

HUNGARY'S PATH TOWARD AN ILLIBERAL SYSTEM

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Hungary's Constitutional Evolution During the Last 25 Years

Abstract. The author provides an overview of Hungary's democratic Constitution of 1989, after sketching its historical development. This Constitution met the requirements of democracy, constitutionality, human rights, and market economy in every respect. It was this constitution with which the Republic of Hungary became a member of the European Union. Hungary's first Constitutional Court – after having been elected freely by the Hungarian Parliament in 1990 – configured an internationally recognized common practice by virtue of interpreting the Constitution in the course of its application. Inaccuracies could have been mended with constitutional amendments. Instead, in 2011 a new so-called Fundamental Law was decreed with the votes of one single party, the governing party Fidesz. Although this new Fundamental Law corrected numerous defects and shortcomings, it at the same time radically transformed the system of public law, in fact withdrawing from the principles of the rule of law, democracy, and the separation of power. The legislator parried domestic (Constitutional Court, legal literature) and international (Council of Europe, European Union) criticism through serially importing numerous judicial regulation into the Fundamental Law that had previously been annulled by the Constitutional Court. Consequently, this lesion and abuse of Hungarian constitutionalism results not to be a singular, but a systemic problem, affecting the whole realm of Hungarian public law.

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Some Key Points in the Evolution of the Hungarian Constitution

In 1989, Hungary received a new constitution with Law XXXI. The law was adopted prior to the regime change of 1990 by a parliament that was not yet democratically elected.¹ Although it consisted formally of a modification of the constitution introduced under the communist regime (Law XX of 1949), which had been modelled on the Soviet constitution of 1936, commonly known as the "Stalin" constitution, Hungary nevertheless received in substance a completely

¹ The preparation of this study was supported by the Alexander von Humboldt Foundation.

new, up-to-date constitution that was in accordance with contemporary European and international thinking and agreements on human rights. The only provision unchanged was the one naming Budapest as the capital. In reality, a constitutional turn had occurred: with the proclamation of the republic on 23 October 1989, which replaced the “people’s republic”, the *Rechtsstaat* was born.² But the democratic opposition had stipulated during the negotiations to secure a peaceful transition that the new constitution should be adopted by the parliament that was to be formed after the democratic elections, to ensure that its legitimacy could not be questioned. Accordingly, the new constitution was formally adopted as a modification of the old one, using the old numbering system.

The antecedents of the Hungarian constitutional evolution are as old as Hungarian statehood, although there never was a written constitution contained in a single law; rather, the entirety of the law at the key moments of this evolution in the aggregate made up the Hungarian constitutional system. One particularly interesting station along the way was the Golden Bull of 1222, issued by King Andrew II in accordance with the will of the nobility, in which the king recognised privileges of the nobility that he himself was not allowed to contravene.³ The right to resist (*ius resistendi*) became the guarantee for the rights listed in the Golden Bull: according to the document, the nobility had the right to resist any action by the king which violated these rights. The Golden Bull is rightly compared to the English Magna Carta, as it combines the listing of rights with the question of remedy for a violation thereof, thus establishing a legal device for the solution of potential conflicts without disturbing the framework of public law.⁴

The essence of the Hungarian feudal constitution was the right freely to elect a king: the actual coronation of the king depended on the nobility, and was therefore the result of a complicated negotiation process. Only in 1687 did the nobility give up this right, in return for liberation from the Turks, acknowledging and regulating by law the hereditary rights of the Habsburg dynasty whilst simultaneously renouncing its own right to resist.

The revolutions of 1848 also brought changes in Hungary: the so-called “April laws” led to the first “civil” constitution. These laws created a system of legal

² On the constitutional turn, see István KUKORELLI, *Az alkotmányozás évtizede*. Budapest 1995, 20f.

³ Ferenc ECKHARDT, *Magyar alkotmány- és jogtörténet*. Budapest 1946, 28f. Amongst the rights that were fixed in the Golden Bull was the king’s obligation to convene the feudal Diet annually, as well as the nobility’s exemption from taxation, the inviolability of their personal freedom and the conditions for their military service. Eckhardt places the true formation of the feudal constitution in the 15th century.

⁴ *Ibid.*, 33.

relationships between Austria and Hungary which, because the Austrian emperor and the Hungarian king were one and the same person, became a *personal union*. Following the anti-Habsburg war of liberation of 1848-1849, the relationship between the two countries, and with the dynasty, was placed on a new basis by the establishment of the Austro-Hungarian Monarchy, which created a dual legal system. Its establishment was made possible by the Compromise of 1867 (*Ausgleich*) between the Hungarian nation and the Habsburg dynasty. The political compromise was put into law. These laws defined the so-called common matters of Austria and Hungary (foreign affairs, the military, and finances), which were managed by common ministries.⁵ In all other matters, the two parts of the monarchy were to manage their affairs on their own. The relationship of the two parts thus surpassed the personal union and became a real union (*Realunion*), which lasted until the end of the First World War, when the monarchy was dissolved and the Kingdom of Hungary came into existence.⁶

The legal system of the interwar period went down in history as the "kingdom without a king": King Charles IV, the last Habsburg ruler, was sent into exile by the Entente powers, which forbade his return to the country. A regent, Miklós Horthy, came to rule the country, provided with the powers of a head of state as defined by a 1920 law. The Horthy era was not a democracy like those coming into existence in Germany with the Weimar Republic or in Czechoslovakia after the First World War. In keeping with a capitalist economy that retained strong feudal characteristics, a centralised state power came into being in Hungary. One of its fundamental characteristics was the electoral system based on an open ballot. A secret ballot was possible only in Budapest. The legal system was based on the exclusive power of a single government party that gave excessive weight to the interests of the aristocracy and the middle-class gentry; its authority could not even be challenged by other parties. The government party exercised executive powers, virtually without competition, until the end of the Second World War.

After the Second World War, a republic was declared in 1946. It gained a provisional constitution with Law I of 1946,⁷ which established and regulated the separation of powers: the legislative, the executive and the judicial powers. Further, the requirement to respect human rights was declared for the first time. In 1949, the advent of the communist dictatorship, which issued a constitution in a comprehensive codex with Law XX of 1949, put an end to these promising developments. In accordance with Law XX, the form of government became

⁵ András GERGELY, Az 1867-es kiegyezés, available at <http://www.rubicon.hu/magyar/oldalak/az_1867_es_kiegyezes/>.

⁶ ECKHARDT, Magyar alkotmány- és jogtörténet, 430f.

⁷ István KUKORELLI, Alkotmánytan, vol. 1. Budapest 2007.

a “people’s republic”, and the separation of powers disappeared together with the principle of free elections.

With Law XXXI of 1989, mentioned above, Hungary established a new constitution that restored the republic and again ensured the separation of powers as well as the protection of human rights.⁸ The framework for the peaceful political transition was agreed upon during the negotiations between the communist regime and the democratic opposition at the time, and one of its most important elements was the elaboration of a constitution viewed as merely temporary. The round table of 30 March 1989, which organised the opposition, clearly expressed in its statement a desire to negotiate the preconditions for the democratic transition, that is, for free elections.⁹ The opposition expressly refused to deal with the constitution and the legal structures of the state, a task it regarded as one for the new parliament.¹⁰ It insisted that the new constitution be considered a provisional one.¹¹

Therefore, the new text indicated that it would remain in effect only until the establishment of a definitive constitution, which meant that its purpose was to lay the constitutional foundations for the transition from dictatorship to democracy, to ensure legally the holding of free elections and to guarantee the creation of the new democratically and freely elected parliament. The first sentence – the preamble – of Law XX of 1949, as amended by Law XXXI of 1989, notes at the outset that this constitution was intended to “promote a peaceful transition to a multi-party system, a parliamentary democracy and a *Rechtsstaat* (*jogállam*) implementing a social market economy”, prior to the ratification of a new constitution by a freely elected parliament. In fact, the constitution of 1989 served well for more than two decades, and this was no accident. The constitution, which bore an old date but had a completely new substance, offered a genuinely civil democratic text, and during its creation much attention was paid to contemporary European constitutions as well as to international human rights agreements.¹² The elaboration of the final constitution was thus

⁸ Cf. IDEM, *Miért nem figyeltek a tűzoltókra?* in: Benedek MOLNÁR / Márton NÉMETH / Péter TÓTH (eds.), *Mérlegen az Alaptörvény. Interjúkötet hazánk új alkotmányáról*. Budapest 2013, 37–68, 41.

⁹ Cf. András Bozóki (ed.), *A rendszerváltás forgatókönyve*, vol. I. Budapest 1999, 86f.

¹⁰ Péter TÖLGYESSY, *Az alkotmányosság helyreállításának húsz esztendeje*, in: Miklós Kocsis / Judit ZELLER (eds.), *A köztársasági alkotmány 20 éve*. Pécs 2009, 17–44, 22.

¹¹ *Ibid.*, 27.

