Fundamentum*, No. 1, 1997, p. 37). This was underlined in another interview that he gave in 1998, before his end of term. He was elaborating on the misinterpretation of the term ‘invisible constitution’ when the journalist confronted him with the question whether the metaphor should be unsaid all together, the response was: “No, what I have written, is there. In those days the constitution was amended month by month, depending on the political climate. For this reason I wanted to point out that the Constitution is of a higher nature: a firm system based not only on technical rules but on values too. Our decisions were meant to express this value system; to clarify, to expose, to use; because from the one line paragraphs and brief sentences one cannot see it. Some focus purely on the letter in their constitutional adjudication, I have seen it both in Europe and Asia.” (Cs. Mihalicz, Interjú Sólyom Lászlóval, az Alkotmánybíróság volt elnökével [Interview with László Sólyom, former President of the Constitutional Court], , *BUKSZ*, Winter, 1998, p. 438.)

if the constitutional amendment were to contravene or grossly violate an international legal obligation that Hungary had assumed, and which was impossible to withdraw from due to the legal or political bearings of the obligation in question, and if this conflict could not be resolved by constitutional interpretation, then the Constitutional Court would be entitled to review it. What the opinion fails to address or answer, however, is whether for example the requirements concerning democratic rule of law in Article 2 of the Treaty on the European Union constitute such obligations, and whether the impugned constitutional amendments violate these requirements. In his concurring opinion, even Judge István Stumpf – who evidently believes that the dismissal of all petitions would have been the right course – points out the contradiction between the operative part of the decision that dismisses the petition and the above-cited reasoning. If that was not in fact his view, but in reality he thought that a substantive review of the constitutional amendments was warranted, then at least as far as this particular issue was concerned he would have attached a dissenting rather than a concurring opinion to the majority stance.

Nevertheless, in spite of dismissing the petition on account of lacking jurisdiction, the majority opinion does reserve the Court a signalling right – or rather obligation – which is just as absent from the Constitution as the possibility of judicial review. Indeed, even the standard formulated as the constitutional basis for this obligation is nowhere to be found in the written text of the Constitution. (In describing ‘constitutional protection through signalling’ as a phenomenon that is beyond the ‘Constitutional Court’s normative jurisdiction,’ Judge András Holló evinces a keen appreciation of the fact that signalization is situated outside the Constitution. In other words it appears that there are indeed jurisdictions outside the Constitution.) And this standard reads as follows: “[T]he attained level of constitutional protection of rights and its system of guarantees may not be diminished.” As an example, the opinion invokes a scenario wherein the limitation of the jurisdiction of the Constitutional Court goes as far as to upset the system of separation of powers that is based on checks and balances. What it fails to address, however, is when such a point is reached, nor does it explain whether the present amendment has upset said balance. The only specifically mentioned example is a situation in which the constituent power wishes to adopt a legal provision, which had previously been nullified by the Constitutional Court, by putting it into the constitution. As we discussed above, that is exactly what happened in 1990 with the restrictions on suffrage that had been declared unconstitutional, without the Constitutional Court indicating this to the constituent power.

With regard to the two principal constitutional amendments impugned by petitions, the restriction of the Constitutional Court's jurisdiction and the retroactive special tax, the majority indicated to the constituent power that there are contradictions between the new provisions and some of the Constitution's existing provisions, especially the requirements of rule of law and legal security in Article 2 (1). These contradictions, thus the majority, necessitate an intervention by the constituent power. Another distortion crops up here, namely that this signalling is akin to that which the judicial body indicated in its decision 23/1990. (X. 31.) on the unconstitutionality of the death penalty, where the Court called attention to the contradiction between Article 8 (2), which provides the basis for the unconstitutionality of the death penalty, and Article 54 (1), which fails to unavoidably rule out the most severe penalty. However, the vast difference between the two cases is that in 1990 the majority of the Court's judges resolved the contradiction by offering a constitutional interpretation – specifically in favour of Article 8 (2) – while at this point the majority opinion did not see this as a workable solution.

The majority also dismissed the petitions seeking a determination that the Constitution's Articles 32/A and 70/I (2) are in breach of international agreements. The dismissal's holding that the petitions were not filed by someone entitled to make such a submission is in order. After all, pursuant to the law only the National Assembly, a permanent committee thereof, or any member of parliament, the president of the republic, the government or any of its members, the president of the State Audit Office, the president of the Supreme Court, or the prosecutor general were entitled to file such a petition. What is wrong, however, is that the Constitutional Court did not wish to exercise its right to proceed *ex officio*, arguing that the "existence of its jurisdiction or the lack thereof may be the subject of controversy in this case." Yet would it not be self-evident to clarify such controversies in the framework of an *ex officio* proceeding? In his concurring opinion, István Stumpf, too, points out this contradiction in the reasoning. He does so of course only with the intention of expressing his support for dismissing the petition. If he did not believe that dismissal is the right course of action, but thought instead that a substantial examination would have been necessary with regard to the constitutional omission, then he would have written a dissent rather than a concurring opinion in this respect as well.

The majority decision also rejects the petitions that request a review of how the restriction of the Constitutional Court's jurisdiction is transposed into the Act on the Constitutional Court, arguing that such a review would indirectly examine the constitutional provisions with similar content. Here the majority proved unable to resolve a contradiction, which was a necessary

consequence of its wrong decision regarding the constitutional amendment. What is at issue here is that the judicial body failed again to substantively examine the impugned legal provision, which according to the standing practice should have resulted in a dismissal rather than a rejection. Yet invoking lacking jurisdiction, which always manifests itself in dismissal, would obviously have been difficult to defend in the context of a law.

The Court created a very bad precedent when the majority of Constitutional Court judges voluntarily signed the death sentence of judicial review. Taking the allegory further, one might of course object that even a decision that would have declared the constitutional amendments unconstitutional, and which would have consequently nullified them, could not have averted the passing of judicial review, neither in the short-term in the context of the Constitution in force, nor in the long-run in the context of the Basic Law passed on 18 April 2011 and entering into force on 1 January 2012.<sup>50</sup>

A committed German critic of the constitutional amendments and the Basic Law claims in his excellent blog that it would not have served the interests of constitutionalism if the judges of the Court had chosen the occasion of their own powers being at stake to change their previous jurisprudence on this question.<sup>51</sup> Yet, does not the question of the restriction of their jurisdiction point to a larger issue whose significance points beyond protecting the Court's interests narrowly understood, and does this issue not concern Hungarian constitutionalism in its entirety? And did not Chief Justice Marshall's opinion in *Marbury v. Madison*, which instituted the previously unknown practice of judicial review in the Court's constitutional jurisprudence thereby revolutionizing constitutionalism across the globe, pertain directly to the Court's powers? The greatest problem of the majority of judges on the Hungarian Constitutional Court is precisely that they gave up on the ideal of constitutionalism.

As the events in 2012 and 2013 have shown, the question of restricting constitutional jurisdiction point to a larger issue whose significance points beyond protecting the Court's interests narrowly understood, and concern Hungarian constitutionalism in its entirety. In the

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<sup>50</sup> The Basic Law puts considerable restriction on ex-post control of the Constitutional Court from the challenged amendment for as long as state debt exceeds half of what is referred to in the Hungarian text as 'entire domestic product,' the content of which is uncertain. For a detailed critique of the Basic Law see Z. Fleck et al., 2011. Available in English from the page of the Law and Public Affairs, Princeton University:

<http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf>; and ConstitutionMaking.org, Resources for Constitutional Design: <http://www.comparativeconstitutions.org/2011/06/hungary-petition.html>

<sup>51</sup> <http://verfassungsblog.de/ungarn-orbn-verdoppelt-seinen-einsatz>.

last days of 2011, the Parliament has enacted the so-called Act on the Transitional Provisions to the Fundamental Law with a claimed constitutional status, which partly supplemented the new constitution even before it went into effect. In the very end of 2012, in the Decision 45/2012. (XII. 29.) the Constitutional Court ruled that those parts of the Transitional Provisions of the Fundamental Law, which are not transitory in nature cannot be deemed as part of the constitution, and are therefore invalid. Although this decision did not go into the substance of the constitutionality of the Transitional Provisions, since the petition of the ombudsman asked exclusively a formal review, but the majority of the judges this time emphasized in the reasoning that in order to keep the unity of the constitution they may consider to look at the substance of a constitutional amendment.

2. As a reaction to this decision in March 2013 the MPs of the governing parties enacted the fourth amendment to the Basic Law. One part of the long amendment just elevates the annulled non-transitory provisions of the Transitional Act into the main text of the Basic Law, in some case with somewhat modified formulation, while in others unchanged. The following provisions were lifted to the constitutional rank without any alteration: the rules on the nationalities, the invest mayors with administrative competences, the authorization of both the Chief State Prosecutor and the President of the Judicial Council to select another court, if they think that the competent one is overloaded with cases, as well as the extension of the restriction of the review power of the Constitutional Court in financial matters even after the state debt does not exceed half of the entire domestic product, for laws, which were enacted in the period when the debt did exceed the limit.

Among the amendments there are ones, which were not part of the Transitional Provisions, but are also consequences of a previous CC annulment. One of them is the authorization of the legislature to set conditions for state support in higher education, for instance to prescribe graduates of state universities to remain in the country for certain period of time after graduation. (Without prior Constitutional Court decision the amendment also limits the autonomy of universities by allowing the government to supervise the financial management of them.) Another revenge for a declaration of unconstitutionality is the authorization of both the legislature and self-governments to criminalize homelessness. In a recent decision the Court also declared the ban of political advertisements in the electoral campaign. The reaction to this is the possibility according to the amended text of the Basic Law to limit political ads in a

cardinal law. In the end of 2012 the Court annulled the very definition of the family in the law on the protection of families as to exclusive. Now the Basic Law defines marriage and the parents-children relationship as the basis of family relationships, not mentioning extra-marital relations and parenting. Also the Constitutional Court expressed constitutional concerns towards private law limitations of hate speech, which violates the dignity of groups. The new amendment allows such limitations, not only to protect racial and other minorities, but also the dignity of the members of the Hungarian nation, who build the overwhelming majority of the population.

Finally there is a set of amendments related to the power of the Constitutional Court itself, as a direct reaction to recent unwelcome decisions of the judges. As an indirect reaction to the readiness of the Court to review the substance of constitutional amendments, expressed in the decision on the unconstitutionality of the non-transitory elements of the Transitional Provisions, the new text of the Basic Law, while allowing the review the procedural aspects of an amendment, specifically excludes any substantive review.

