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Inventing constitutional identity in Hungary

***Petra Bárd – Nóra Chronowski – Zoltán Fleck*[1]**

Abstract

Constitutional traditions can play an important role in the identity of states. A modern version of social integration can be based on constitutional identity. Hungary's public law history has few elements that are compatible with modern constitutional values. Our public law tradition is mostly one of affirming the prerogatives of the feudal estates rather than of parliamentarism and respect for individual rights.
After 2010, the ruling party made a sharp break with the ideals of regime change and declared a new beginning. To do so, it invented the Hungarian historical constitution and the doctrine of the Holy Crown, which originally aimed to restore the territorial unity of the country between the two world wars. In addition to nationalist identification, this political and ideological turn was also a way of supporting the topos of the decline of the West and serving as a shield against European critics who were calling the destruction of the rule of law to account. However, the values of the "historical constitution" are not just political ideology, but a legal interpretation enshrined in the Fundamental Law, which binds those who apply the law. The Constitutional Court, which has lost its independence, has done this job by interpreting the Preamble to the Fundamental Law.

This paper was commissioned by the Netherlands Helsinki Committee. References to Paper I through Paper VII are to other reports in this series, published consecutively as working papers:

Paper I – State of the art - the crises of the rule of law and democracy

Paper II – Tactics Against Criticism of Autocratization. The Hungarian Government and the EU's Prolonged Toleration

Paper III – Inventing Constitutional Identity in Hungary

Paper IV – The Constitutional Court

Paper V – Is the EU toothless? An assessment of the Rule of Law enforcement toolkit

Paper VI – The CJEU and the ECtHR – High Hopes or Wishful Thinking?

Paper VII – The Changes Undermining the Functioning of a Constitutional Democracy

[1] Authors are grateful for the insightful comments by Professor Daniel R. Kelemen. As always, responsibility for any errors remains our own.

Petra Bárd, Nóra Chronowski, Zoltán Fleck

Inventing constitutional identity in Hungary

> *"... separation of powers, free multi-party elections, rights and freedoms, especially freedom of the press and opinion, judicial independence and the rule of law – which make the Western world so humane and tolerable, despite all its mistakes – is not some kind of a "civic" superstructure, but simply an objective technique, the most advanced technique of freedom up to date, whose superiority will sooner or later be recognized, just like the superiority of a Western fountain pen or Morgan's theory of heredity."*
> István Bibó. Magyarország helyzete és a világhelyzet [The Situation of Hungary and the world], 1957

Introduction: constitutional identity - from intellectual illusion to political demagogy

The 7th modification of the Fundamental Law introduced the notion of "constitutional identity" as a counterweight opposition to European Union. The historical constitution in Hungary is based on thin constitutionalism and limited democratic values. Historicisation of the legal is a part of the pure political self-description, also known as identity politics. From 2010 the Hungarian right-wing populist government and its media teams use this meaningless concept with the same intensity and aims as their Putin-friend colleagues.

The Hungarian Constitutional Court operating under political guardianship loyally used the concept of "historical achievement" as a cloudy conceptual aftermath of the historical constitution. In the case of judicial independence for example where judges referred to the 19th century acts on courts without any references to the truncated autonomy of judges in the Hungarian history. All of the cases where the historical achievement emerged naming the old parliamentary act was enough to base the historical root. This legalistic modesty serves the political demand, but also signs the formalistic tradition of the legal profession. In this way any constitutional dilemma can be decorated by this "achievement" argument without any critical scrutiny of the past. Thus the terms of "historical constitutionalism", "historical achievements", "constitutional identity" breed the public law illusion on Hungarian constitutional heritage. If there is a historical tradition in the field of public law, it is this illusory evaluation of the past. Any analysis of the uses of the historical "constitution" by the Constitutional Court can prove the basic emptiness of the category: any time for any purpose without any content.[2] This overuse of the history in legal-political texts is another form of falsification of history. The basic uncertainty and careful critic of some judges and the disintegrative potential of the history as compulsory argument cannot endanger the primary function of the modification of the Fundamental Law: expanding the ideological language of the regime to the legal field. All this conceptual vagueness diverted the jurisdiction into the ideological forest. All the texts around this turn of the Hungarian constitutional practice is merely ideological and political, no serious arguments made. Consequently, there is no methodology of legal interpretation behind it, although it is not needed, moreover it does not seem exaggerated evaluation to state that this is the point: to liquidate methods of interpretation. Which was not especially hard thanks to the low level of methodological sophistication of the judicial