¹² The description of this constitution, which preceded the currently effective Fundamental Law adopted in 2011, as a “communist constitution” is based solely on its date. Therefore it is misleading political propaganda intended to mask current political aspirations. Cf. for example Roger Köppel’s interview with Prof. Dr. Rupert Scholz. According to Scholz, “the new constitution is in effect since 1 January 2012. Previously, Hungary had a constitution that was written by the communists and was taken over by the post-communists.” Roger

bequeathed to the new parliament. But the two-thirds majority necessary to do so could not be achieved because of lack of understanding and cooperation of the parliament's parties, as will be explained in the following.

The Application of the Constitution of 1989

However, it proved possible on several occasions to achieve such a majority in order to amend the constitution, and in this way the parliament that assembled following the first free elections was able in 1990 to solve by constitutional amendment a crucially important problem. The problem lay in the fact that the Constitution of 1989 conditioned the adoption of a large number of laws upon an affirmative vote by a two-thirds majority of the members of parliament. In the circumstances of 1990, when the transition to democracy was still uncertain, these laws could have served as tools of obstruction whereby the democratic opposition could prevent, by paralyzing the legislature, the return to a communist dictatorship. Under democratic circumstances, however, such tools of obstruction made the country ungovernable.¹³ Although the two constitutional amendments of 1990 substantially reduced the number of these laws, the large number of so-called two-thirds laws remains a problem today, because they create possibilities for abuse for the always contingent two-thirds parliamentary majority by cementing the laws adopted in this way. For the opposition, they can, besides being used for obstruction, function as instruments of political blackmail.

By amending the Constitution of 1989 twice in 1990 alone, the freely elected parliament both recognised and strengthened its own legitimacy. No new constitution was created, but the new Hungarian Constitutional Court, which commenced its work in 1990 and soon acquired much respect, both at home and abroad, was able to apply the constitution according to its own inventive legal conception, and, as a result, the creation of a new constitution was no longer an urgent task. Finally, Hungary became a member country of the Council of Europe and of the European Union with this constitution, which entirely fulfilled the accession criteria with respect to democracy, rule of law, market economy, and the ability to adopt EU law. The organisations themselves acknowledged that the Hungarian Constitution of 1989 entirely fulfilled the requirements regarding the democratic rule of law, respect for human rights and a market economy.

KÖPPEL, Ungarn: Orbán will in die Moderne, *Die Weltwoche* 11 (2013), available at <<http://www.weltwoche.ch/ausgaben/2013-11/ungarn-orban-will-in-die-moderne-die-weltwoche-ausgabe-112013.html>>.

¹³ For this reason, István Kukorelli calls the original constitutional text, which contained a large number of laws requiring a two-thirds majority, the "constitution of mutual fears". KUKORELLI, *Miért nem figyeltek a tűzoltókra?*, 45.

The first constitutional court in the history of Hungary began its work in applying the constitution on 1 January 1990. After a short time, this body gained domestic and international recognition, and with its decisions, which were on a high level, it developed Hungarian constitutional law.¹⁴ In interpreting the constitution, the Constitutional Court took the experience of other countries into account, for example, German and American legal practice,¹⁵ but it also referred to the practice of the Council of Europe's European Court of Human Rights in Strasbourg and to international agreements.¹⁶ The reputation that the Hungarian Constitutional Court, and with it the Constitution of 1989, had won is best illustrated by the fact that the body was, in the early 1990s, admitted out of turn to the Conference of European Constitutional Courts, which held its annual Congress in Budapest in 1996. In addition, its important decisions, including dissenting opinions, were published by a German publishing house.¹⁷

Thus the 1989 Constitution fulfilled its function well, although time pressure, haste, the circumstances and the period left their mark on its text: it was born in the "constitutional revolution" of 1989-1990. However, it turned out that problems could be solved by amending the constitution, and the Constitutional Court showed the way wherever the text was problematic. The text of the constitution and its interpretation formed a *mostly coherent system* by the mid-1990s.¹⁸ Although plans were made in a cooperative effort by constitutional law scholars¹⁹ and the government in 1994,²⁰ the lack of a two-thirds majority meant that no new constitution was adopted.

The Constitution of 1989 had, as its fate would show, two critical aspects: First, it retained the centralised state structure, although a regionalised one

¹⁴ KUKORELLI, Az alkotmányozás évtizede, 31.

¹⁵ For example, the Constitutional Court's decision 33/1993 (V.28.) AB took into account the German Constitutional Court's decision on *Investitionshilfe* (judgment 20 July 1954), which itself relayed the contemporary (now obsolete) thesis regarding the constitution's neutrality on economic policy in the United States Supreme Court's judgment in *Lochner v. New York* (1905). See Imre Vörös, Contextuality and Universality: Constitutional Borrowings on the Global Stage – The Hungarian View, *University of Pennsylvania Journal of Constitutional Law* 1 (1999), no. 3, 651-660, 656.

¹⁶ *Ibid.*, 656f.

¹⁷ Georg BRUNNER / László SÓLYOM (eds.), *Verfassungsgerichtsbarkeit in Ungarn. Analysen und Entscheidungssammlung 1990-1993*. Baden-Baden 1995.

¹⁸ András JAKAB, Az alkotmányozás előkérdései, in: IDEM, *Az új Alaptörvény keletkezése és gyakorlati következményei*. Budapest 2011, 19.

¹⁹ Especially the Institute for Legal Studies of the Hungarian Academy of Sciences, Budapest.

²⁰ See Government Decision 2078/1994 (VIII.29.); István SOMOGYVÁRI, Kísérletek új alkotmány megalkotására, in: KOCSIS / ZELLER (eds.), *A köztársasági alkotmány 20 éve*, 45f. In 2006, the Ministry of Justice prepared a new plan but the government did not introduce it to the parliament. The Minister of Justice justified this by saying that "the current constitution completely meets the requirements with regard to constitutionality". See SOMOGYVÁRI, Kísérletek új alkotmány megalkotására, 58.

(for example, the creation of provinces based on the model of Austria or Germany with a federal organisation) would have provided an opportunity for an irreversible break from centralised communist one-party rule by introducing a counterbalancing factor concerning the legislation. Second, only a two-thirds majority was prescribed for modifying the constitution, which suggested that if a government succeeded in winning such a majority in the elections, amending the constitution could become a daily event.

Thus, the constitution did not raise real obstacles for the transformation of a parliamentary majority into a one-party rule; no real checks and counterbalances against the exercise of legislative power by one party were created. It can therefore be said that, despite the fundamental changes, the Constitution of 1989 did not go far enough. The Constitution created only a single genuine legislative counterweight against a possible return to one-party rule: the Constitutional Court. It is thus no coincidence that the modification of the Constitutional Court's competencies and the composition of its personnel became a key issue during the total transformation of the constitutional order that began in the summer of 2010.

The original communist constitution was amended 22 times between 1949 and 1989; the codification of the Constitution of 1989 as an amendment to Law XX of 1949 was the 23rd amendment. In the subsequent years, the Constitution of 1989 underwent 25 minor amendments.²¹ Apart from the two amendments in 1990, mentioned above, the fact that, from 1990 onwards, the transformation to a civil democracy and a social market economy was under way played a role in this. These amendments were, however, not nearly as important as the total constitutional revision of 1989. Thus, the total number of modifications, 48, does not seem significant for a period of 50 years; the German *Grundgesetz* was amended some 50 times during the 60 years after its adoption.²²

Hungarian specialists were unanimously of the opinion that whilst the text of the constitution needed to be refined and consolidated, its content was valuable and worthy of preservation. In their view, it was necessary to correct the deficiencies of the document, but the idea that a modification of the constitutional order, of the public law system was also needed did not even arise.²³ Accordingly, a "constitutional predicament" did not exist.

²¹ István KUKORELLI, Az alkotmánymódosítások alkotmánya – egységes szerkezetben, in: KOCSIS / ZELLER (eds.), A köztársasági alkotmány 20 éve, 59-66, 61f.

²² JAKAB, Az alkotmányozás előkérdései, 15.

²³ Attila VINCZE, Die neue Verfassung Ungarns, *Zeitschrift für Staats- und Rechtswissenschaften* 5 (2012), no. 1, 110-129; SOMOGYVÁRI, Kísérletek új alkotmány megalkotására, 55; András BRAGYÓVA, Az új alkotmány egy koncepciója. Budapest 1995; András SAJÓ, Egy lehetséges alkotmány. Budapest 1991.