In his letter to Mr. Thorbjørn Jagland, Secretary General Council of Europe, Mr. Tibor Navracsis, Minister of Public Administration and Justice explains: “The Proposal contains that constitutionality of the Fundamental Law itself and any amendments thereto may be examined by the Constitutional Court from a procedural point of view, in order to check their compliance with procedural law requirements regulated in the Fundamental Law. This is a new competence for the Constitutional Court, because under the Fundamental Law so far it had no legal possibility at all for any review of the amendments to the Fundamental Law. The provision is in accordance with the case law of Constitutional Court based on the former Constitution under which, for the last time in decision 61/2011, the Constitutional Court explicitly reinforced that it had no power to review in merits the amendments to the Constitution. Neither did the decision of 45/2012 on the Transitional Provisions overrule this former practice.”

As we have seen, unfortunately none of these arguments are correct. In its mentioned decision 45/2012. (XII. 29.), the Constitutional Court emphasized in the reasoning that it is the constitutional responsibility of the Court to protect the unity of the constitution, and to ensure that the text of the constitution can be clearly identified. The justices added that an amendment of the constitution cannot create an irresolvable inconsistency in the text of the constitution. Therefore they argued: “In certain cases, the Constitutional Court can examine the continuous

realization of the substantial constitutional requirements, guarantees and values of the democratic state governed by rule of law, and their incorporation into the constitution.”

In this decision, therefore, the Court concluded that it had the theoretical power to review constitutional amendments for their substantive constitutionality.

As we can see, the formal review power in the case of constitutional amendments isn't a new competence for the Constitutional Court, since the Court has derived this from its competences both under the old, as well as under the new constitution. While the Court had in the past said it did not have the power to review amendments to the constitution on substantive grounds, the Court in its decision 45/2012 has indeed changed its opinion, taking the power to review future constitutional amendments for their substantive conflict with basic constitutional principles. Therefore the Fourth Amendment's ban on substantive review of constitutional amendments is a direct reaction to this decision of the Constitutional Court from December 2012. The real reason for this ban is to prevent the Court from evaluating on substantive grounds the Fourth Amendment or any subsequent amendment. The ban on substantive review of constitutional amendments in the Fourth Amendment has therefore allowed the government to escape review by inserting any previously declared unconstitutional provision directly into the constitution. This move abolished the difference between ordinary and constitutional politics, between statutory legislation and constitution making. Now the government's two-thirds majority is above any power that might constrain it. It can, constitutionally speaking, now do anything it wants.

This situation has been demonstrated by a decision of the Constitutional Court ruled on 21 May 2013 on the constitutionality of the Fourth Amendment. In its petition the ombudsman argued that on the one hand by failing to discuss parts of the suggested modification to the amendment at the plenary session, the Parliament have violated the formal requirements of the amendment procedure, and on the other some provisions of the amendment, which are in contradiction with provisions of the Basic Law, endanger the unity of the constitution, which is in his view also a formal requirement of the amendment procedure. The majority of the judges haven't find any formal mistake in the amendment procedure, therefore rejected the first part of the petition, and arguing with the lack of their competence haven't reviewed the contradictions among constitutional provisions on the basis of the ombudsman's unity of the constitution argument.



These majority of the judges argued that there is no substantial limit to the amendment power, and consequently the Constitutional Court has no jurisdiction for such a review.

### III. The Basic Structures and Concepts

In this chapter I address some of those flaws in the structures and concepts of the Fundamental Law of Hungary in relation to which the suspicion arises that they may permit exceptions to the European requirements of democracy, constitutionalism and the protection of fundamental rights, and, thus, that in the course of their application they could conflict with Hungary's international obligations.

#### **1. Government Without Checks**

The 2011 constitution *appears* to still contain the key features of constitutional constraint imposed by checked and balanced powers. But those constraints are largely illusory, because key veto points have been abolished or seriously weakened<sup>52</sup>. Appointments to key offices, like Constitutional Court judgeships, ombudsmen, the head of the State Audit Office and the public prosecutor, no longer require minority party input. Independent boards regulating crucial institutions necessary for democracy, like the election commission and the media board, no longer ensure multiparty representation. The Constitutional Court itself has been packed and weakened because its jurisdiction has been limited.

The constitutional reforms have seriously undermined the independence of the ordinary judiciary through changing the appointment process of judges. The Head of the National Judicial Office can select any judge from among the top three candidates recommended by the judicial council of the court where the appointment would be made. The retirement ages for judges on ordinary courts has been reduced from 70 to 62, starting on the day the new constitution went into effect. This change forced around ten percent of the Hungarian judges into early retirement. Those judges include six of the 20 court presidents at the county level,

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<sup>52</sup> See a more detailed analysis on the lack of checks and balances in M. Bánkúti & G. Halmai & K. L. Scheppele, 'From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions', in G. A. Tóth (Ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*, CEU Press, 2012.

four of the five appeals court presidents and 20 of the 80 Supreme Court judges. The head of the National Judicial Office, who is close personal friends with the Prime Minister and also married to the chief author of the new constitution, and the public prosecutor, also Fidesz loyalist, can assign specific cases to specific courts according to their assessment of the relative workloads of the country's courts.

The old ombudsman system has also been seriously weakened. In place of four separate ombudsmen with separate staffs and independent jurisdictions, the new system has only one general "parliamentary commissioner for human rights" with two deputies operating under his direction and a much-reduced staff. The old data protection ombudsman's office has been eliminated and its functions have been transferred to a new office that is part of the government and no longer an independent body.

The State Audit Office, once a bastion of independent expertise, has been given additional powers in the new constitutional order to launch serious investigations into misuse of public funds. But the new head of the state audit office, elected for 12 years by a two-thirds vote of the Parliament, has no professional auditing experience. Instead, he was a former Fidesz MP.

The new constitution created a new Budget Council with the power to veto any budget that the Parliament may produce that adds even a single Forint to the national debt. The Budget Council consists of three officials, two elected by a two-thirds vote of the Parliament and one appointed by the President of the Republic. The constitution says that if the Parliament fails to agree on a budget by March 31 of each year, then the President may dissolve the Parliament and call new elections. Obviously, if the Budget Council, dominated by Fidesz loyalists, vetoes the budget on the eve of the deadline, the constitutional trigger may be pulled for new elections. If another party can come to power in a future election, this provision hangs like the Sword of Damocles over its continued term in office.

The constitution also created the possibility of increasing the government's influence over monetary policy, by increasing the number of vice-presidents from two to three and gave the Prime Minister the authority to select individuals to these positions.

The constraints on power that appear in the new constitution are also illusory, because the specific people who occupy crucial positions can be appointed for extraordinarily long terms, thus maintaining the current government's control over any foreseeable future government. Loyalists to the current government can stay in power through multiple election cycles, thereby making it almost impossible for a future government dominated by different political parties to carry out new policy initiatives. Offices like the public prosecutor (9 years), the president of the Supreme Court of Justice (named the "Kúria", 9 years), the president of the National Judicial Office (9 years), the head of the Budget Council (6 years), the head of the State Audit Office (12 years), constitutional judges (12 years), the commissioner for fundamental rights (6 years), the president of the National Media and Communications Authority (9 years) were being filled by the Fidesz government, but the people in those powerful offices – all party loyalists – will remain through multiple election cycles.

## ***2. Identity of the Political Community***

An important criterion for a democratic constitution is that everybody living under it can regard it as his or her own. The Fundamental Law breaches this requirement on multiple counts.

a) Its lengthy preamble, entitled National Avowal, defines the subjects of the constitution not as the totality of people living under the Hungarian laws, but as the Hungarian ethnic nation: "*We, the members of the Hungarian Nation ... hereby proclaim the following*". A few paragraphs down, the Hungarian nation returns as "our nation torn apart in the storms of the last century". The Fundamental Law defines it as a community, the binding fabric of which is "intellectual and spiritual": not political, but cultural. There is no place in this community for the nationalities living within the territory of the Hungarian state. At the same time, there is a place in it for the Hungarians living beyond the borders.

The elevation of the "single Hungarian nation" to the status of constitutional subject suggests that the scope of the Fundamental Law somehow extends to the whole of historical, pre-WWI Hungary, and certainly to those places where Hungarians are still living today. This suggestion is not without its constitutional consequences: the Fundamental Law makes the right to vote accessible to those members of the "united Hungarian nation" who live outside

the territory of Hungary. It gives a say in who should make up the Hungarian legislature to people who are not subject to the laws of Hungary. In the 2014 elections, when Fidesz gained two thirds of the seats, 95.5 percent of voters beyond the borders voted for the party, which provided them with the new citizenship, while Fidesz got only 43.5 percent within Hungary. The votes of non-resident citizens were needed for the two thirds majority of Fidesz. In 2018 the percentage of Fidesz' votes even increased to 96.2 percent, but this time they got the two thirds majority anyway<sup>53</sup>. This result is an obvious consequence of the appreciation of these extraterritorial citizens towards Fidesz<sup>54</sup>.

b) It characterises the nation referred to as the subject of the constitution as a Christian community, narrowing even further the range of people who can recognise themselves as belonging to it. "We recognise the role of Christianity in preserving nationhood", it declares, not as a statement of historical fact, but also with respect to the present. And it expects everyone who wishes to identify with the constitution to also identify with its opening entreaty: "God bless the Hungarians". As mentioned earlier, these provisions were supplemented by the Seventh Amendment with the reference to the Christian culture, to be protected by all state authorities.

c) The preamble of the Fundamental Law also claims that the "continuity" of Hungarian statehood lasted from the country's beginnings until the German occupation of the country on 19 March 1944, but was then interrupted only to be restored on 2 May 1990, the day of the first session of the freely elected Parliament. Thus, it rejects not only the communist dictatorship, but also the Temporary National Assembly convened at the end of 1944, which split with the fallen regime. It rejects the national assembly election of December 1945. Today's democracy-watchers would classify the parliamentary election of December '45 as "partly free", adding that it was the freest in Hungary's entire history up until that time. It also rejects the progressive legislation of the National Assembly: the "little constitution" of the Republic approved at the beginning of 1946, which the Round Table was able to draw on in 1989; as well as the abolition of noble titles and the Upper House of Parliament.

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<sup>53</sup> See B. Majtényi, A. Nagy and P. Kállai, "'Only Fidesz' – Minority Electoral Law in Hungary", *verfassungsblog.de*, 31 March, 2018.

<sup>54</sup> About this feeling of honour see Sz. Pogonyi, *Extra-Territorial Ethnic Politics, Discourses and Identities in Hungary*, Springer, 2017. 166-169.

With the historical dividing lines drawn by the preamble of the Fundamental Law, it does not take care of acknowledging that war crimes and crimes against humanity were committed not only by foreign occupying forces and their agents, but also between 1920 and 1944 by extreme right-wing “free troops” and the security forces of the independent Hungarian state, and not only against “the Hungarian nation and its citizens”, but also against other peoples. Neither does it acknowledge that the continuity of Hungary’s statehood was not interrupted on 19 March 1944. Restrictions were placed on the government agencies’ freedom to act, but they were not shut down. The Regent remained in his office, and the Parliament sat and regularly passed those bills that were introduced by the government. The Hungarian state leadership did not declare the termination of legal continuity, but cooperated with the occupying powers.