[2] A former judge of CC blamed the law-maker for precarious wording of the Fundamental Law: Vörös Imre: A történeti alkotmány az Alkotmánybíróság gyakorlatában, Közjogi Szemle, 2016/4. 44-57. He has also right stating that the real function and logic of the compulsory historization remained covered.

interpretation in general. Meanwhile lawyers, public law professionals produced a long list of publications over the possible content of the historical constitution in the Hungarian case. Apart from its scientific values the law professors have missed the point: they were out of the playground, the scientific, public disputes on the legal terms will not play any role in practice. Constitutional jurisprudence was freed from the scientific, logical-rational obligation for verification firstly by selecting low-rated professionals or pure loyalists for the members of CC, secondly by institutionalising ideological terms as obligatory basis of interpretation. From this perspective the dispute over the temporal scope of the term historical constitution (whether this begins with the modern Hungarian state or it is more then one thousand years old) seems simply ridiculous: it has no scientific or legal implications. Even the constitutional practical utility of the 1989 constitutional tradition remained ideological question and decided by regime ideologists. However, this historical tradition should be taken seriously. But the "invisible constitution" which was the guiding metaphor of the short democratic period after the fall of Communism, was sharply refused by all figures close to ideology of the ruling Government. This massive hate against the "constitutionality of the transformation", the sheer negation of the rule of law revolution which was expressed in the ban of use of any reference from the period before 2010 need more attention as the cornerstone of the identity of the Orbán regime. This political ideology of a "new revolution" refers to the pure majoritarian principle, and blames the overdeveloped liberal network of rights. The first target became the strongest non-majoritarian institution, the Constitutional Court – as it is explained in paper IV about the court capture.
In this paper we give a short historical introduction to the peculiarities of constitutional heritages of the Hungarian state, its political exploitation and misinterpretation and legal re-interpretation by the Constitutional Court. At the end we return to some theoretical issues concerning political identity formation.

The Hungarian historical constitution, and the Doctrine of the Holy Crown[3]

Constitutionalism in the broad sense and debates about the rule of law have a centuries-long tradition in Hungary. The so-called '**historical constitution** 'that incorporated a number of statutes, doctrines, and customs can be traced back to the **blood oath** or according to its literal translation blood contract (in Hungarian: vérszerződés) concluded in the 9th century.[4] This crucial event of the Hungarian state-building is known from the Gesta Hungarorum, the Deeds of the Hungarians that is a chronicle written in the early 13th century.[5] According to this account the leaders of the seven Hungarian tribes – Álmos, Előd, Ond, Kond, Tas, Huba and Töhötöm –, agreed to elect a Grand Duke (in Hungarian: fejedelem) from among themselves, thus to concentrate the political power in the hands of one ruler.When they sealed the contract, they followed the old tradition of cutting their arms and letting their blood flow into a chalice to enter into a fictive kinship By the fifth part of their oath they explicitly obliged themselves to respect the terms of their contract: if any of the descendants of Duke Álmos and of the other tribal chiefs should seek to breach parts of their oath, they should be put under an everlasting curse.[6] After the establishment of the Hungarian Duchy (Magyar Fejedelemség), it was uncontested that only the descendants of Árpád (son of Álmos) were entitled to the throne. In the following centuries, however, seniority (the right of the most senior member of the ruling family), primogeniture (the right of the firstborn legitimate child) and sometimes appointment by the incumbent monarch constituted rival principles of succession.

[3] The author is grateful to Kim Lane Scheppele and Viktor Zoltán Kazai for their insightful comments.
[4] For an artistic representation see for example the fresco painted by Bertalan Székely in the ceremonial hall of the city hall of Kecskemét, Hungary.
[5] There exists one copy of the original Gesta, which is part of the collection of the Hungarian National Széchényi Library. For an English translation see https://discovery.ucl.ac.uk/id/eprint/18975
[6] See section 5 (Of the election of Duke Álmos) and section 6 (Of their oath) in the English translation of the Gesta Hungarorum, available at: https://discovery.ucl.ac.uk/id/eprint/18975/1/18975.pdf