For this reason, it was surprising that the drafting of a new constitution was put on the agenda after the elections of 2010. Constitutional literature signalled that, if a new constitution was to be drafted nonetheless, there were strong arguments for retaining the text of the 1989 Constitution.²⁴ Soon it became clear that what was on the agenda was not some form of consolidation, but a fundamental rearrangement of the whole legal system. In 2010-2011 alone, that is, within 18 months, before the new Fundamental Law came into force, the 1989 Constitution was amended 12 times.²⁵

One may note, for example, the way in which the Constitutional Court's competencies with respect to public finances, especially the budget and the fiscal law, were eliminated in the fall of 2010 by an amendment to the 1989 Constitution. Specifically, after the elections in the spring of 2010, the parliament had designed a law that compelled public servants who received severance payments to pay a special tax of 98%. The law applied retroactively to the previous five years. The Constitutional Court declared the law unconstitutional on the ground that its retroactivity violated the rule of law and legal security and voided the law in its decision 184/2010 (X.28.) AB. Only one hour after the announcement of the decision, the government submitted a constitutional amendment to the parliament that would allow the Constitutional Court to consider any law on public finances only in the highly unlikely case that the law violated the right to life, human dignity, freedom of conscience, thought and religion, the data protection laws, or the laws regarding Hungarian citizenship. These requirements were adopted without any changes in the text in paragraph 37, article (4) of the new Fundamental Law. As it is exceptionally unlikely that budgetary laws or laws on taxes and tariffs would violate these rights, the amendment has effectively deprived the Constitutional Court of this legal area in which it had previously had authority.

The Fundamental Law of 2011

Neither legal scholars nor other organisations were involved in the preparation of the new constitution, *Alaptörvény* (Fundamental Law); the work on it was conducted in offices that were closed to the general public.²⁶ The text was intro-

²⁴ András JAKAB, *Az új Alaptörvény keletkezése és gyakorlati következményei*. Budapest 2011, 18.

²⁵ For an evaluation of the amendment process, see Tímea DRINÓCZI, *Hol a tervezés, koordináció és a szakmaiság? Alkormánymódosítások 2010. április-július, Közjogi Szemle* 3 (2010), no. 3, 66-72; EADEM / Nóra CHRONOWSKI / Judit ZELLER, *Túl az alkotmányon..., Közjogi Szemle* 3 (2010), no. 4, 1-12.

²⁶ Attila Vincze points out that the members of the preparatory committee were not chosen primarily for their professional competence, but for their political loyalty to the prime minister. VINCZE, *Die neue Verfassung Ungarns*.

duced to the parliament on 14 March 2011, adopted on 18 April and announced on 25 April, and thus it came into force on 1 January 2012. By September 2013, slightly more than one and one-half years later, it had already been amended five times.²⁷ Under the circumstances, the parliamentary debate on the Constitution was a mere formality, and the Fundamental Law was adopted solely with the votes of the governing party alliance. The constitutional process in connection with the Fundamental Law, which in this form could be regarded as a one-party constitution, and the manner of its adoption were sharply criticised, not only by Hungarian legal scholars, but also by the Venice Commission of the Council of Europe.²⁸ The Hungarian critique pointed out that the absence of a discussion of the draft constitution amongst experts as well as in public due to time pressure was an even larger problem than the secrecy of the preparations. It also noted that the Fundamental Law cites the completely rewritten Law XX of 1949, i.e. the former constitution – the very same document that is labelled a “communist constitution” and declared invalid in the Fundamental Law’s preamble – as the legal basis of its own adoption.²⁹ This contradiction alone renders the legitimacy of the Fundamental Law questionable.

One positive characteristic of the Fundamental Law’s content is that its text is stylistically better arranged than that of its predecessor and its structure is better thought out. It largely retains the text of the former constitution and even complements it with principles that reflect the decisions of the Constitutional Court.³⁰

²⁷ An (unofficial) English translation of the Fundamental Law can be downloaded from the website of the Hungarian Government, available at <<http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf>>.

²⁸ For the Venice Commission’s opinions in connection with the Hungarian Fundamental Law and/or the regulation of fundamental rights in Hungary after 2010, see European Commission for Democracy through Law (Venice Commission), Opinion on the New Constitution of Hungary, Opinion no. 621/2011, CDL-AD(2011)016, Strasbourg, 20 June 2011, available at <<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282011%29016-e>>; Opinion on Act CLXII of 2011 On the Legal Status and Remuneration of Judges and Act CLXI On the Organisation and Administration of Courts in Hungary, Opinion no. 663/2012, CDL-AD(2012)001, Strasbourg, 19 March 2012, available at <<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282012%29001-e>>. See also the opinions CDL(2011)016, CDL(2011)001, CDL-AD(2012)009, CDL-AD(2012)020, CDL-AD(2012)004; and JAKAB, Az új Alaptörvény keletkezése és gyakorlati következményei, 172, 182.

²⁹ JAKAB, Az új Alaptörvény keletkezése és gyakorlati következményei, 183; VINCZE, Die neue Verfassung Ungarns.

³⁰ Hungarian legal scholars have evaluated the Fundamental Law in detail. See, for example Nóra CHRONOWSKI, Az Unió értékei és az alaptörvény, in: EADEM (ed.), Alkotmány és jogalkotás az EU tagállamként. Válogatott tanulmányok. Budapest 2011, 45-98; EADEM, Az alaptörvény európai mérlegen, *Fundamentum* 15 (2011), no. 2, 68-80, available at <<http://www.fundamentum.hu/sites/default/files/11-2-06.pdf>>; EADEM, The New Hungarian Fundamental Law

For example, two criteria elaborated in the decisions of the Constitutional Court with regard to restrictions on fundamental rights were included in the Fundamental Law: A fundamental right may be restricted only to allow the effective use of another fundamental right or to protect a constitutional value, and it must be absolutely necessary and proportionate to the objective pursued (Article I, paragraph 3). Not only did this solution raise the practice of the Constitutional Court to a constitutional level, it also is consistent with the text of Article 52 of the EU Charter of Fundamental Rights.

In the constitutional structure, the formulation of fundamental rights was put before the part addressing the state structure, a positive alteration of the former constitution. Similarly, the legal literature regards the wording of the fundamental rights as more refined than before.³¹

One notable positive feature of the Fundamental Law is the legal basis it provides for the third generation of fundamental rights, e.g. customer protection, environmental protection, GMO-free agriculture and prohibition of the importation of contaminated waste products. Another important step forward is the regulation of the economic polity,³² especially the formulation of regulations concerning matters of public finance, which were completely absent from the former constitution.³³ Article N) of the Fundamental Law provides that Hungary implements the principles of a balanced, transparent and financially sustainable economy. Article O) creates the obligation to contribute to state and community tasks. These goals are further elaborated in the regulations on public finance, which are placed in a separate chapter (Articles 36-44). In accordance with the debt ceiling formulated in Article 36, until state debt falls

in the Light of the European Union's Normative Values, *Revue Est Europa* numéro spéciale 1 (2012), 111-142, available at <<http://www.est-europa.univ-pau.fr/images/archives/2012-Hongrie/nora-chronow-ski.pdf>>; EADEM / Tímea DRINÓCZI / Miklós Kocsis, What Questions of Interpretation May Be Raised by the New Hungarian Constitution?, *International Constitutional Law* 6 (2012), no. 1, 41-64, available at <http://www.internationalconstitutionallaw.net/download/bf5cbb95c04ead4af933dc923bdc81e/Chronowski_Drinoczi_Kocsis.pdf>; IDEM, Mozaikok, azaz milyen értelmezési kérdéseket vethet fel az alaptörvény?, in: Tímea DRINÓCZI (ed.), Magyarország új alkotmányossága. Pécs 2011, 45-64, available at <http://www.law.pte.hu/files/tiny_mce/File/karikiadvanyok/magyarorszag_uj_alkotmanyossaga_kotet_11.pdf>; VINCZE, Die neue Verfassung Ungarns; JAKAB, Az új Alaptörvény keletkezése és gyakorlati következményei. See also newer evaluations, e. g. Lóránt CSINK / Johanna FRÖHLICH, Egy alkotmány margójára. Alkotmányelméleti és értelmezési kérdések az Alaptörvényről. Budapest. 2012; and MOLNÁR / NÉMETH / TÓTH (eds.), Mérlegen az Alaptörvény.

³¹ Herbert KÜPPER, Hol vagyok én a szövegben?, in: MOLNÁR / NÉMETH / TÓTH (eds.), Mérlegen az Alaptörvény, 89-110, 107; CHRONOWSKI / DRINÓCZI / KOCIS, What Questions of Interpretation May Be Raised?

³² Tímea DRINÓCZI, Gazdasági alkotmány az Alaptörvényben, *Jogtudományi Közlöny* 67 (2012), no. 10, 369-383.

³³ Ernő VÁRNAY, Közpénzügyek az alkotmányban – az adósságfék, *Jogtudományi Közlöny* 66 (2011), no. 10, 483-495.

below the rate of 50% of the Gross Domestic Product (GDP), only state budgets that reduce the rate of state debt in relation to the GDP are acceptable. As long as state debt exceeds 50% of the GDP, Article 37 of the Fundamental Law also prohibits borrowings that would raise the proportion of state debt in relation to the GDP, as compared with the previous year.