The Fundamental Law only recognises the (pre-1944) glorious pages of Hungarian history, but does not acknowledge the acts and failures that give cause for self-criticism. It only holds to account the – reputed or genuine – injuries caused to the Hungarian people by foreign powers, and does not wish to acknowledge the wrongs committed by the Hungarian state against its own citizens and other peoples.

Paul Shapiro of the U.S. Holocaust Memorial Museum in his testimony at ‘The Trajectory of Democracy – Why Hungary Matters’ hearing before the Commission on Security & Cooperation in Europe: U.S. Helsinki Commission held on 19 March 2013 in Washington, D.C. said the following about the continuity of Hungary’s statehood, and the shared responsibility of the Hungarian government in the Hungarian Holocaust: “Under Regent and Head of State Miklós Horthy, foreign Jews resident in Hungary were deported to their deaths. Jewish men were forced into labour battalions, where tens of thousands died. And over 400,000 Hungarian Jews and at least 28,000 Romani citizens of the country were deported from Hungary to Auschwitz. During the months that followed the removal of Horthy from power in October 1944, the Arrow Cross Party of Ferenc Szálasi committed additional atrocities. The record is one of immense tragedy: 600,000 Hungarian Jews murdered out of a total Jewish population of over 800,000, at least 28,000 Romani victims and significant

participation and complicity in the crime by Hungarian authorities from the head of state down to local gendarmes, police and tax collectors in tiny villages.”<sup>55</sup>

As Gary Jeffrey Jacobsohn observes the constitution’s language, and especially the preambles to constitutions are exceptionally informative in conveying the underlying meaning of the authors, and may indicate a commitment on their part to establish a constitutional identity, but until confirmed in the accumulated practice of the constitutional community, the goal will remain unfulfilled.<sup>56</sup> The establishment of a constitutional identity seems to be failed after the transition in 1989-90, but it is also remain to be seen, whether this new attempt will be successful.

### ***3. Intervention into the Right to Privacy***

The Fundamental Law breaks with a distinguishing feature of constitutions of rule-of-law states, namely, that they comprise the methods of exercising public authority and the limitations on such authority on the one hand and the guarantees of the enforcement of fundamental rights on the other. Instead of this, the text brings several elements of private life under its regulatory purview in a manner that is not doctrinally neutral, but is based on a Christian-conservative ideology. With this, it prescribes for the members of the community a life model based on the normative preferences that fit in with this ideology in the form of their obligations towards the community. These values feature as high up as the Fundamental Law’s preamble entitled National Avowal:

“We recognise the role of Christianity in preserving nationhood.”

“We hold that individual freedom can only be complete in cooperation with others.” “We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love”.

“Our Fundamental Law ... expresses the nation’s will and the form in which we want to live.”

With particular regard to the fact that according to article R) the provisions of the Fundamental Law must also be interpreted in keeping with the National Avowal, and that according to article I, paragraph (3) fundamental rights may be restricted in the interest of

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<sup>55</sup> See the transcript of the hearing at [http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord\\_id=539&ContentType=H,B&ContentRecordType=H&CFID=24497186&CFTOKEN=18666051](http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord_id=539&ContentType=H,B&ContentRecordType=H&CFID=24497186&CFTOKEN=18666051)

<sup>56</sup> G. J. Jacobsohn, ‘The Formation of Constitutional Identity’, in T. Ginsburg & R. Dixon (Eds.), *Comparative Constitutional Law*, Edward Elgar, 2011, p. 131.

protecting a constitutional value, this provision could serve as the basis for a restriction of fundamental rights.

Certain provisions of the Fundamental Law pertaining to fundamental rights intervene in questions of marriage and the family, the prohibition on same-sex marriage, and the protection of embryonic and foetal life, prescribing ideologically-based normative value preferences in private relationships.

a) According to article L) of the Fundamental Law:

“(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation’s survival.

(2) Hungary shall encourage the commitment to have children.

(3) The protection of families shall be regulated by a cardinal Act.”

The Fundamental Law’s conception of marriage – which, incidentally, follows the definition serving as the basis for the Constitutional Court’s Decision 154/2009 (XII. 17.) AB on the constitutionality of registered domestic partnerships – corresponds roughly to the Catholic natural-law interpretation of marriage, which regards faithfulness, procreation and the unbreakable sanctity of the relationship between spouses as the most important elements of marriage. This constitutional regulation, founded on natural-law principles, protects those of the people’s interests that not everyone attributes to themselves, and with which they do not necessarily wish to identify themselves and, thus, it breaches their autonomy. When defining marriage and evaluating the role of the family a modern, living constitution – especially a new Fundamental Law – should accommodate the changes to society that increase the range of choices available to the individual. This should have required the Fundamental Law to regulate the institution of marriage and family together with the fundamental rights guaranteeing the self-determination of the individual and the principle of equality.

b) With the constitutional ban on same-sex marriage the constitution-maker has ruled out the future ability of the Hungarian legislature, following the worldwide tendency, to make the institution of marriage available to same-sex couples. In keeping with this, article XV of the Fundamental Law does not mention discrimination based on sexual orientation and gender identity in its list of prohibited forms of discrimination. This means that the Hungarian constitution-maker does not prohibit the state from supporting or negatively discriminating against a way of life—based on sexual orientation alone. This solution runs counter not only to the European Union’s Charter of Fundamental Rights and the case law of the European

Court of Justice (for the latest example see judgement C-147/08 in the case of Jürgen Römer v Freie und Hansestadt Hamburg), but also to the provisions of Hungary's still effective Act CXXV of 2003 on the Promotion of Equal Treatment and Equal Opportunities.

While a complete neutrality of the constitutional is almost impossible, these provisions very much challenge the autonomy of individuals who do not accept the normative life models defined on the basis of the Fundamental Law's ideological values—as the preamble words it: “the form in which we want to live” – and they are capable of ostracising them from the political community.

#### ***4. Weakening of the Protection of Fundamental Rights***

The decline in the level of protection for fundamental rights is significantly influenced not only by the substantive provisions of the Fundamental Law pertaining to fundamental rights, but also by the weakening of institutional and procedural guarantees that would otherwise be capable of upholding those rights that remain under the Fundamental Law. The most important of these is a change to the review power of the Constitutional Court, making it far less capable than before of performing its tasks related to the protection of fundamental rights. Added to this is the change in the composition of the Constitutional Court, taking place prior to the entry into force of the Fundamental Law, which will further impede it in fulfilling its function as protector of fundamental rights.

a) The considerable restriction on ex-post control has caused great controversy in Hungary and abroad, because the withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been restricted based on the object of the legal norms to be reviewed. The constitutional court judges can only review these laws from the perspective of those rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship) that they typically cannot breach. The restriction remains in effect for as long as state debt exceeds half of what is referred to in the Hungarian text as “entire domestic product”, the content of which is uncertain. Therefore, in the case of laws that are not reviewable by the court the requirement that the constitution be a fundamental law, and that it be binding on everyone, is



not fulfilled. This also clearly represents a breach of the guarantees, set out in Article 2 of the TFEU, relating to respect for human dignity, freedom, equality and the respecting of human rights – including the rights of persons belonging to a minority.

With regard to the Constitutional Court's powers of ex-post control, the effectiveness of the protection of fundamental rights is reduced not only by the limitation of their objective scope, but also by a radical restriction of the range of persons that may initiate a Constitutional Court review. This is due to the abolition of one of the peculiarities of the Hungarian regime change: the institution of the action popularis, according to which a petition claiming ex post norm control may be submitted by anybody, regardless of their personal involvement or injury. Over the past two decades or more this unique institution has provided, not only private individuals, but also non-governmental organizations and advocacy groups with the opportunity to contest in the Constitutional Court, for the public good, those legal provisions that they regard as unconstitutional. It could of course be argued that this institution has never existed in any other democratic state, but it has nevertheless undoubtedly contributed substantially to ensuring the level of protection of fundamental rights that has been achieved and which now diminishing.

Abstract ex-post norm control, under point e) paragraph (2) of Section 24 of the Fundamental Law, may in future only be initiated by the government, a quarter of the votes of members of parliament, or the Commissioner for Fundamental Rights. Given the balance of power in the current parliament, this makes any such petitions much more difficult, since the government is hardly about to make use of this opportunity against their own bills, while a quarter of MPs' votes would assume a coalition between the two democratic opposition parties and the extremist right-wing party, which supports the government.<sup>57</sup>

The cardinal Act on the Constitutional Court, passed in October 2011 decided on the fate of the several hundred petitions that are already lying in the court's in-tray, submitted in the form of an action popularis by private individuals entitled to do so prior to the entry into force

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<sup>57</sup> Indeed, in 2012 it was only the ombudsman, who filed such petitions in 35 cases (12 petition files were still pending earlier, and there were 23 new ones). The Constitutional Court decided on 11 of these cases, 6 cases in favour of the petitions, and 5 rejections. There are still 24 petitions pending. See: Ombudsmani indítványok az Alkotmánybíróság előtt. (Petitions of the ombudsman before the Constitutional Court) <http://www.jogiforum.hu/hirek/28922>

of the Fundamental Law, but who will be subsequently divested of this right. It applies the *ad malam partem* retroactive effect, so willingly applied by the present government in other cases, also came into play here with the result that the Constitutional Court does not pass judgement on previously submitted petitions.

b) Private individuals or organisations may only turn to the Constitutional Court in future if they themselves are the victims of a concrete breach of law and this has already been established in a civil-administration or a final court decision. In this case, the legal remedy offered by the Constitutional Court will naturally only affect them. In other words, the extension of opportunities to submit constitutional complaints is no substitute whatsoever for the widely available right of private individuals and organisations to file petitions.

c) There is no doubt that the widely available opportunity to submit complaints could be beneficial to the judging of cases involving fundamental rights, and this has been the case in Germany, Spain and the Czech Republic. A prerequisite for this, however, is a Constitutional Court that is committed to fundamental rights and is independent from the government. The present government, on the other hand, has done all it can to prevent this since taking office in May 2010. This process began with the alteration of the system for nominating constitutional court judges, giving the governing parties the exclusive opportunity to nominate and subsequently replace judges. The Fundamental Law, in a further weakening of the guarantees of independence, increased the number of Constitutional Court judges from eleven to fifteen, which makes it possible to select five more new judges, after the two judges selected in May 2010, with their appointments lasting for a term of twelve years rather than the previous nine; in other words, for three parliamentary cycles. In future the president of the constitutional court, who has until now been elected for a term of three years by the judges, will be selected by Parliament for the duration of his/her time in office. These changes could not wait until the entry into force of the Fundamental Law on 1 January 2012; rather, the president and the new members were selected at the end of July based on an amendment to the existing constitution, passed in 6 July 2011.<sup>58</sup>

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<sup>58</sup> See: <http://www.parlament.hu/irom39/03199/03199.pdf>

## **5. Constitutional Entrenchment of Political Preferences**

At the time of the Hungarian regime change, the constitution makers have preserved the amendment rule of the original 1949 constitution used to produce a substantively new constitution. Whatever the original reason, this rule requiring only 2/3 of the absolute majority of parliament to make any and all changes to the constitution has been long considered insufficient for a protection of fundamental rights, adequate constitutional review and of the stability of the basic structure of the constitution. Observers including the author of this article considered this deficiency the main one requiring the making of a new constitution.<sup>59</sup> The FIDESZ government, in its initial plans, proposed a new amendment rule that would require 2/3 votes in two parliamentary sessions with an election in between to approve constitutional amendments. Unlike its Spanish prototype, not distinguishing between fundamental revision and minor changes, this rule promised to entrench to too high a degree a constitution that was not produced with sufficient consensus. It was because of such legitimization problems the government backed away from the idea of replacing the purely parliamentary amendment rule. But it chose to compensate for this failure by lifting a large number of ordinary policy issues into the realm of entrenched laws, thereby removing the power of future parliaments to alter policy choices made by the present one.