When Saint Stephen, the first king of the Árpád dynasty (1000-1038) opted for **Christianity**, meaning he concerted and forced Hungarians to convert as well,[7] he clearly intended Hungary to join Western Europe and the Roman Catholic Church. The crown he received from the Pope, and offering Hungary to be the land of Virgin Mary symbolized independent nationhood.[8] The church granted ideological and financial support to the kingdom, and power was subjected to Christian morality. If the ruler violated divine laws, religious leaders could force him to do penance and as a last resort could deprive him of the crown. Christianity was thus a key factor in the creation of the normative system, which was acknowledged by both the rulers and the people. It created a check on secular power.[9]

One of the earliest sources of the historical constitution is the **Golden Bull** (in Hungarian: Aranybulla) from 1222, which was a royal charter, an edict issued by King Andrew II of Hungary upon the pressure of Hungarian nobility, granting noblemen liberties and privileges and at the same time limiting the powers of the king.[10] Somewhat different versions of the original royal charter were reissued by Hungarian monarchs from time to time to confirm their commitment. However, it was not until the middle of the 14th century that the Golden Bull became unequivocally the source of liberties and privileges of the noblemen.[11]

This historical significance was acknowledged less than a century later when in 1514 István Werbőczy collected the laws of the country in a document called Opus Tripartitum or in short: **Tripartitum**, published in 1517 in Vienna.[12] The document was an amalgam of medieval organic theories and crown-doctrines.[13] Although it was never promulgated in the form of an official law, the Tripartitum enjoyed a special status, it was a highly influential text arranging the relation between the nobilities and the king. The liberties of the nobles could be enforced according to the resistance clause, referring back to the Golden Bull, claiming that if the ancient privileges were disrespected, the estates could oppose the King without a taint of infidelity.[14]

A significant element of the historical constitution was the **Doctrine of the Holy Crown**, first formulated in written form in the Tripartitum.[15] But it was of Péter Révay's *De Sacrae Coronae Regni Hungariae Ortu, Virtute, Victoria, Fortuna* in 1963 that first offered an explanation of the theory.[16]According to the Doctrine, political power did not flow from the monarch, but from the Holy Crown. The Holy Crown has several meanings: first, it is a physical object, the actual crown used to crown the King. The monarch could only exercise his powers as a result of the act of coronation, and

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[7] Nóra Berend, At the Gate of Christendom: Jews, Muslims and 'Pagans' in Medieval Hungary, c.1000 – c.1300, Cambridge Studies in Medieval Life and Thought: Fourth Series, Series Number 50, Cambridge University Press, 2006.

[8] Albeit many elements of this story are contested: did the crown come from the Pope or from the Holy Roman Emperor? Did it come with a sword? Did Stephen really dedicate the Crown to Virgin Mary? None of the sources are conclusive, and many myths have grown up around these stories.

[9] Attila Horváth: A magyar történeti alkotmány tradíciói [Traditions of the Hungarian historical constitution], Alkotmánybírósági Szemle, 2011/1; Attila Horváth, A történetiség az alaptörvényben [Historicity in the Fundamental Law], In: György Kiss (eds.), Államszervezet és államiság Magyarország Alaptörvényében [State structure and the state in the Fundamental law of Hungary], Budapest: Dialóg Campus, 2017., 33-85, 35.

[10] These included for example exemption from taxes, or the right not to be arrested without being summoned and sentenced by judge in a due process.

[11] Zsófia Bíró: A történeti alkotmány alapjai [The foundations of the Hungarian historical constitution], JURA, 2018/2, 55.

[12] See R.J.W. Evans: Opus Tripartitum, in: Hans J. Hillebrand (ed.), The Oxford Encyclopedia of the Reformation, Oxford: Oxford University Press, 1996

[13] Pál Sonnevend, András Jakab, Lóránt Csink, The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary in: Armin von Bogdandy, Pál Sonnevend (eds.), Constitutional Crisis in the European Constitutional Area, 33-109, 36. In reality the Tripartitum says very little about the Crown. It has been retroactively been held to be the source of the Holy Crown theory after the publication of Péter Révay's book which is the first complete account of the doctrine. Péter Révay, De Sacrae Coronae Regni Hungariae Ortu, Virtute, Victoria, Fortuna, 1613.

[14] See Tripartitum, Part One, Chapter 9, § 6.