Considering that, as previously mentioned, the Constitutional Court was deprived of its competencies regarding matters of public finance in 2010, conformity to these regulations depends upon the government's discretion. There is no procedural way to petition or to enforce the termination of a budgetary or tax law that contradicts these regulations on the ground that it is unconstitutional. Therefore, as a practical matter, the chapter on public finance has no meaning; the Constitutional Court may exercise its authorities regarding these laws only when the proportion of state debt falls below 50% of the GDP (Article 37, paragraph (4)). This event, in turn, depends upon the respective government's economic policy, and the executive power will hardly ever strive to bring state debt below 50%. This is a serious flaw in the Fundamental Law. The other substantial errors in the Fundamental Law are also related to budgetary matters.

Amongst the negative features, the legal literature regards as worrisome the new provisions that were added to those retained from the previous constitution. The reason is that the additions alter the meaning of the whole previous text, which is the basis of the entire Hungarian legal system.

The legal literature notes that the approval of the budget depends on the consent of a three-member committee, the Budget Council (Fundamental Law, Article 44).³⁴ Because the president of the Hungarian National Bank and the auditor general are ex officio members of the Budget Council, their spheres of action will inevitably mingle: their judgment of the budget will be influenced by their own positions, and they will inevitably share a part of the responsibility for the fiscal policy of the government. Further, to constitute a quorum in the Budget Council, which also has veto rights, the presence of only two of its members is required.³⁵ Thus, two persons could prevent the adoption of Hungary's budget. Moreover, in the event that the parliament does not approve the state budget by 31 March, the president of the republic has the right to dissolve the parliament (Fundamental Law, Articles 3 and 9, paragraph 3), even shortly after parliamentary elections. This is a serious violation of the rule of law and a recurring component of the legal literature's critique of the Fundamental

³⁴ KÜPPER, *Hol vagyok én a szövegben?*, 107; VINCZE, *Die neue Verfassung Ungarns*, point VII.

³⁵ See Law CXCV, Article 27, § (2) (Law on the economic stability of Hungary), available at <http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1100194.TV>.

Law.³⁶ It thus appears that three constitutional rules which were formulated to relate to one other, despite being placed in different passages of the text and therefore not easily discovered, together create an opportunity for abuse: in this way, the will of the people, which was expressed in the parliamentary elections, can be disregarded.

Another problem is caused by the large number of laws that can be changed only by a two-thirds majority vote in the parliament. The Fundamental Law labels them “cardinal laws”, and there are currently 33 such laws. Amongst them are laws on citizenship; the awarding of honours and decorations; the pension system; the rules for the functioning of the aforementioned Budget Council; the tax system; forms of military service; local self-government; the protection of families; the organisation and administration of courts; and agricultural land. The significance of these laws does not justify the supermajority requirement for voting on them. The intention, however, is clear: to reduce the room for manoeuvre of future governments, and to secure at any given moment a tool for paralyzing the government for the respective opposition.³⁷ The consequences are predictable: the government will be unable to react to changing circumstances without the opposition’s consent, which means that the opposition will effectively share in governing without assuming responsibility for the result. Because the disruption of the legal system’s functioning and a constitutional crisis are thus in a sense pre-programmed, the legal literature advises either the complete abolition of the category of cardinal laws, or at least the reduction of their number to three or four.³⁸

One fundamental right has been abolished: the right to social security. In the former constitution, paragraph 70/E obliged the state to organise adequate social security and social insurance institutions and formulated these obligations as rights which were enforceable at the Constitutional Court. Social security included the pension system and covered the instances of illness, disability, orphanhood and involuntary unemployment. Now, according to Article XIX of the Fundamental Law, the state merely “strives for social security”, which includes taking care of the aforementioned problems, but it has no obligation to do so. Therefore, pensions, health care provisions, unemployment aid etc. have

³⁶ VINCZE, Die neue Verfassung Ungarns, point VII; KÜPPER, Hol vagyok én a szövegben?, 107; András JAKAB, Távolabb kerültünk az európai mainstreamtől, in: MOLNÁR / NÉMETH / TÓTH (eds.), Mérlegen az Alaptörvény, 111-128, 121f.; IDEM, Az új Alaptörvény keletkezése és gyakorlati következményei, 290f.

³⁷ Prime Minister Orbán stated in an interview with the *Kronen-Zeitung* that it was an explicit political goal of his to tie the hands of future governments. Kurt SEINITZ, Orbán: Nur toter Fisch schwimmt mit dem Strom, *Kronen-Zeitung*, 10 June 2011, available at <http://www.krone.at/Welt/Orban_Nur_toter_Fisch_schwimmt_mit_dem_Strom-Krone-Interview-Story-267398>.

³⁸ CHRONOWSKI / DRINÓCZI / KOCIS, What Questions of Interpretation May Be Raised?; KUKORELLI, Miért nem figyeltek a tűzoltókra?, 54-57; KÜPPER, Hol vagyok én a szövegben?, 99.

changed from fundamental rights into forms of state beneficence, depending on the particular budget.

The Fundamental Law terminated the legal status of self-governing bodies with respect to fundamental rights: the former constitution's declaration that local self-government bodies have fundamental rights is no longer included. Also absent from the Fundamental Law is the option for local self-government bodies to appeal to the Constitutional Court to protect their rights, which had been recognised in paragraph 43 (2) of the former 1989 Constitution. The Fundamental Law makes no reference to the actual content of local self-government or to the citizens' right to local self-government.³⁹ For this reason, it is particularly important that the property of self-governing bodies is no longer protected as a fundamental right to property: the constitutional legislator's reaction to the wasteful spending and economic mismanagement of local self-governing bodies in past decades was the effective elimination of self-government. Although a stricter approach is understandable, the removal of the local self-governments' economic foundations is, first, too high a price to pay, and second, a distinctive feature of the drive towards centralisation of the new public law regime.⁴⁰

The right of every citizen to appeal to the Constitutional Court for a judicial review (*actio popularis*) has been abolished. Although this unrestricted right has been frequently abused by appellants, the constitutional complaint that now replaces it codifies an extraordinarily narrow procedural route for legal redress in comparison with the former constitution: it requires that a violation of a fundamental law is present in a specific court decision.⁴¹ Whilst it was undoubtedly necessary to restrict the *actio popularis*, its complete abolition was not required. It must be noted, however, that neither the *actio popularis* nor the existence of a constitutional court itself is a necessary precondition for a state system to be qualified as a *Rechtsstaat*. However, if this change is viewed in the context of the other changes, as well as the developments described below, a picture of a legal system of an entirely different quality emerges.

The eclectic, ideologically partisan wording of the preamble to the Fundamental Law, which conveys an idealised picture of the past, describes the evolution of the Hungarian state and its constitutional law in recent decades

³⁹ Imre IVANCSICS / Adrián FÁBIÁN, A helyi önkormányzatokra vonatkozó szabályok az Alaptörvényben, in: DRINÓCZI (ed.), Magyarország új alkotmányossága, 97-107.

⁴⁰ VINCZE, Die neue Verfassung Ungarns, point IV.1.

⁴¹ J. Zoltán TÓTH, A 'valódi' alkotmányjogi panasz használatba vétele, *Jogtudományi Közlöny* 69 (2014), no. 5, 224-239, 237. According to the experience of the last two years, the Constitutional Court has been extraordinarily strict regarding the acceptance of constitutional complaints, accepting only about 2% of them. Amongst the constitutional complaints that were accepted, about 50% were successful.

in a one-sided way.⁴² The doctrine of the Holy Crown, which developed in medieval times under feudalism and which has no meaning in constitutional law in the 21st century, was included in the text. According to this doctrine, which is completely incomprehensible today, the Crown of King St. Stephen (first King of Hungary) is the embodiment of Hungarian statehood. The preamble also includes the problematic category of the “historical constitution”, the content of which remains undetermined and can therefore be applied to anything imaginable:⁴³ it states that the Fundamental Law shall be interpreted “in accordance with [...] the National Avowal [i.e. the preamble] contained herein and the achievements of our historical constitution” (Article R). With the adoption of the Fundamental Law, the provisions of the preamble thus became binding guidelines for the Constitutional Court.

The court system was altered as well: the Fundamental Law replaced the Supreme Court of Justice with the renamed Curia as the highest judicial body. The Curia thus became the Supreme Court’s legal successor. In connection with the change of names, the president of the Supreme Court of Justice was removed from office. The president appealed to the European Court of Human Rights in Strasbourg, which upheld his complaint in its decision: his removal as president and the relevant legal decree were judged to violate the European Convention on Human Rights.⁴⁴

Whilst the Fundamental Law did not name a new body for court administration, two laws abolished the previous courts’ system of self-administration, which, incidentally, had been justly criticised in the past.⁴⁵ Now, the National Office for the Judiciary (OBH), whose president has a broad sphere of influence on the entire career path of judges, including applications for the judicial career, the judges’ unfolding careers and the transfer or removal of judges. In its opinion on the two laws, the Venice Commission criticised the fact that the judges became immediately dependent on the president, who is not accountable to anyone for his activities. The Hungarian Constitutional Court perceived a violation of the rule of law in the fact that the president had no obligation to give reasons for his personnel decisions, and the Constitutional Court consequently

⁴² Also, for example, the Christian faith is emphasised in the preamble in a rather one-sided way.