The new Fundamental Law regulates some issues which would have to be decided by the governing majority, while it assigns others to laws requiring a two-third majority. This makes it possible for the current government enjoying a two-thirds majority support to write in stone its views on economic and social policy. A subsequent government possessing only a simple majority will not be able to alter these even if it receives a clear mandate from the electorate to do so. In addition, the prescriptions of the Fundamental Law render fiscal policy especially rigid since significant shares of state revenues and expenditures will be impossible to modify in the absence of pertaining two-third statutes. This hinders good governance since it will make it more difficult for subsequent governments to respond to changes in the economy. This can make efficient crisis management impossible. These risks are present irrespective of the fact whether in writing two-third statutes the governing majority will exercise self-restraint (contrary to past experience). The very possibility created by the Fundamental Law

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<sup>59</sup> See G. Halmai, 'Grundstrukturen staatlichen Verfassungsrechts: Ungarn', in A. von Bogdandy, P. C. Villalón, P. M. Huber (Eds.), *Ius Publicum Europaeum*. Volume I., C.F. Müller Verlag, Heidelberg. 2007. 687 – 727.

to regulate such issues of economic and social policies by means of two-third statutes is incompatible with parliamentarism and the principle of the temporal division of powers.<sup>60</sup>

a) As regards pensions, the Fundamental Law itself excludes the possibility that a subsequent governing majority create a funded pension scheme based on capital investment. Europe and the Western world in general will face serious demographic challenges in the coming decades. One possible response of public policy to this challenge is the partial transformation of the pay-as-you-go pension system to a funded pension scheme based on capital investment. Such a decision is to be preceded by a comprehensive social debate and assessment of the pros and cons of different public policy solutions. It is not compatible with the functions of the constitution that the current governing majority excludes the application of one of the available public policy solutions in the Fundamental Law without having been empowered by the electorate to do so. In addition, Section 40 of the Fundamental Law assigns the basic rules of the pension system to a cardinal act, which, as mentioned above, requires a two-third majority. It is impossible to know today to what extent this statute will regulate the pension system. In any case, the Fundamental Law makes it possible that the retirement age and other conditions of eligibility as well as the basis for calculating pensions will be modifiable only by a two-third majority. This prevents subsequent governments winning popular support at free elections to put in practice its own views of pension policy.

b) Section L) of the Fundamental Law specifies that the regulation of family welfare support is also to be subject to two-third statutory regulation. Without knowing the text of the planned statute, which hasn't been enacted yet, it is impossible to decide to what extent the governing majority intends to regulate this issue in the pertaining two-third statute. It is clear, however, that the pertaining prescriptions of the Fundamental Law creates the possibility that every detailed issue of the family welfare support will only be modifiable subsequently by a two-third majority. It is to be part of the ruling majority's social policy at any given time to settle questions such as the child's age limit until which motherhood support is paid, the eligibility conditions and amount of this support, or the eligibility of different family types for different kinds of support. Thus, in a parliamentary democracy there is no justification for writing in stone the views of the current government coalition in such a manner.

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<sup>60</sup> One can argue that the economic crisis created such exceptional measures, like the debt brakes proposed by the German Chancellor, Angela Merkel.

c) Section 40 of the Fundamental Law states that basic rules of taxation are to be determined by a fundamental statute, that is, one requiring a two-third majority. This prescription makes it possible that the currently ruling government coalition to set its own views in a two-third statute on tax policies, especially as regards the linear, flat tax and the exceptionally high tax benefits for families. This could easily make it impossible that a subsequent government gaining power because of its promise to introduce progressive taxation realize its public policies based on the mandate received from voters.

d) In addition to the long-term fixing of preferences concerning economic and social policies, the governing parties can implement their very own personal preferences, too, in the appointment and replacement of the leaders of independent institutions. Parliament chose as president of the State Audit Office for 12 years and a head of the National Media and Telecommunications Authority for 9 years former MPs of the bigger governing party. The chief prosecutor appointed for 9 years is a former parliamentary candidate of the bigger governing party. Without any additional reason, the coming into force of the Fundamental Law makes it in itself possible that the governing parties nominate only their own candidates for the new positions of Constitutional Court judges, a new president of the Constitutional Court, the head of the ordinary judiciary, as well as new ombudspersons for six, nine and twelve years, respectively. Following the adoption of the Fundamental Law, a statute prohibits the president of the National Council of Justice, who, at the same time, is also the president of Hungary's Supreme Court, to appoint judges until the Fundamental Law comes into force. Clearly, the aim of this moratorium is that the head of the Curia, to be chosen for nine years on the basis of new Fundamental Law, should appoint the heads of the most important courts. This will result in the long-term entrenchment of personal preferences, which undermines the adequate operation of independent institutions.

e) In a related development, the Fundamental Law gave the Budget Council the right to veto the state budget statute. Two of the three members of the Council were appointed by the ruling government coalition until at least 2019. At the same time, the Fundamental Law fails to define unequivocally what is covered by the Council's right to veto. In addition, it does not contain guarantees to exclude the abuse of the powers of this body. Such guarantees would be all the more required as the drafting of the budget is the competence and responsibility of the governing majority at any given time. This prerogative cannot be limited by a body which seems to be independent, but consists of appointees of an earlier government. This raises the

possibility that in addition to – or even instead of – considerations regarding the sustainability of budgetary policies the Budgetary Council may be guided by preferences of public policy when exercising its veto right.

## **6. A Populist Illiberal Constitutional System**

The Hungarian system of governance became populist, illiberal, and undemocratic.<sup>61</sup> This was Prime Minister Orbán's openly stated intention.<sup>62</sup> The backsliding has happened through the use of "abusive constitutional" tools: constitutional amendments and even replacements, because both the internal and the external democratic defense mechanisms against the abuse of constitutional tools failed.<sup>63</sup> The internal ones (constitutional courts, judiciary) failed because the new regime managed to abolish all checks on its power, and the international ones, such as the EU toolkits, failed mostly due to the lack of a joint political will to use them.

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<sup>61</sup> As Jan-Werner Müller rightly argues, it is not just liberalism that is under attack in these two countries, but democracy itself. Hence, instead of calling them "illiberal democracies" we should describe them as illiberal and "undemocratic" regimes. See J-W. Müller, 'The Problem with "Illiberal Democracy"', *Project Syndicate*, January 21, 2016, <https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01?barrier=accessreg>.

<sup>62</sup> In a speech delivered on July 26, 2014, before an ethnic Hungarian audience in neighboring Romania, Orbán proclaimed his intention to turn Hungary into a state that "will undertake the odium of expressing that in character it is not of liberal nature." Citing as models he added: "We have abandoned liberal methods and principles of organizing society, as well as the liberal way to look at the world. . . . Today, the stars of international analyses are Singapore, China, India, Turkey, Russia. . . . and if we think back on what we did in the last four years, and what we are going to do in the following four years, than it really can be interpreted from this angle. We are . . . parting ways with Western European dogmas, making ourselves independent from them . . . . If we look at civil organizations in Hungary, . . . we have to deal with paid political activists here. . . . [T]hey would like to exercise influence . . . on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of it being a liberal state, that we should make it clear, that these are not civilians . . . opposing us, but political activists attempting to promote foreign interests. . . . This is about the ongoing reorganization of the Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests." See V. Orbán, 'Full Text of Viktor Orbán's speech at Băile Tușnad (Tusnádfürdő) of 26 July 2014', *Budapest Beacon*, July 29, 2014, <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>.

<sup>63</sup> The category of "abusive constitutionalism" was introduced by David Landau using the cases of Colombia, Venezuela, and Hungary. See D. Landau, 'Abusive Constitutionalism', *UC Davis Law Review* 47, 2013: 189–260. Abusive constitutional tools are known from the very beginning of constitutionalism. The recent story of the Polish Constitutional Tribunal is reminiscent of the events in the years after the election of Jefferson, as the first anti-Federalist president of the United States. On March 2, 1801, the second-to-last day of his presidency, President Adams appointed judges, most of whom were Federalists. The Federalist Senate confirmed them the next day. As a response, Jefferson, after taking office, convinced the new anti-Federalist Congress to abolish the terms of the Supreme Court that were to take place in June and December of that year, and Congress repealed the law passed by the previous Congress creating new federal judgeships. In addition, the anti-Federalist Congress had begun impeachment proceedings against some Federalist judges. About the election of 1800 and its aftermath, see B. Ackerman, *The Failure of the Founding Fathers. Jefferson, Marshall, and the Rise of Presidential Democracy*, Harvard University Press, 2007.

If from the large range of definitions of populism, we use the one provided by Mudde and Kaltwasser, who define “populism” as a “thin-centered ideology that considers society to be ultimately separated in two homogeneous and antagonistic camps, ‘the pure people’ and the ‘corrupt elite,’ and which argues that politics should be an expression of the ‘volonté générale’ (general will) of the people,”<sup>64</sup> the Hungarian constitutional system became a populist one. This populism rejects the basic principles of constitutional democracy,<sup>65</sup> understood as limited government, governed by the rule of law, and protecting fundamental rights.<sup>66</sup> In Hungary we can also detect the main characteristics of populism, described Luigi Corrias on popular sovereignty, as well as its approach to constitutional identity.<sup>67</sup> (The latter I discuss in chapter 4).