⁴³ See CSINK / FRÖHLICH, *Egy alkotmány margójára*, 124-131. Csink and Fröhlich consider the history of Hungary’s constitutional development, which they outline in the first chapter of their book, to be a useful tool of interpretation in this regard.

⁴⁴ The decision by the European Court of Human Rights is available at <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144139>>.

⁴⁵ Act CLXI. of 2011 on the Organisation and Administration of Courts of Hungary and Act CLXII. of 2011 on the Legal Status and Remuneration of Judges. The Venice Commission criticised both laws sharply: see Venice Commission, *Opinion on Act CLXII of 2011 and Act CLXI of 2011*, Opinion CDL-AD(2012)001.

judged this regulation under the aforementioned laws to be unconstitutional.⁴⁶ The law also awarded the president of the National Office for the Judiciary the right to assign any case to courts other than those prescribed by law, without an obligation to give reasons and without any possibility of appeal. This rule, which was harshly criticised by the Venice Commission,⁴⁷ was later quashed by the Hungarian Constitutional Court, on the ground that it seriously violated the citizens' right to fair trial and a legally competent judge, as guaranteed by the Fundamental Law (Article 28).⁴⁸

The Fundamental Law reflects a new philosophy regarding the separation of powers by codifying the primacy of the executive branch vis-à-vis the other branches of power (Article 15). One specific feature of this structure, called the administrative state in the legal literature, is the exceptionally broad formulation of the government's competencies. These authorities encompass everything that is not specifically assigned to another body by a legal act. The government may not only promulgate regulations according to its legal authorisation, but may also do so on subjects not regulated by law. This authority relates to the fact that the Fundamental Law de facto effectively accepts only the indirect exercise of power. Manifestations of direct democracy, such as a national referendum, are exceptional instruments: the list of topics that are excluded from being subject to a national referendum comprises ten topics, including the electoral law. Thus, it can be said that the possibility of a national referendum is virtually ruled out.

The overall assessment of the Fundamental Law in the legal literature is a balanced critique, as follows:⁴⁹ Amendments necessary for a constitutional consolidation were not implemented; instead, a constitution was born that looks to the past and is less restrictive towards state power than its predecessor.

⁴⁶ Constitutional Court of Hungary, 13/2013. (VI. 17.) AB határozat a bíróságok szervezeteről és igazgatásáról szóló 2011. évi CLXI. törvény és a bírák jogállásáról és javadalmazásáról szóló 2011. évi CLXII. törvény egyes rendelkezései alaptörvény-ellenességének megállapításáról és megsemmisítéséről, valamint mulasztásban megnyilvánuló alaptörvény-ellenesség és alkotmányos követelmény megállapításáról, available at <<http://www.opten.hu/13-2013-vi-17-ab-hatarozat-j229325.html>>.

⁴⁷ Venice Commission, Opinion on Act CLXII of 2011 and Act CLXI of 2011, Opinion CDL-AD(2012)001, paragraph 1.

⁴⁸ Constitutional Court of Hungary, decision 36/2013 (XII.5.): Magyarország Alaptörvényének átmeneti rendelkezései (2011. december 31.) 11. cikk (3) bekezdésével, a bíróságok szervezeteről és igazgatásáról szóló 2011. évi CLXI. törvény 62., 63. és 64. §-ával, valamint a büntetőeljárásról szóló 1998. évi XIX. törvény 20/A. §-ával, valamint az Országos Bírói Hivatal Elnökének bíróság kijelöléséről szóló 22/2012. (II. 16.) OBHE számú határozatával összefüggő alkotmányjogi panasz, paragraph 34, available at <<http://public.mkab.hu/dev/dontesek.nsf/0/C89E70BD4E261A16C1257ADA00524D2F?OpenDocument>>.

⁴⁹ See, for example, CHRONOWSKI / DRINÓCZI / KOCIS, What Questions of Interpretation May Be Raised?, 63; regarding the "cementing" of the governing party's rule, see e.g. VINCZE, Die neue Verfassung Ungarns, 129; KUKORELLI, Miért nem figyeltek a tűzoltókra?, 46; and KÜPPER, Hol vagyok én a szövegben?, 107.

The Fundamental Law in several respects cements the power of the governing party, which was the only party to vote for it in the parliament. There is a general consensus in the legal literature that Hungary remains a state under the rule of law, but that there have been several regressions in comparison with the guarantees of the former constitution, creating a risk for the proper functioning of the *Rechtsstaat*. Whilst several important matters of principle, such as the separation of powers and the prohibition of retroactive legislation, are missing, the Fundamental Law can still, on the whole, fulfill the functions of a constitution. I am of the opinion that these criticisms are justified. Even if the Fundamental Law retained in large part the wording of the former constitution, it did so by adding corrective rules that downgrade or weaken the rights-guaranteeing character of the regulations of the former constitution. Prior to 2010, one of the National Assembly's subcommittees appointed judges of the Constitutional Court on a parity basis. The procedure ensured that both the current government and the opposition could nominate roughly equal numbers of judges. The Fundamental Law, in contrast, prescribes that the composition of the subcommittee responsible for the nomination of the judges must reflect the relative strength of the parties in parliament. In this way, the 2010 government's two-thirds majority ensured that only persons nominated by the government party are elected as judges. Thus the composition of the Constitutional Court has been significantly altered, even distorted. This fact has had consequences also for the Constitutional Court's decisions: the legal literature, and, in July 2014, even the Constitutional Court's president himself, have harshly criticised a number of the Court's decisions for their perceived one-sidedness.⁵⁰

Amendments to the Fundamental Law

The Fundamental Law was first amended only five and one-half months after its entry into force on 18 June 2012. The reason for the first amendment was that in connection with the Fundamental Law, a number of so-called "provisional regulations to the Fundamental Law" were adopted in a separate law. This law, however, contained not only provisional regulations, but also rules such as one

⁵⁰ Mátyás BENCZE / Ágnes KOVÁCS, „Mission Impossible”. Alkotmánybírászkodás az alkotmányos értékek védelme nélkül, *Jogtudományi Közlöny* 69 (2014), no. 6, 273-284; Péter Paczolay, the president of the Constitutional Court, added a dissenting opinion to the Court's decision 26/2014 (VII.23.) AB, regarding the modification of the electoral system in the summer of 2014. He declared: "The current item does not simply touch upon a matter of fundamental rights, but upon the right to vote, which is the foundation of democracy. Therefore the Constitutional Court should have judged with the utmost responsibility and with the exclusive consideration of constitutional factors." Thus the president expressed the opinion that the position of the majority was influenced by not only professional but also political considerations.

granting the president of the National Office for the Judiciary the capacity to reassign court cases from the legally prescribed courts to other courts. The intention was to create a constitutional basis for the aforementioned right in order to prevent its scrutiny by the Constitutional Court for a possible violation of the right to fair trial and a legally competent judge, a right that is guaranteed in the Fundamental Law (Article 28, see above point 3.7.). In another case, a regulation regarding taxation was introduced with similar intentions; this regulation authorised the government to implement a surtax in the event that Hungary incurred unexpected and unbudgeted financial obligations arising from a sentence by the Constitutional Court, the European Court of Justice or any other court. As in the instance previously mentioned, the aim was to prevent a review of the regulation by the Constitutional Court, but these rules were not included in the Fundamental Law. These rules were placed in the mentioned separate law on provisional regulations because the governing party's legislators themselves may have regarded the codification of such measures in the Fundamental Law as too embarrassing; they were less conspicuous in a separate law. Because the question whether the provisional regulations formed part of the Fundamental Law or not was completely novel, the first amendment of the Fundamental Law became necessary. It confirmed that the provisional regulations were indeed part of the Fundamental Law.

However, following an appeal by the general ombudsman for fundamental rights, the Constitutional Court in December 2012 quashed a significant part of the provisional regulations, on the ground that the law contained not only provisional rules but also new constitutional rules.⁵¹ Because these new constitutional rules were not part of the Fundamental Law and could not be considered modifications of or additions to it, the extra-constitutional separate law caused considerable legal uncertainty, which was violating the rule of law.⁵² The reason for this was that the content of the Fundamental Law, the benchmark for ascertaining the constitutionality of a law, had become indeterminable.

At the end of 2012, the Fundamental Law was amended twice, for a total of three amendments within eight months. One amendment concerned the modification of the provisional regulations, which were then quashed by the Constitutional Court altogether. The other amendment designated all legislation regarding agricultural land as cardinal laws requiring a two-thirds majority vote in the parliament. In the spring of 2013, the Fundamental Law was amended

⁵¹ Constitutional Court of Hungary, decision 45/2012 (XII.29.) AB, Magyarország Alaptörvényének átmeneti rendelkezései (2011. december 31.) alaptörvény-ellenességének vizsgálatára irányuló utólagos normakontroll, available at <<http://public.mkab.hu/dev/dontesek.nsf/0/B139EF59DD213D0BC1257ADA00524EC0?OpenDocument>>.

⁵² Constitutional Court of Hungary, decision 45/2012(XII.29.) AB, paragraphs 68, 75 and 76.

for the fourth time and in September 2013 for the fifth time. It had then been amended five times in less than two years of its entry into force.

The fourth amendment effectively incorporated into the Fundamental Law a large part of the mentioned provisional regulations that had been quashed by the Constitutional Court. Laws corresponding to these regulations had been adopted in the meantime, and with the abolishing of the provisional regulations, they lost their constitutional basis. The fourth amendment of the Fundamental Law was the subject of sharp domestic and international criticism,⁵³ because the constituent majority of the parliament incorporated into the constitution a series of legal rules that had been quashed by the Constitutional Court. As noted previously, what is provided there cannot be unconstitutional, and thus additional subjects of regulation were removed from the Constitutional Court's field of activity, without a direct alteration of its competencies.

The fourth amendment has also been criticised internationally by the Council of Europe's Venice Commission and by a resolution of the European Parliament.⁵⁴ The Hungarian government itself, as well as the Council of Europe's general secretary, had requested the opinion of the Venice Commission. The two critical evaluations prompted the constitutive parliamentary majority to modify

⁵³ Nóra CHRONOWSKI / Erzsébet CSATLÓS, Judicial Dialogue or National Monologue?, *ELTE Law Journal* 1 (2013), no. 1, 7-29, available at <<http://eltelawjournal.hu/judicial-dialogue-or-national-monologue-the-international-law-and-hungarian-courts/>>; Judit ZELLER, Nichts ist so beständig... Die jüngsten Novellen des Grundgesetzes Ungarns im Kontext der Entscheidungen des Verfassungsgerichts, *Osteuropa Recht* 59 (2013), no. 3, 307-325; Imre Vörös, Az alkotmányban korlátozott alapvető jogról és az ilyen alkotmányról. Glossza az Alaptörvény negyedik módosításához, *Élet és Irodalom* 57 (2013), no. 50. For a joint expert opinion of the Hungarian Helsinki Committee, the Eötvös Károly Policy Institute and the Hungarian Civil Liberties Union on the 4th amendment, see: Main Concerns Regarding the Fourth Amendment to the Fundamental Law of Hungary, 26 February 2013, available at <http://helsinki.hu/wp-content/uploads/Appendix_1_Main_concerns_regarding_the_4th_Amendment_to_the_Fundamental_Law_of_Hungary.pdf>; Gábor HALMAI, Constitutionalism in Hungary: Undermining the Fundamental Law, *Jurist.org*, 12 April 2013, available at <<http://jurist.org/forum/2013/04/gabor-halmi-hungary-churches.php>>; Attila ANTAL, Alkotmányozási korszakok és technikák, *Közjogi Szemle* 6 (2013), no. 2, 1-18; Péter SMUK, Ostrom vagy felújítás alatt? A vélemény szabadság új határai, *Közjogi Szemle* 6 (2013), no. 2, 25-34; Endre ORBÁN, Az Alaptörvény paradoxonjai. Átmenetből? Átmenetbe!, *Közjogi Szemle* 6 (2013), no. 2, 51-58; Viktor KAZAI, Kettős nyomás alatt, *Közjogi Szemle* 6 (2013), no. 3, 54-60.

⁵⁴ European Commission for Democracy through Law (Venice Commission), Opinion on the Fourth Amendment to the Fundamental Law of Hungary. Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013.). Opinion 720/2013, 17 June 2013, available at <<http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282013%29012-e>>; European Parliament, European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights, Standards and Practices in Hungary (Pursuant to the European Parliament Resolution of 16 February 2012, 2012/2130(INI), 3 July 2013, available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0315+0+DOC+XML+V0//EN>>.

the situation created by the fourth amendment by means of a fifth amendment to the Fundamental Law. These modifications, however, were merely cosmetic, as discussed below.

The basis for some of the objections of the Venice Commission and the European Parliament is the violation of the European Convention on Human Rights as well as EU law. They will be introduced here as examples.

The legal regulation concerning the recognition of religious communities, which left the decision of recognition to the parliament, had been found unconstitutional and had been voided by the Constitutional Court, partly on the ground that it transformed recognition into a political question, and partly because there was no way to seek legal redress. The fourth amendment incorporated the text of the quashed law into the Fundamental Law. In the opinion of the Venice Commission, the text nonetheless lacked precision, used oversimplified criteria and gave the parliament wide discretion. As a result, a matter that is protected as a fundamental right, the freedom of belief and conscience, as guaranteed in Article 9, paragraph (1) of the European Convention on Human Rights (in the following, ECHR), continued to be subject to political decisions. The Venice Commission's opinion also criticised the continuing lack of any means for legal redress.⁵⁵ The European Parliament's resolution emphasised that the fourth amendment had been adopted merely two weeks after the Constitutional Court's decision and had effectively overruled it by incorporating into the Fundamental Law the regulation that the Constitutional Court had found unconstitutional.⁵⁶ According to the resolution, all of this has a negative influence on the state's obligation to treat religions and world views impartially and without bias.

The fifth amendment was a reaction to this critique: it changed the text of the fourth amendment, but it did so without changing its essential characteristics (Fundamental Law, Article VII, paragraphs (2) to (4)). The point of emphasis shifted to a new category of "cooperation", and it remained the role of the parliament to decide which religious communities were cooperating with the state. Such communities have special rights and privileges with regard to receiving subsidies from the state budget. Therefore, the essential questions were still to be decided by politicians, and the possibility of legal redress was not even mentioned.

The parliament then changed the law on churches in conformity with the fifth amendment. On 8 April 2014, the European Court of Human Rights in

⁵⁵ Venice Commission, Opinion on the Fourth Amendment, point 36.

⁵⁶ European Parliament, Resolution of 3 July 2013 on the Situation of Fundamental Rights, point CP and chapter II, point 56.

intact.⁶² In its *resolution*, the European Parliament pointed out that the regulation jeopardises the obligation to provide balanced information. Contributing to the danger is the fact that the public broadcasting service, which is controlled by an extremely centralised institutional system, provides one-sided information and also distorts the media market.⁶³

The fifth amendment of the Fundamental Law also reacted to this critique in its own way. The new rule permits electoral advertising in the commercial media, but only if it is published gratis (free of charge). The lifting of the constitutionally formulated ban is thus subject to a condition which effectively reaffirms the ban.⁶⁴ It can therefore be said that the fifth amendment circumvented the critique of the Venice Commission and the European Parliament.

The Constitutional Court had adjudged unconstitutional and therefore quashed a regulation that required state-supported participants in higher education to work in Hungary for a certain amount of time because of their state financial support. This regulation was also incorporated into the Fundamental Law by the fourth amendment (Fundamental Law, Article XI, paragraph (3)). In its previously mentioned opinion, the Venice Commission noted that such a detailed regulation has no place on the constitutional level.⁶⁵ Again, the principal aim was to prevent its review by the Constitutional Court. The fifth amendment of the Fundamental Law did not deal with this question, the wording remained unchanged.

Similarly, the law that made homelessness an administrative offence, thus criminalising it, had previously been quashed by the Constitutional Court, on the ground that it did not meet the constitutional requirements for the imposition of criminal sanctions. According to the Constitutional Court, homelessness is not a question of criminal law but instead one of social relations, which must be dealt with by using the instruments of social legislation and social policy. This regulation was also incorporated into the Fundamental Law (Article XXII, paragraph (3)). The Venice Commission repeated its objection that the regulation was a detailed one that should not have been elevated to the constitutional level. The aim to prevent further examination of the law's constitutionality by the Constitutional Court remained the same.⁶⁶ Like the Hungarian Constitutional Court, the European Parliament resolution considers it worrisome that

⁶² Venice Commission, Opinion on the Fourth Amendment, points 45-47.

⁶³ European Parliament, Resolution of 3 July 2013 on the Situation of Fundamental Rights, points 45 and 50.

⁶⁴ During the electoral campaign prior to the April 2014 elections, electoral advertisements were broadcasted only in the state-owned media controlled strictly by the government.

⁶⁵ Venice Commission, Opinion on the Fourth Amendment, point 61.

⁶⁶ *Ibid.*, point 65.

the question of homelessness was addressed through criminal law.⁶⁷ Again, the fifth amendment of the Fundamental Law did not deal with this question: the criminalisation remained unchanged.