For popular sovereignty, as Corrias argues, populism holds the belief that “the people” is a unit, and that, as such, it is present in the polity often only through the means of direct democracy, such as referenda. Particularly while in opposition, for populists, such as Orbán, representation merely serves as a tool to give voice to the unity.<sup>68</sup> But as Pinelli rightly points out, contemporary populists, especially being in government, do not necessarily reject representation, nor do they necessarily favor the use of referenda.<sup>69</sup> For instance, Orbán’s Fidesz party tried to undermine the legitimacy of representation after losing the 2002 parliamentary elections. He refused to concede defeat, declaring that “the nation cannot be in opposition, only the government can be in opposition against its own people.” After the 2010 electoral victory, he claimed that through the “revolution at the voting booths,” the majority has delegated its power to the government representing it. This means that the populist government tried to interpret the result of the elections as the will of the people, viewed as a homogenous unit. Also, the Orbán government, which after overthrowing its predecessor in 2010 as a result of a popular referendum, made it more difficult to initiate a valid referendum for its own opposition. While the previous law required only 25 percent of the voters to cast a vote, the new law requires at least 50 percent of those eligible to vote to take part, otherwise

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<sup>64</sup> C. Mudde and R. C. Kaltwasser, *Populism: A Very Short Introduction*, Oxford: Oxford University Press, 2017. 6.

<sup>65</sup> See C. Pinelli, ‘The Populist Challenge to Constitutional Democracy’, *European Constitutional Law Review* 7, 2016: 5–16, 6.

<sup>66</sup> See these “essential characteristics” of constitutional democracy in M. Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’, *Southern California Law Review*, 74, 2001: 1307–1352, 1307.

<sup>67</sup> L. Corrias, ‘Populism in a Constitutional Key: Constituent Power, Popular Power, Popular Sovereignty and Constitutional Identity’, *European Constitutional Law Review* 12 (2016): 6–26, 12.

<sup>68</sup> *Ibid.*, 18–19.

<sup>69</sup> See C. Pinelli, ‘The Populist Challenge to Constitutional Democracy’, *European Constitutional Law Review* 7, 2016: 5–16, 11.

the referendum is invalid.<sup>70</sup> The ambivalence of Orbán toward representation and referenda in government and in opposition applies to his attitude regarding established institutions. While he readily attacked the “establishment” while in opposition, he very much protects his own governmental institutions. The situation is different with transnational institutions, such as the EU, which are also attacked by the Hungarian populist governments as threats to their countries’ sovereignty. A good example is the Hungarian Parliament’s reaction to the European Parliament’s critical report from July 2013 on the constitutional situation in Hungary. The Hungarian parliamentary resolution on equal treatment reads: “We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain.” These words very much reflect the Orbán government’s view of “national freedom,” the liberty of the state (or the nation) to determine its own laws: “This is why we are writing our own constitution. . . . And we don’t want any unconsolidated help from strangers who are keen to guide us . . . Hungary must turn on its own axis.”<sup>71</sup>

Although Hungary became a liberal democracy on an institutional level after 1989, on a behavioral level, the consolidation of the system has always been very fragile. If one considers liberalism as not merely a limit on the public power of the majority, but as also a concept that encompasses the constitutive precondition of democracy—the rule of law, checks and balances, and guaranteed fundamental rights—then Hungary is not a liberal democracy anymore. Since the 2010 victory of the current governing Fidesz party, all of the public power is in the hands of the representatives of one party. Freedom of the media and religious rights, among others, are seriously curtailed. And before the 2014 parliamentary elections, the electoral system became unfair, ensuring again a two-thirds majority for Fidesz in the Hungarian Parliament.

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<sup>70</sup> It is the irony of fate that due to these more stringent conditions, the only referendum that the Orbán government initiated—one against the EU’s migration policy—failed. On October 2, 2016, Hungarian voters went to the polls to answer one referendum question: “Do you want to allow the European Union to mandate the relocation of non-Hungarian citizens to Hungary without the approval of the National Assembly?” Although 92 percent of those who cast votes and 98 % of all the valid votes agreed with the government, answering no (6 percent were spoiled ballots), the referendum was invalid because the turnout was only around 40 percent, instead of the required 50 percent.

<sup>71</sup> The English-language translation of excerpts from Orbán’s speech was made available by Hungarian officials, see, e.g. *Financial Times: Brussels Blog*, March 16, 2012, <http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigtC>.



The problem with the Hungarian populist and illiberal constitutional system is that the country is currently a member of the European Union, which considers itself to be a union based on the principles of liberal democratic constitutionalism. Of course, the citizens of Hungary, as any other citizens of a democratic nation-state, have the right to oppose joint European measures, for instance on immigration and refugees, or even the development of a liberal political system altogether. However, this conclusion must be reached through a democratic process. There are still a significant number of people who either consider themselves to be supporters of liberal democracy, or at least represent views that are in line with liberal democracy. But if Hungarians ultimately opt for a non-liberal system, they must accept certain consequences, including parting from the European Union and the wider community of liberal democracies.

## IV. Constitutional Identity

### **1. *The Abuse of the Concept***

1. As mentioned in chapter I, after the first, failed attempt of the Seventh Amendment to the Fundamental aiming at explaining the non-compliance of the Hungarian government with the European reéocation plan for refugees in 2016, the packed Constitutional Court came to the rescue of Orbán's constitutional identity defence of its policies on migration. The Court carved out an abandoned<sup>72</sup> petition of the also loyal Commissioner for Fundamental Rights (hereinafter: Commissioner), filed a year earlier, before the referendum was initiated. In his motion, the Commissioner asked the Court to deliver an abstract interpretation of the Fundamental Law in connection with the Council Decision 2015/1601 of 22 September 2015<sup>73</sup>. The Commissioner asked the following four questions:

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<sup>72</sup> The Constitutional Court has no deadline to decide on petitions.

<sup>73</sup> The petition was based on Section 38 para. (1) of the Act CLI of 2011 on the Constitutional Court, which reads: "On the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a concrete constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law".

1. Whether the absolute prohibition of expulsion of foreigners from Hungary in Article XIV (1) of the Fundamental Law<sup>74</sup> forbids this kind of action only by the Hungarian authorities, or if it also covers actions by Hungarian acts performed by the bodies or institutions of the Hungarian State as necessary for the implementation of an unlawful collective expulsion executed by another State.
2. Whether under Article E) (2), state bodies, agencies, and institutions are entitled or obliged to implement EU legal acts that conflict with fundamental rights stipulated by the Fundamental Law. If they are not, which state organ can establish that fact?
3. Whether under Article E) (2), the exercise of powers bound to the extent necessary may restrict the implementation of the *ultra vires* act. If state bodies, agencies, and institutions are not entitled or obliged to implement *ultra vires* EU legislation, which state organ can establish that fact?
4. Whether Article XIV (1) and Article E) can be interpreted in a way that authorizes or restricts Hungarian state bodies, agencies, and institutions, within the legal framework of the EU, to facilitate the relocation of a large group of foreigners legally staying in one of the Members States without their expressed or implied consent and without personalized and objective criteria applied during their selection.

The Commissioner's own interpretation was clear from the formulations of the questions.

With regard to the first question, the Commissioner argued that "the rules of international law grant a right for the asylum seekers waiting to be transferred to stay in Italy or in Greece until the end of the asylum procedure". In the context of the Council decision, the Commissioner concluded that although "the collective expulsion – *prima facie* – implemented by these two Member States", but since "the transfer cannot be exercised by a Member State without the reception act of another Member State (according to the petition this Member State would be Hungary if implementing the relocation plan – G.H.): the latter is an indispensable act of the former one". The question does not seem to take into account that Article XIV (1) of the Fundamental Law applies explicitly to Hungarian citizens, or the collective expulsion of foreigners from the territory of Hungary, and that non-Hungarian asylum seekers relocated due to the Council Decision would not be expelled by Italy or Greece. But the petition is judgmental also regarding the powers of the EU, when claiming that "the European Union has

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<sup>74</sup> Article XIV (1) reads as follows: „Hungarian citizens shall not be expelled from the territory of Hungary and may return at any time from abroad. Foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision. Collective expulsion shall be prohibited”.

no competence to adopt regulations affecting the staying of certain groups of foreigners in the territory of the Member States”.<sup>75</sup>

By rendering the petition admission, in its decision 22/2016 (XII. 5.) AB,<sup>76</sup> the Court decided to answer the first question related to the interpretation of Article XIV of the Fundamental Law in a separate judgment<sup>77</sup>. Imre Juhász, one of the justices, wrote a concurring opinion in which he disagreed with the majority’s decision to separate the part of the petition on interpreting Article XIV (1) of the Fundamental Law. In his view “the separation – which is in fact postponing the adoption of the decision for an indefinite period of time – is indeed questionable in the light of the fact that the Council Decision is applicable to the persons who arrive(d) to the territory of Italy or Greece.”

The Court identified question 2 as a reference to the issue, whether a legal act of the European Union can violate fundamental rights, while question 3 concerned the evaluation of *ultra vires* acts of the Union. These two questions, the Court argued, are clearly constitutional issues to be examined by the Court directly at the level of the Fundamental Law, as they satisfy the condition of concreteness under Article 38 (1) of the Act on the Constitutional Court.<sup>78</sup> Question 4 could only be interpreted in the framework of questions 2 and 3. Therefore the Court explained its response to question 4 in its response to questions 2 and 3. In other words, the Court tried to avoid directly answering the question about the constitutionality of the EU’s relocation power.

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<sup>75</sup> In my view the legal basis for this is article 78(3) of the Treaty on the Functioning of the European Union (TFEU) which states that: "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament".

<sup>76</sup> The English translation of the decision is available at the homepage of the Constitutional Court: [http://hunconcourt.hu/letoltesek/en\\_22\\_2016.pdf](http://hunconcourt.hu/letoltesek/en_22_2016.pdf). The citations are from this translation.

<sup>77</sup> See Injunction X/3327-31/2015. On the separation: The Constitutional Court has the power to separate parts of a petition, and decide them separately from each other. The decision on the interpretation of Article XIV (1) of the Fundamental Law has not been published yet.

<sup>78</sup> Section 38 (1) reads: “On the petition of Parliament or its standing committee, the President of the Republic, the Government, or the Commissioner of the Fundamental Rights, the Constitutional Court shall provide an interpretation of the provisions of the Fundamental Law regarding a *concrete* constitutional issue, provided that the interpretation can be directly deduced from the Fundamental Law”. (italics added – G.H.)

Answering questions 2-4, the Court established that its own competence was regulated neither by the Fundamental Law nor the Act on the Constitutional Court on fundamental rights review and *ultra vires* review, the latter composed of a sovereignty review and an identity review. But before creating these new competences for themselves, the justices examined the positions taken by the European Court of Justice and the Member States' constitutional courts. Referring to *Costa v. Enel*<sup>79</sup> the Hungarian Constitutional Court acknowledged "the fact that from the point of view of the ECJ, EU law is defined as an independent and autonomous legal order", but quoting the *Kloppenburg* judgment<sup>80</sup> of the German Federal Constitutional Court, the Hungarian justices stated that it is Member States "national enforcement acts that ultimately determine the extent of primacy to be enjoyed by EU law against the relevant Member State's own law in the Member State concerned".

On the basis of the review of case law of many of the Member States' supreme and constitutional courts, including the Lisbon judgement of the German Federal Constitutional Court, the Hungarian justices established that "within its own scope of competences on the basis of a relevant petition, in exceptional cases and as a resort of *ultima ratio*, i.e. while respecting the constitutional dialogue between the Member States, it can examine whether exercising competences on the basis of Article E) (2) of the Fundamental Law results in the violation of human dignity, the essential content of any other fundamental right or the sovereignty (including the extent of the competences transferred by the State) and the constitutional self-identity of Hungary".<sup>81</sup>

With regard to the fundamental rights review, the Court established that "any exercise of public authority in the territory of Hungary (including the joint exercise of competences with other Member States) is linked to fundamental right".<sup>82</sup> The fundamental rights review is based on Article E) (2) and Article I (1) of the Fundamental Law. The latter provision declares that "The inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights." Having these rules in mind, and after referring to the *Solange* decisions of the German Federal Constitutional Court, and explicitly to the decision of 15 December 2015 (2 BvR 2735/14), and the need for

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<sup>79</sup> *Costa v ENEL* [1964] ECR 585

<sup>80</sup> BVerfGE 75, 223 [242] (1987)

<sup>81</sup> 22/2016. (XII. 5.) AB. [46]

<sup>82</sup> *Ibid.* [47]

cooperation in the EU and the primacy of EU law, the Court stated that it “cannot set aside the *ultima ratio* protection of human dignity and the essential contents of fundamental rights, and it must grant that the joint exercising of competences under Article E) (2) of the Fundamental Law would not result in a violation of human dignity or the essential content of fundamental rights”.<sup>83</sup>

Regarding the *ultra vires* review, the Court argued that there were two main limits on conferred or jointly exercised competencies under Article E) (2): “the joint exercise of a competence shall not violate Hungary’s sovereignty (sovereignty control), and on the other hand it shall not lead to the violation of constitutional identity (identity control)”<sup>84</sup>. But the Court also emphasized that “the direct subject of sovereignty- and identity control is not the legal act of the Union or its interpretation, therefore the Court shall not comment on the validity or invalidity of the application of primacy with respect to such acts of the Union”.<sup>85</sup>

The constitutional foundation of the sovereignty review is Article B) (1) of the Fundamental Law, which states that “Hungary shall be an independent, democratic rule-of-law State”. Paragraphs (3) and (4) contain the popular sovereignty principle: “(3) The source of public power shall be the people”, “(4) The power shall be exercised by the people through elected representatives or, in exceptional cases, directly”. The Court warned that these provisions of the Fundamental Law “shall not be emptied out by the Union-clause in Article E)”, and it established that “the maintenance of Hungary’s sovereignty should be presumed when reviewing the joint exercise of competences” that have already been conferred to the EU.<sup>86</sup>

The protection of constitutional identity, the Court argued, is based on Article 4 (2) TEU and on “an – informal cooperation with the ECJ based on the principles of equality and collegiality, with mutual respect to each other”.<sup>87</sup> The Court “interprets the concept of constitutional identity as Hungary’s self-identity and its unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution –

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<sup>83</sup> *Ibid.* [49]

<sup>84</sup> *Ibid.* [54]

<sup>85</sup> *Ibid.* [56]

<sup>86</sup> *Ibid.* [59]-[60]

<sup>87</sup> *Ibid.* [63]

as required by Article R) (3) of the Fundamental Law”.<sup>88</sup> The Court held that “the constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomy under public law, freedom of religion, the exercise of lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us”.<sup>89</sup> According to the Court these are achievement of the Hungarian historical constitution on which the legal system rests.

The Court held that “the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law, consequently constitutional identity cannot be waived by way of an international treaty”.<sup>90</sup> Therefore, the Court argued, “the protection of the constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State”<sup>91</sup>. Because sovereignty and constitutional identity are in contact with each other in many points, “their control should be performed with due regard to each other in specific cases”.<sup>92</sup>

Based on the above, the Court came back to the question of the Commissioner related to the transfer of third country nationals in the context of the EU, and answered it in the framework of this abstract constitutional interpretation as follows: “If human dignity, another fundamental right, the sovereignty of Hungary (including the extent of the transferred competences) or its self-identity based on its historical constitution can be presumed to be violated due to the exercise of competences based on Article E) (2) of the Fundamental Law, the Constitutional Court may examine, on the basis of a relevant petition, in the course of exercising its competences, the existence of the alleged violation”.<sup>93</sup> And this very sentence is also the holdings (dictum) of the judgement, which stands at the very beginning of the decision.

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<sup>88</sup> *Ibid.* [64]

<sup>89</sup> *Ibid.* [65]

<sup>90</sup> *Ibid.* [67]

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* [69]

Looking at the competence of the Constitutional Court, neither the Fundamental Law nor the Act on the Constitutional Court authorizes the Court to perform this review. In Article 24 (2) of the Fundamental Law, one can find that in every listed jurisdiction of normative control (points a)-c) and e)) the subjects of the review are either Hungarian legal norms or judicial decisions. Article T) (2) of the Fundamental Law lists all the legal regulations of Hungarian authorities, without mentioning the legal acts of the European Union, which consequently cannot be subject to any review procedure of the Hungarian Constitutional Court. According to Article 23 (3) of the Act on the Constitutional Court, the Court is authorized to carry out preliminary review of the conformity of an international treaty or of its provisions with the Fundamental Law, but this competence certainly does not apply to EU legal regulations.

Interestingly, three of the justices recognised that the Hungarian Constitutional Court does not have the power to review EU legal acts, but this did not motivate them to write a dissent by rejecting the petition of the Commissioner. István Stumpf, in his concurring opinion, claimed that the holdings of the decision is limited to approving the review of “the joint exercising of competences under Article E) (2) of the Fundamental Law”, and although the reasoning deals with the review of EU laws, the holdings “only reaches a self-evident conclusion”.<sup>94</sup> But he fails to explain how the task could possibly be completed without reviewing the EU legal regulation. In my view, a review of a Hungarian application of an EU decision would not amount to the review of EU law. In his concurring opinion, Béla Pokol takes it for granted that the holdings of the decision declared the monitoring of the Constitutional Court’s procedure against the legal acts of the Union as a possibility in the course of exercising all of its competences, although as I pointed out, it is not prescribed by either the Fundamental Law, or the Act on the Constitutional Court. Pokol thinks that “the right of initiating the procedure should have only be given to the Government”- by the Court.<sup>95</sup> In other words, Pokol assumes a non-existent legislative power of the Constitutional Court. László Salamon, the author of the single dissenting opinion goes even further by stating that “in addition to establishing its own competence of review, the Constitutional Court should also declare the applicability of this requirement (namely the duty of ultra vires review – G.H.) to the whole of the State’s system”.<sup>96</sup> Make no mistake, he did not dissent on the ground that the Constitutional Court exceeded the limits of its own competences, but because he thought that the majority decision

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<sup>94</sup> *Ibid.* [96]

<sup>95</sup> *Ibid.* [92]

<sup>96</sup> *Ibid.* [117]

“fails to provide a complete answer to the questions aimed at the interpretation of the Constitution, as asked by the Commissioner for Fundamental Rights”.<sup>97</sup>

Viktor Orbán’s first jubilant reaction in an interview given to the Hungarian Public Radio shows how enthusiastic he was that the Court has helped the government’s wishes come true by making up for the failed referendum and the Seventh amendment: “I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary’s constitutional identity<sup>98</sup>. This means that the cabinet cannot support a decision made in Brussels that violates Hungary’s sovereignty”, adding that the Court decision is good news for “all those who do not want to see the country occupied”.<sup>99</sup> In the same interview, Orbán anticipated the next issue relating to which Hungary’s national constitutional identity can be invoked, referring to the latest EU plan to terminate Hungarian state regulation of public utility prices. He said that the European Commission incorrectly argued that competition in the energy sector leads to lower prices. “Therefore Hungary insists on reducing utility rate cuts and we shall defend it in 2017. Although this will be a very tough battle, we have a chance of success”.<sup>100</sup> The next sign of the battle regarding asylum seekers was another speech of Viktor Orbán delivered in February 2017, in which he stated: „I find the preservation of ethnic homogeneity very important.”<sup>101</sup> On 5 March a newspaper reported on Hungary’s shameful treatment of asylum seekers, including severe beatings with batons and the use of attack dogs.<sup>102</sup>

2. One can ask the question: What’s Wrong with Hungary’s New Constitutional Identity? I have to admit here that both the failed Seventh Amendment to the Fundamental Law of Hungary and the decision of the Constitutional Court on the interpretation of the country’s constitutional identity look like carefully crafted documents, which seem to fit into the discourse about constitutional identity under several EU Member States’ constitutional laws, as well as about national identity under EU law. Ever since its seminal judgment in

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<sup>97</sup> *Ibid.* [113]

<sup>98</sup> In the context of the Constitutional Court’s decision it is clear that the Prime Minister was not merely referring to the possibility of the government bringing proceeding before the ECJ, but to the Court’s established power to declare the EU law inapplicable.

<sup>99</sup> [http://hvg.hu/itthon/20161202\\_Orban\\_beszed\\_pentek\\_reggel](http://hvg.hu/itthon/20161202_Orban_beszed_pentek_reggel)

<sup>100</sup> *Ibid.*

<sup>101</sup> Speech delivered on 28 February 2017 at the annual gathering of the Hungarian Chamber of Commerce. See Éva S. Balogh, ‘Viktor Orbán’s ’ethnically homogeneous Hungary’, Hungarian Spectrum, March 3, 2017. <http://hungarianspectrum.org/2017/03/01/viktor-orbans-ethnically-homogeneous-hungary/>

<sup>102</sup> The report from Belgrade was published in the Swedish newspaper Aftonbladet. <http://www.aftonbladet.se/nyheter/a/noLbn/flyktningarna-den-ungerska-polisen-misshandlar-och-torterar-oss>



*International Handelsgesellschaft*<sup>103</sup> the ECJ has confirmed that national constitutional norms in conflict with secondary legislation should be inapplicable. On the other hand, Member State constitutions can specify matters of national identity, and constitutional courts claim identity control tests to EU acts. In other words, national constitutional courts must retain the authority for – as the German Federal Constitutional Court puts it - ‘safeguarding the inviolable constitutional identity’ of their states.