The aforementioned right of the president of the National Office for the Judiciary (OBH) to assign legal cases to courts other than those prescribed by law has also been sharply criticised by the Venice Commission.⁶⁸ Referring to this critique, the European Parliament's resolution criticised the lack of objective or normative criteria for the selection of legal cases to be reassigned.⁶⁹ The fifth amendment deleted this regulation from the Fundamental Law. Thus, it seemed that the critique has been heeded. However, if we consider that the OBH president's broad ability to exert influence over the judges, which results in their legal and de facto dependency, it becomes clear that it was not necessary to uphold the president's right to reassign cases; the goal that was to be achieved by this right was achievable by other means as well. The reassignment regulation has also been deleted from the respective law.⁷⁰

Meanwhile, the Constitutional Court, reviewing a constitutional complaint, ruled in its decision 30/2013 (XII.5.) AB that the regulation under which the OBH president had already reassigned more than 40 cases to courts other than those prescribed by law⁷¹ was unconstitutional. The decision had a retroactive effect. The Constitutional Court determined that these legal regulations violated not only the Fundamental Law, but also international agreements, being in conflict with Article 6, paragraph (1) as well as Article 13 of the ECHR, regarding the right to fair trial and the right of appeal, respectively. Accordingly, the Constitutional Court made clear that the law forbids the application of the reassignment rule in the pertinent aforementioned more than 40 procedures, which meant that the reassignments of cases had been unconstitutional.⁷² From the ruling by the Constitutional Court, which clarified the legal situation, one might have concluded that the court cases at issue would now be heard at the courts prescribed by law. This result, however, did not happen. Although at first numerous cases were given to the courts prescribed by law on the grounds that the designated

⁶⁷ European Parliament, Resolution of 3 July 2013 on the Situation of Fundamental Rights, chapter II, point 55.

⁶⁸ See Venice Commission, Opinion on the Fourth Amendment, point 74.

⁶⁹ European Parliament, Resolution of 3 July 2013 on the Situation of Fundamental Rights, chapter I, point AZ

⁷⁰ We are referring to Law CLXI of 2011 on the Organisation and Administration of Courts, §§ 62-64; and to Law XIX of 1998 on the Prosecution, § 20/A.

⁷¹ In the case in question, the OBH president had reassigned the case with his decision 22/2012.(II.16.) OBHE.

⁷² See Constitutional Court of Hungary, decision 36/2013 (XII.5.), paragraph 62; the law paragraph forbidding the application of the regulation is Article 45, § (2) of Law CLI of 2011 on the Constitutional Court.

courts lacked jurisdiction, a number of them were again reassigned to the courts designated by the OBH president, as if the Constitutional Court ruling did not exist. The reason for this is that, in its final verdict on the matter, the Curia rather surprisingly adopted the position that the Constitutional Court's ruling "did not affect" the previous reassignments.⁷³ The Constitutional Court may have adopted this position due to legal considerations surrounding the "retroactive" abolition of a legal regulation that, whilst no longer legally effective, has legal consequences that remain.

The Venice Commission's opinion criticises the approach of routinely incorporating into the Fundamental Law regulations that have been ruled unconstitutional by the Constitutional Court,⁷⁴ an approach that can by now be considered systematic and recurrent. This way of proceeding undermines the Constitutional Court's position within the legal system and does harm to the three core principles formulated in the Treaty on European Union: respect for human rights, the rule of law, and democracy. At the same time, it endangers the principle of the separation of powers.⁷⁵

In my opinion, whilst there has been no direct reduction of the Constitutional Court's competencies, the restrictions affect the citizens' legal status with regard to constitutional law enforcement. The reason for this is that the unconstitutionality of certain subjects of regulation cannot be addressed, as the Constitutional Court cannot examine them, and thus the possibilities to protect the citizens' legal possibilities: constitutional rights are reduced. With regard to legal status, it is becoming more and more questionable whether the Constitutional Court can still fulfil its designated functions as the supreme protector of the Fundamental Law.⁷⁶ Evidently, it cannot be said that the existence of a constitutional court is a precondition for being a democratic state under the rule of law, as there are democratic countries, amongst them EU member states, that do not have a constitutional court.⁷⁷ In the case of Hungary, however, the possible employment of double standards is ruled out if we consider that both the Venice Commission and the European Parliament did not formulate their concerns regarding the Hungarian Constitutional Court in isolation. Instead, they viewed them as one element of the Hungarian legal system, which they analysed in its entirety, and in connection with other phenomena that have already been mentioned above.

⁷³ Kúria, warrant Bkk.III.494/2014/4.

⁷⁴ Venice Commission, Opinion on the Fourth Amendment, point 81.

⁷⁵ *Ibid.*, point 87.

⁷⁶ Cf. Fundamental Law, Article XXIV, paragraph (1); and paragraph 2 of Law CLI of 2011 on the Constitutional Court.

⁷⁷ Attila VINCZE, *Wrestling with Constitutionalism: the Supermajority and the Hungarian Constitutional Court*, *ICL Journal* 8 (2014), no.1, 86-97, 97, available at <https://www.icl-journal.com/download/4265a338416f370b5e810a2bb0827a70/ICL1_Vincze.pdf>.

The fourth amendment of the Fundamental Law stipulated that the Constitutional Court may not establish its rulings on the basis of its own decisions made prior to the Fundamental Law's entry into force, that is, under the 1989 Constitution (Fundamental Law, Closing Provisions, point 5). In the opinion of the Venice Commission, this provision endangers legal certainty because the Constitutional Court's previous decisions do act as reference points to a significant degree, not only for the Constitutional Court's future decisions, but also for the practice of other courts. The Venice Commission sees this provision as another sign that the Hungarian government and the National Assembly are aiming for a systematic, methodical restriction of the Constitutional Court's legal role.⁷⁸ According to the European Parliament's resolution, the Hungarian Constitutional Court's previous decisions "contain[ed] an entire system of founding principles and constitutional requirements, including any potential case law affecting the application of EU law and of European human rights law".⁷⁹ Therefore the European Parliament is especially concerned that other courts "may not be able to base their decisions upon the previous case law of the Constitutional Court".⁸⁰ The Constitutional Court has declared in its decision 13/2013 (VI.17.) AB that it will continue to apply its own previous holdings, provided their relevance is not excluded by differences between the texts of the old and the new constitution.⁸¹

The fourth amendment allowed for the examination of the constitutionality of constitutional amendments only for procedural defects (Fundamental Law, Article 24, paragraph (5)). For that reason the Constitutional Court dismissed in its decision 12/2013 (V.24.) AB a legal motion that called for the examination of the constitutionality of the substance of the fourth amendment. In connection with the frequent constitutional amendments, the problem of the constitutionality of constitutional amendments became prominent in Hungarian legal literature.⁸² The specialist literature, referring,

⁷⁸ Venice Commission, Opinion on the Fourth Amendment, points 90 and 98.

⁷⁹ European Parliament, Resolution of 3 July 2013 on the Situation of Fundamental Rights, chapter II, point 19.

⁸⁰ Ibid.

⁸¹ Constitutional Court of Hungary, decision 13/2013. (VI.17.) AB, *Határozat a bíróságok szervezetéről és igazgatásáról szóló 2011. évi CLXI. törvény és a bírák jogállásáról és javadalmazásáról szóló 2011. évi CLXII. törvény egyes rendelkezései alaptörvény-ellenességének megállapításáról és megsemmisítéséről, valamint mulasztásban megnyilvánuló alaptörvény-ellenesség és alkotmányos követelmény megállapításáról*, points 28-33, available at <<http://www.opten.hu/13-2013-vi-17-ab-hatarozat-j229325.html>>.

⁸² CHRONOWSKI / CsATLós, *Judicial Dialogue or National Monologue?*; ZELLER, *Nichts ist so beständig...*; Vörös, *Az alkotmányban korlátozott alapvető jogról és az ilyen alkotmányról*. Glossza az Alaptörvény negyedik módosításához, available at <http://fundamentum.hu/sites/default/files/vorosi_korkerdes.pdf>. Hungarian Helsinki Committee / Eötvös Károly Policy Institute / Hungarian Civil Liberties Union (eds.), *Main Concerns Regarding the Fourth*

for example, to the dissenting opinions of the constitutional judges István Stumpf and András Bragyova attached to decision 12/2013 (V.24.) AB, points out that the measure of constitutionality of constitutional amendments has become paradoxical: the amendment itself becomes the measure of its own constitutionality. Attila Vincze points out that in this way, power-restricting function and normative force of the Fundamental Law grows ever weaker.⁸³

Summing up its points of criticism, the European Parliament's resolution concluded that

"the systemic and general trend of repeatedly modifying the constitutional and legal framework in very short time frames, as well as the content of such modifications, is incompatible with the values referred to in Article 2 of the Treaty of European Union (TEU), Article 3, paragraph 1, and Article 6 TEU, and deviate from the principles referred to in Article 4, paragraph 3, TEU".

The resolution noted the "clear risk of a serious breach of the values referred to in Article 2 of the Treaty of European Union".⁸⁴ The resolution formulated an appeal to the Council of Europe not to remain passive in the event of a violation of the rule of law and fundamental rights.⁸⁵ Further, it made recommendations to the European Commission, which, whilst being prepared in connection with the examination of the constitutional developments in Hungary, are of a general nature and refer to all member states.