Decisions of the German Federal Constitutional Court, and other high courts, claiming jurisdiction to protect national identity are usually referring to their co-operative relationship with the European Court of Justice, emphasizing their ‘Europe-friendliness’<sup>104</sup>, and aiming to increase the level of protection offered by the EU<sup>105</sup>. In the case of the European Central Bank’s Outright Monetary Transaction (OMT) programme about the ‘irreversibility of the Euro the German Court in its first preliminary reference ever de facto declared the OMT programme illegal, and called the Court of Justice to strike it down.’<sup>106</sup> But after the ECJ’s ruling delivered on 16 June 2015 reaffirmed the rule that a judgment of the Court of Justice “is binding on the national courts, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings,”<sup>107</sup> the German Court complied with the answer given by the ECJ.<sup>108</sup>

Similarly to their German colleagues in *Gauweiler*, the Italian Constitutional Court in its preliminary reference order 24/2017 explains to the ECJ the reasons why the Italian justices think that ECJ Grand Chamber judgment of 8 September 2015 in case C-105/14 in *Taricco* infringes upon the Italian coconstitution’s principle not to be prosecuted beyond the statute of limitation period that was applicable at the time of the criminal offence was committed, and invites the ECJ to correct or qualify its decision. As Davide Paris rightly observes, even though the ECJ might well be unhappy with this development of ‘threatening references of appeal’, it is better than seeing national constitutional courts invoking constitutional identity

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<sup>103</sup> Case C-11/70, *International Handelsgesellschaft mbH* [1970] ECR 01125.

<sup>104</sup> See for instance the judgement of the GFCC of 24 April 2013 on the Counter-Terrorism Database Act, 1 BvR 1215/07. This judgment was referred to by the Supreme Court of the United Kingdom in *State v. Secretary of State for Transport*, 22 January 2014.

<sup>105</sup> Order of 15 December 2015, 2 BvR 2735/14. Protection of Fundamental Rights in Individual Cases is Ensure as Part of Identity Review. This decision of the German Federal Constitutional Court on the European Arrest Warrant lead to the Judgment of the Grand Chamber of the European Court of Justice of 5 April 2016 in the case of *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*. C-404/15.

<sup>106</sup> BVerfG, Case No. 2 BvR 2728/13, order of 7 February 2014.

<sup>107</sup> Case C-62/14 *Gauweiler*, para 16.

<sup>108</sup> BVerfG, 34/2016. Judgment of 21 June 2016.

to decide whether and to what extent the Member States shall comply with EU law, without the ECJ having the opportunity to express its opinion.<sup>109</sup>

In the framework of a dialogue between national constitutional courts and the ECJ, also the Spanish Tribunal Constitucional emphasizes the harmony between the European and Spanish basic values and read into the identity clause a confirmation that an infringement of the core principles of the Spanish Constitution would also violate the European Treaty.<sup>110</sup> Similarly, in the reading of the French Conseil d'Etat what is 'inherent' in the constitutional identity of a Member State is what is very crucial and distinctive of it, namely the 'essential of the Republic'.<sup>111</sup> The conclusion of the Conseil d'Etat in the case of Arcelor has been that if in the EU legal order there is an equivalent protection of the principle of rights safeguarded by the Constitution, the review of legality of the EU law should be deferred to the ECJ.<sup>112</sup> The Czech Constitutional Court, although reserving its power to review the constitutionality of EU law, but at the same time reserved this possibility for exceptional cases, such as the 'abandoning the identity of values' or exceeding the scope of conferred powers.<sup>113</sup>

Provided that we ignore the lack of the competence of the Constitutional Court in the current Hungarian constitutional system to review EU law, as argued earlier, what is wrong then with the decision of the Hungarian Constitutional Court, which also wants to break with the absolute primacy of EU law?

First, it is important to clarify the legal nature of the decision. It is certainly not aimed at placing the legality of an EU legislative act under review. Although, as mentioned, the parliamentary Commissioner in his petition to the Constitutional Court referred to Council decision 2015/1601 of 22 September 2015 on the quota system, he did not ask for a review of

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<sup>109</sup> D. Paris, 'Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco', QIL, Zoom-in 37 (2017), 5-20.

<sup>110</sup> Tribunal Constitucional 13.12.2004, Declaration (DTC) 1/2004. Quoted by M. Claes, 'National Identity: Trump Card or Up for Negotiation?', in A. S. Arnaiz and C. A. Llivina (eds.), *National Constitutional Identity and European Integration*, Intersentia, 2013. 109-139, at 128.

<sup>111</sup> See Conclusions of the Commissaire du gouvernement: Mattias Guyomar in Société Arcelor Atlantique et autres, lecture du 8 février 2007. Quoted by B. Guastafarro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause', Yearbook of European Law, Vol. 31. No. 1 (2012), 263-318, at 270.

<sup>112</sup> *Ibid.*

<sup>113</sup> Decision 2611.2008, Lisbon I, Pl. ÚS 19/08. Quoted by J. Rideau, 'The Case Law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the 'German Model'', in A. S. Arnaiz and C. A. Llivina (eds.), *National Constitutional Identity and European Integration*, Intersentia, 2013. 243-261, at 255-256.

its legality, and the Court did not provide such review.<sup>114</sup> Hence the decision cannot be considered as an ultra vires act nor as an identity review of the Council decision itself. It is rather an announcement of what the Court could do to review such an EU decision, whether it violates “human dignity, another fundamental rights, the sovereignty of Hungary or its identity based on the country’s historical constitution”.<sup>115</sup>

As the ECJ has stressed in its standing case law on derogations, EU laws have to be interpreted strictly so as to be applicable only when the case at hand entails a ‘genuine and sufficiently serious threat to a fundamental interest of society’.<sup>116</sup> There is no strict and exhaustive list of constitutional identity-sensitive matters accepted by the ECJ, but taking into account the jurisprudence of the ECJ there are some more frequently acknowledged issues, such as decisions on family law, the form of State, foreign and military policy, and protection of the national language.<sup>117</sup> The subject matter of the Hungarian Constitutional Court decision was the quota decision of the Council, on the basis of which 1294 asylum seekers would be relocated from Greece and Italy to Hungary, and the Hungarian authorities would be obliged to process their asylum applications. What ‘fundamental interests of the society’ can legitimately trump the requirement of sincere cooperation of Article 4(3) TEU here? As I pointed out earlier, this could not be the alleged collective expulsion of asylum seekers by Italy and Greece claimed by the Commissioner in his petition because the Hungarian Fundamental Law prohibits the collective expulsion of non-Hungarians from the territory of Hungary, and not from a third country. In other words, the human dignity and other

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<sup>114</sup> Independently from this procedure, the Hungarian government, right after its Slovakian counterpart’s submission, also challenged the quota decision before the European Court of Justice. This procedure is still pending, but the ECJ in its decision will not take into account the text of the Hungarian constitution or the domestically binding interpretation of it by the Constitutional Court. Why not? What if Hungary argued that a judgment constituted a violation of article 4(2) TEU (the EU’s obligation to respect the national identity of Hungary)?

<sup>115</sup> See the wording of the holdings of 22/2016. (XII. 5.) AB:

<sup>116</sup> Case C-208/09, Sayn-Wittgenstein, para 86.

<sup>117</sup> See these matters mentioned in P. Faraguna, ‘Taking Constitutional Identities Away from the Courts’, *Brook. J. Int’l L.* Vol. 41:2. 2016. 491, at 506-508. In addition, Sayn-Wittgenstein, Faraguna mentions the Groener judgment (Case C-379/87) from 1989, and the more recent Runevi judgment (Case C-208/09). Barbara Guastaferrero discusses also the Omega and Dynamic Medien Cases (Case C-391/09), the Spain v. Eurojust Case (Case 160/03), as well as the Affatato Case (Case 3/10). See B. Guastaferrero, ‘Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause’, *Yearbook of European Law*, Vol. 31. No. 1 (2012), 263-318. Besides these cases, Monica Claes also mentions from the pre-Lisbon case-law the Michaniki case (Case 213/07) and Adria Energia AG (Case 205/08), where the reference was to the protection of the national cultural identity of the relevant Member States rather than to the more political form of it. See M. Claes, ‘National Identity: Trump Card or Up for Negotiation?’, in A. S. Arnaiz and C. A. Llivina (eds.), *National Constitutional Identity and European Integration*, Intersentia, 2013. 109-139, at 131-32.

fundamental rights of refugees not staying in Hungary cannot be protected under the text of the current Hungarian Constitution.

Another problem with the Constitutional Court's interpretation of the constitution is that it claims that 'Hungary's constitutional identity is rooted in its historical constitution'. But the substantive meaning of the text of the Fundamental Law on 'the achievements of our historical constitution' is totally ambiguous<sup>118</sup>; there is no legal-scientific consensus in Hungary regarding its precise nature<sup>119</sup>. Presumably, since the case law of the Constitutional Court prior to 2011 has been annulled, it should not include precedents stemming from the Court's accumulated practice of legal interpretation since the regime change. Justice András Varga Zs. in his concurring opinion claims that 'the constitutional governance of the country has been one of the core values the nation has always stuck to, and that has been a living values even at the times when the whole or the majority of the country was occupied by foreign powers'.<sup>120</sup> By contrast, in my view, the thousand years of the Hungarian historical constitution – with the exception of some short moments, such as during the failed revolution of 1848 or shortly after 1945, until the communist parties take over, and also after 1989, when liberal democracy again seemed to be the 'end of history'<sup>121</sup> - the dominant approach was an authoritarian one.<sup>122</sup>

3. When the Hungarian Constitutional Court protects Hungary's current constitutional identity using the pretext of protecting the rights of the asylum seekers against collective expulsion, but aiming at not taking part in the joint European solution of the refugee crisis<sup>123</sup>, it does so

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<sup>118</sup> Because there is no list of laws officially considered as part of the historical constitution, an extreme interpretation could be made that the Jewish laws adopted in the 1930s, earlier than similar legislation in the Nazi Germany belong to it.

<sup>119</sup> See G. Schweitzer, 'Fundamental Law – Cardinal Law – Historical Constitution: the Case of Hungary since 2011', 4 *Journal on European History of Law*, 124-128.

<sup>120</sup> 22/2016. (XII. 5.) AB. [110]

<sup>121</sup> See the results of the research project "Negotiating Modernity": History of Modern Political Thought in East-Central Europe, led by Balázs Trencsényi, and supported by the European Research Council, [https://erc.europa.eu/"negotiating-modernity"-history-modern-political-thought-east-central-europe](https://erc.europa.eu/)

<sup>122</sup> See I. Császár, B. Majtényi, 'Hungary: The Historic Constitution as the Place of Memory', M. Suksi, K. Agapiou-Josephides, J-P. Lehnens, M. Nowak (eds.) *First Fundamental Rights Documents in Europe*, Cambridge: Intersentia, 2015. 57-69.

<sup>123</sup> In an article, Viktor Orbán warned the 'unionists' of the EU, who call for a United States of Europe and mandatory quotas, that if they refuse to accept the 'sovereignists' desire for a Europe of free and sovereign nations, who reject quotas of any kind, the mainstream will follow precisely the course that Hungary has set forth to affirm its constitutional values[?], Christian roots, its demographic policy, and its effort to unify the nation scattered across borders. See V. Orbán, 'Hungary and the Crisis of Europe: Unelected Elites versus People', *National Review*, January 26, 2017.

in a way that is inconsistent with the requirement of sincere cooperation of Article 4(3) TEU. It promotes national constitutional identity without accepting the constitutional discipline demanded by the European legal order<sup>124</sup>. The reference to national constitutional identity of Article 4 (2) is legitimate only if the Member State refuses to apply EU law in a situation where a fundamental national constitutional commitment is in play.<sup>125</sup> The Hungarian abuse of constitutional identity is nothing but national constitutional parochialism,<sup>126</sup> which attempts to abandon the common European constitutional whole.

As we saw in chapter II, when Fidesz regained its constitution-making two third majority after the 2018 parliamentary elections they successfully adopted the Seventh Amendment, which failed two years earlier with almost the same content. The abusive interpretation of constitutional identity provided by the Constitutional Court became part of the text of the Fundamental Law.

## ***2. The Instrumental Role of Religion in National Identity***

The Seventh Amendment adopted on 20 June 2018 also added another element to text, which also meant to be part of Hungary's constitutional identity, namely about the Christian culture. This new provision reads: "The protection of Hungary's self-identity and its Christian culture is the duty of all state organizations."

The purpose of the proposed provision was questioned at the preparatory meeting of the judicial committee by members of opposition parties. The only explanation MPs of the governing Fidesz party, who initiated the new text were able to provide was a paraphrase of an alleged sentence by Robert Schuman, founding father of the European Union: "Without Christian culture there is neither Europe nor Hungary." The major points of the recent

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<sup>124</sup> This is what Joseph Weiler calls the principle of constitutional tolerance, which lies at the heart of what makes European integration possible. See J.H.H. Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg', in J.H.H. Weiler and M. Wind, *European Constitutionalism Beyond the State*, CUP, 2003.

<sup>125</sup> See M. Kumm and V. Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union', 3 *ICON*, 473, 491 and 492.

<sup>126</sup> See the term used M. Kumm, 'Rethinking Constitutional Authority: On Structure and Limits of Constitutional Pluralism', in M. Avbelj and J. Komárek, *Constitutional Pluralism in the European Union and Beyond*, Hart, 2012. 51.

constitutional amendment, namely the criminalization of any civil assistance to refugees and the declaration of homelessness as an unlawful behaviour are deeply contradictory to the very idea of Christian culture. (Most probably the same intention to legitimate his anti-European idea lead Prime Minister Orbán recently to reframe his concept of ‘illiberal democracy’ as a fulfilment of ‘Christian democracy.’) But this reasoning does not reveal the compensatory message sent to the European People’s Party, the party family of Fidesz in the European Parliament, and to its most powerful member, the German CDU-CSU: even if we may have strange views on European values, but we are good Christians, like you are. Besides the political message of the amendment towards Europe, there will be clear internal constitutional law consequences of the new provision, as it can be used as a basis of reference to annul any legal norm allegedly violating Christian culture, a tool that can be useful for the packed Constitutional Court or any court in Hungary.

Not that the text of the Fundamental Law would have been ideologically neutral so far. This new constitution, which was passed by the Parliament in April 2011, shows the role of religion in national legitimation through characterizing the nation referred to as the subject of the constitution not only as the community of ethnic Hungarians, but also as a Christian community, narrowing even the range of people who can recognize themselves as belonging to it. The preamble to the Fundamental Law, which is compulsory to take into consideration when interpreting the main text, commits itself to a branch of Christianity, the Hungarian Roman Catholic tradition. According to the text of the preamble, “We are proud that our king Saint Stephen built the Hungarian state on solid ground and made our country a part of Christian Europe”, the members of the Hungarian nation recognise Christianity’s “role in preserving nationhood”, and honours the fact that the Holy Crown “embodies” the constitutional continuity of Hungary’s statehood. Besides the sacral symbols, this choice of ideology is reflected—inter alia—in the Fundamental Law’s concept of community and its preferred family model, and its provision regarding the protection of embryonic and foetal life from the moment of conception.

The preamble, while giving preference to the thousand-year-old Christian tradition, states, that “we value the various religious traditions of our county”. The choice of words displays its model of tolerance, under which the various worldviews do not have equal status, although following them is not impeded by prohibition and persecution. It is however significant that

the tolerance thus declared only extends to the various “religious traditions”, but does not apply to the more recently established branches of religion, or to those that are new to Hungary, or to non-religious convictions of conscience.

The refugee crisis of 2015 has demonstrated the intolerance of the Hungarian governmental majority, which styled itself as the defender of Europe’s ‘Christian civilization’ against an Islamic invasion. In the beginning of the crisis, Prime Minister Viktor Orbán claimed that “Christian culture is the unifying force of the nation... [and] Hungary will either be Christian or not at all.”<sup>127</sup> In another speech held in early September, Orbán went further by stating that: “The Christian-national idea and mentality will regain its dominance not just in Hungary but in the whole of Europe.” This new era should follow ‘the age of liberal blah blah,’ because the origin of the mass migration and the consequent refugee crisis is ‘the crisis of liberal identity’: “For years we have told them that 'the world is a global village' ... we have talked about universal human rights to which everybody is entitled to. We forced our ideology on them: freedom is the most important thing, we said. We bombed the hell out of those who didn't accept our ideology.... We created the Internet, we declared the freedom of information, and we told them that every human being should have access to it. We sent them our soap operas. They watch what we do.... We sent our TV stars into their homes.... they now think that our virtual space is also their space and that in this virtual space everybody can meet anybody else. ... These people, partly because of our culture lent to them or forced upon them, are no longer tied to their own land and to their past.”<sup>128</sup>

But should the alleged defense of Christianity from the ‘Muslim hordes’ be taken seriously? In a speech on 26 July 2012 Orbán explains why authoritarianism is needed to treat Hungarians: *‘Joining forces is not a matter of intentions, but of sheer force. With a half-Asian lot such as ours, there is no other way [than compulsion or force – G.H.]’*<sup>129</sup> This assessment is very similar to that of the late Imre Kertész, the Nobel laureate in literature, who argued that Hungary’s ill-fate stemmed from its inability to choose between Asia and Western Europe.<sup>130</sup> Historically in Hungary, the bloody conflicts of the Reformation meant that until

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<sup>127</sup> Orbán’s speech in Debrecen on 18 May 2015.

[http://index.hu/belfold/2015/05/18/orban\\_magyarorszag\\_kereszteny\\_lesz\\_vagy\\_nem\\_lesz/#](http://index.hu/belfold/2015/05/18/orban_magyarorszag_kereszteny_lesz_vagy_nem_lesz/#)

<sup>128</sup> Speech in Kötcsé on 5 September 2015. <https://vastagbor.atlatszo.hu/2015/09/17/a-vagatlan-kotcsei-beszed/>

<sup>129</sup> See B. Szabó, ‘Félázsiai származékoknál, mint mi, csak így megy’ [*With a half-Asian lot such as ours, there is no other way*], *Népszabadság*, 27 July 2012.

<sup>130</sup> ‘La Hongrie est une fatalité’, *Le Monde*, 10 February 2012.

the Horthy era no church could fully identify itself with the Hungarian nation. Although the Catholic Church dominated the Protestants, both numerically and politically, the Catholic Church still played little historical role in preserving national consciousness, so that Catholicism has never become equated with Hungarian patriotism. Under communism, the Roman Catholic church neither served as a symbol of national independence, nor as a source of protection for the opposition, as it happened in Poland.<sup>131</sup>

Christianity and religion serve as reference points that Orbán's right wing populism uses opportunistically. Fidesz, that used to be a liberal party with a militantly anti-clerical views, has started to become conservative from the mid-90s, turning to an openly positive stance towards religion. Still, religion has never been taken as significant part of its identity, rather played a purely instrumental, opportunistic role in the party's political strategy (even after joining the European People's Party (EPP), the center-right party family of the European Parliament).<sup>132</sup> Fidesz uses religious symbols in an eclectic way in which references to Christianity are often mentioned together with the pre-Christian pagan traditions. This refers to the idea of 'two Hungarys': the Western Christian, and the Eastern pagan, tribal one.<sup>133</sup> Orbán once voiced his conviction that the Turul bird, a symbol of ancient pre-Christian Hungarians, 'the symbol of national identity of living,'<sup>134</sup> is the image Hungarians are born in. Fidesz interprets this pre-Christianity within the framework of nationalism, and this ethno-nationalism provides sufficient basis of political identification as a type of surrogate-religion. In this respect Fidesz follows the authoritarian traditions of the Horthy regime between the two World Wars, in which the nation-religion ('nemzetvallás') played a crucial role. Another example of Christianity being instrumental for Orbán is the fact that when he listed the illiberal regimes he admires from Singapore through China, Turkey, India, Singapore, and Russia all of them are either non-Christian or Orthodox.

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<sup>131</sup> A. Grzymala-Busse, Whither Eastern Europe? Changing Political Science Perspectives on the Region. Studying Religion and Politics in East Central Europe, University of Michigan, 5 December 2013, <http://users.clas.ufl.edu/bernhard/whitherpapers/Florida%20workshop%20ECE.pdf>

<sup>132</sup> Only 22% of Fidesz voters are followers of churches, and the same percentage of them consider themselves as explicitly non-religious. Political Capital Institute's research, Budapest, 2012.

<sup>133</sup> See A. Bozóki and Z. Ádám, State and Faith: Right-wing Populism and Nationalized Religion in Hungary, East European Journal of Society and Politics, 2016/1.

<sup>134</sup> 'Minden magyar a turulba születik' [All Hungarian Are Born Into the Turul Bird], *Népszabadság*, Sept. 29, 2012.



The newly adopted, Seventh amendment to the Fundamental Law of Hungary with the state's obligation to protect Christian culture – besides its potential to limit fundamental rights – strengthens the role of religion to constitutionally legitimize the concept of ethnic nation. In this concept the nation, as subject of the Fundamental Law isn't just the community of ethnic Hungarians, but is also a Christian community, which means that those who do not associate themselves with Christianity, can feel themselves excluded from the nation as well. In this constitutional order the state is not necessarily obliged to tolerate all religions, and the representatives of the Christian religion can feel themselves entitled to be intolerant towards the representatives of other religions.