Summarising the issues mentioned above, substantial parts of the fourth amendment either remained in force or were, in a slightly reworded form, "preserved" by the fifth amendment. In our view, the unconstitutionality of certain provisions under Hungarian law and the violation of ECHR as well as EU law remain unchanged. Apart from individual judgments by the Constitutional Court, it has been increasingly noted by the Venice Commission and the European Parliament that the concerns regarding constitutionality and the legal system in Hungary are of a general and systemic nature.⁸⁶ Whilst the le-

Amendment to the Fundamental Law of Hungary; HALMAI, *Constitutionalism in Hungary: Undermining the Fundamental Law*; ANTAL, *Alkotmányozási korszakok és technikák*; SMUK, *Ostrom vagy felújítás alatt? A vélemény szabadság új határai*; ORBÁN, *Az Alaptörvény paradoxonjai*; KAZAI, *Kettős nyomás alatt*.

⁸³ Cf. Attila VINCZE, *Az Alkotmánybíróság határozata az Alaptörvény negyedik módosításáról*, *Jogesetek Magyarázata* 4 (2013), no. 3, 3-12, 9-12, available at <<http://www.jema.hu/article.php?c=245>>.

⁸⁴ European Parliament, Resolution of 3 July 2013 on the Situation of Fundamental Rights, chapter II, point 58.

⁸⁵ The European Parliament adopted the "Resolution on the Situation of Fundamental Rights in Hungary" with a distinct majority of 370 votes for and 248 against. Eighty-two members of the European Parliament, many of them belonging to the European People's Party faction, abstained.

⁸⁶ This view was formulated especially sharply in European Parliament, Resolution of 3 July 2013 on the Situation of Fundamental Rights, chapter III, point 70, section 5.

gal system exhibits characteristics that are incompatible with the requirements of a *Rechtsstaat* and a democracy, Article C), paragraph (2) of the Hungarian Fundamental Law prohibits all efforts to possess the executive power exclusively. It cannot be said that anyone in Hungary is in exclusive possession of the executive power, but efforts to gain it are clearly visible. The developments of the Hungarian legal system in the last four years show a distinct tendency towards such efforts.

In its Communication of 11 March 2014,⁸⁷ the European Commission corresponded with the European Parliament recommendations for a “new EU framework to strengthen the Rule of Law”, which may avert the application of Article 7. The procedures regarding a member state’s failure to fulfil an obligation under the EU treaties (Treaty on the Functioning of the European Union, Article 258) do not offer a solution for a case in which political measures in a given member state systematically endanger the rule of law in that state but do not violate any specific EU rule.⁸⁸ In such a case, only Article 7 is applicable. Its application, however, may be averted by the development and implementation of the new rule of law framework. According to the Commission, the framework does not require an amendment to the basic EU treaties: the Commission, as the guardian of the EU treaties, is merely signalling how it will act in the future to protect the rule of law. The new framework will be applied in the event that a member state’s safety mechanisms “do not seem to be capable” of warding off the threats to the rule of law.

Conclusion

The constant changes of the Fundamental Law have damaged the foundation that guarantees the rule of law in Hungary. The methods used in the fourth and fifth amendments as well as the content of the amendments make this very clear: we are not merely speaking of a new constitution but of a realisation of the “central force field” in the legal system that was offered as a political programme by Prime Minister Viktor Orbán in 2009, prior to his coming to office.⁸⁹

⁸⁷ Communication From the Commission to the European Parliament and Council, COM(2014) 158 final, Strasbourg, 11 March 2014, available at <<http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20140158.do>>.

⁸⁸ *Ibid.*, points 3 and 4.1.

⁸⁹ “[...] huzamosan létrejön egy nagy kormányzó párt, egy centrális politikai erőter [..] Egyszerűbben szólva: egy olyan kormányzati rendszert próbálunk felépíteni, amely minimálisra csökkenti a duális erőter visszaállásának esélyét, és helyette egy nagy centrális erőterben rendezi el a politikai kérdéseket [...]” “[...] swiftly, a large governing party, a central political force field will be realised [...] To put it more simply: we try to construct a government system that minimises the probability that the dual force field will be restored, and which regulates the political questions in one large central force field instead

Today this programme, which is based on antidemocratic and authoritarian concepts of an “illiberal” state structure, is openly pursued. The developments in constitutional law between 2010 and 2014, which have been well thought out and build on each other, demonstrate that many values and guarantees of the 1989 Constitution with regard to political democracy and the rule of law have been lost. The aim and the result of the overwhelming majority of the provisions in the fourth and fifth amendments of the Fundamental Law was to dress current political efforts in constitutional clothes, even at the price of dismantling the rule of law.

In my view, the Hungarian legal system, the constitutional order contravenes Article C), paragraph (2) of the Fundamental Law, which prohibits all efforts aimed at possessing exclusively the public power. Hungary also routinely violates its international obligations under the European Convention on Human Rights as well as international treaties and EU law. Such action is also a violation of Articles E) and Q) of the Fundamental Law, which prescribe the government's duty to fulfil its obligations under international law and EU law.

We are thus speaking of a threefold dimension of unconstitutionality, and within that, of a situation of constant opposition to the actions of the other legal branches, in short, a constant and flagrant violation of law. The events will soon make pointless Hungarian constitutional and jurisprudential analyses, which are in a process of devaluation, as the story is more and more about something else: the continuous building and finalisation of the “political order of another type”,⁹⁰

[...]”, quoted in: Gergely BÁRÁNDY, *Centralizált Magyarország – megtépzott jogvédelem. A hatalommegosztás rendszerének változásairól* (2010–2014). Budapest 2014, 27. Historically speaking, it is of course not a unique phenomenon that somebody clearly states his future intentions without being taken seriously. German Chancellor Heinrich Brüning expressed his worries in December 1931: “It cannot be legal when somebody announces that in case of his coming into power by legal means, he will violate the law.” Cf. William L. PATCH, Heinrich Brüning and the Dissolution of the Weimar Republic. Cambridge 1998, 228f., as quoted in: Richard J. EVANS, *A harmadik birodalom születése*. Budapest 2012, 278. On Prime Minister Viktor Orbán's speech of July 2014, which established the “illiberal” state structure as his governmental program, see the *Washington Post* editorial article Hungary's “Illiberalism” Should Not Go Unchallenged, *The Washington Post*, 16 August 2014, available at <http://www.washingtonpost.com/opinions/hungarys-illiberalism-should-not-go-unchallenged/2014/08/16/b2dc72d4-1e5c-11e4-82f9-2cd6fa8da5c4_story.html>.

⁹⁰ Cf. the remarks made by Prime Minister Viktor Orbán in 2012: “We hope [...] that we do not have to invent political orders of another type instead of democracy [...]. Cohesion is not a question of intent, but of power [...] such a half-Asian people like us [...] can stick together when there is power.” TV interview, *ATV*, 26 July 2012, quoted in Attila ARA-KOVÁCS, *Előképek és rémképek*, in: Bálint MAGYAR / Júlia VÁSÁRHELYI (eds.), *Magyar polip. A posztkommunista maffiaállam*. Budapest 2013, 110. An analysis of the new electoral system of 2011 would have gone beyond the scope of this article, but see Attila Ágh's contribution to this special issue. In the framework of the new electoral law the result became as follows: the governing parties won 44% of the votes and received 66,6% – two-third majority – of the parliament's seats;

which has developed as a legal system replacing democracy, a process that seemingly is not even finished yet.⁹¹

Translation from Hungarian: Christian Mady

the “remaining” majority of 56% received one-third of the seats. The OSCE report that was published one day after the April 2014 elections does reinforce my final assessments, see OSCE, Hungary, Parliamentary Elections, 6 April 2014: Statement of Preliminary Findings and Conclusions, Budapest, 7 April 2014, available at <<http://www.osce.org/odihr/elections/17205?download=true>>. The final report formulates serious objections regarding the electoral system and gives 36 (!) recommendations, see Hungary, Parliamentary Elections, 6 April 2014. OSCE/ODIHR Limited Election Observation Mission Final Report, Warsaw 11 July 2014, available at <<http://www.osce.org/odihr/elections/hungary/121098?download=true>>. The Hungarian government did not publish this report and did not accept its recommendations. Whilst the OSCE was invited by the Hungarian government to send observers to the local government elections taking place in the fall of 2014, the request was rejected. Apparently, the OSCE did not want observers to give legitimacy to an electoral system that it considers unfair. With regard to the new electoral system, see also Zoltán Tóth, Before Parliamentary Elections in 2014, Blog ‘A szavazatok erejével’, 20 June 2014, available at <http://tothzoltan.blog.hu/2014/06/20/zoltan_toth_before_parliamentary_elections_in_2014>. Regarding the elections, see the analysis by Kim L. Scheppelle, written in collaboration with experts on electoral mathematics and published after the parliamentary elections, Kim Lane SCHEPPELE, Legal, But Not Fair (Hungary), *The New York Times*, 13 April 2014, available at <<http://krugman.blogs.nytimes.com/2014/04/13/legal-but-not-fair-hungary/>>.

⁹¹ One comparative constitutional study has already dealt with the problem of abusive constitutionalism, which makes it possible to move into an authoritarian direction. The author studies the situations of Colombia, Venezuela and Hungary, respectively. David LANDAU, Abusive Constitutionalism, *University of California, Davis Law Review* 47 (2013), no. 189, 189-260, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244629#>.