[15] See Tripartitum, Part One, Chapter 4, § 1, but the doctrine allows and indeed did trigger very widespread interpretations.

[16] Péter Révay: De Sacrae Coronae Regni Hungariae Ortu, Virtute, Victoria, Fortuna, 1613.

in the name of the Holy Crown. At the same time, it symbolizes also a concept, according to which the estates and the monarch were together 'members of the Holy Crown.' The territory of the Kingdom of Hungary was neither owned by the monarch, nor by the estates, but by the Holy Crown.

A very rich period of constitutional thinking followed in the **18th century**, when the estates designed a system which used as one of its central pillars the idea of the "ancient constitution" (in Latin: avita constitutio, in Hungarian: ősi alkotmány).[17] In a special historical context, draft constitutions and reform laws mushroomed. Most constitutional drafts relied on natural law and accordingly emphasized individual rights that are to be protected by the state, and the principle that law needs to cover relations between the government and the governed. This was the time when social contract theories flourished. Legal theories of Enlightenment and in particular Montesquieu's separation of powers doctrine highly influenced this period of Hungarian thinking about constitutionalism. Especially the reference to Hungary in 'The Spirit of the Laws'[18] made Montesquieu's work 'the bible for the nobility'.[19] Another example to follow was the English constitution, due to its similarity of dividing power between royalty and nobility.[20] This was the time when the concept of constitutionalism in the modern sense was established, even though writings of the time used the words 'constitutio', 'cardinal rights', 'ancient freedoms', 'privileges', 'customs', 'immunities'. A number of fundamental statutes were passed by the 1790/91 Parliament on electing palatines (Law No. V.), transferring the Holy Crown to Buda (Law No. VI.), the independence of Hungary (Law No. X.), exercising legislative and executive powers (Law No.), taxation (Law No. XIX.), freedom of religion (Laws Nos. XXVI–XXVII.), free movement of villains (Law No. XXXV.), on the Jews (Law No. XXXVIII.), the prohibition of torture (Law No. XLII.), granting non-noblemen the right to appeal (Law No. XLIII.), and also committees to draft the Criminal Code and the Civil Code were created.[21]

The Holy Crown Doctrine began to assume a political and constitutional relevance and was a symbol for division between the nobility and the non-nobles. The doctrine helped the nobility's resistance to enlightened absolutism.[22] "This was the period when the modernizing reforms and the independence of Hungary became the two poles. The holy crown doctrine became a contributing factor to the new

[17] Ferenc Hörcher: Is the Historical Constitution of Hungary Still a Living Tradition? A Proposal for Reinterpretation, In: Górnisiewicz, Arkadiusz; Szlachta, Bogdan (eds.): The Concept of Constitution in the History of Political Thought, Berlin, Boston,: De Gruyter Verlag, (2017) pp. 89-110. As Hörcher explains, Péter, Szijártó, Concha all date back the traces of the historical constitution to the 18th century. See László Péter, Hungary's Long Nineteenth Century. Constitutional and Democratic Traditions in a European Perspective. In: Miklós Lojkó (Ed.): Central and Eastern Europe: Regional Perspectives in Global Context, Leiden-Boston: Brill, 2012, 191.

[18] Book VIII. Chapter 9: "The house of Austria has ever used her endeavours to oppress the Hungarian nobility; little thinking how serviceable that very nobility would be one day to her. She would fain have drained their country of money, of which they had no plenty; but took no notice of the men, with whom it abounded. When princes combined to dismember her dominions, the several parts of that monarchy fell motionless, as it were one upon another. No life was then to be seen but in those very nobles, who, resenting the affronts offered to the sovereign, and forgetting the injuries done to themselves, took up arms to avenge her cause, and considered it the highest glory bravely to die and to forgive."

[19] László Péter: Montesquieu's Paradox on Freedom and Hungary's Constitutions 1790–1990, In: In: Miklós Lojkó (Ed.): Central and Eastern Europe: Regional Perspectives in Global Context, Leiden-Boston: Brill, 2012, 35-54.

[20] Attila Horváth citing György Aranka from 1790, Attila Horváth: Alkotmányjogi javaslatok és reformok, 1790-1949 [Constitutional recommendations and reforms, 1790-1949] in: András Jakab, András Körösényi: Alkotmányozás Magyarországon és máshol [Constitution-making in Hungary and elsewhere, 1790-1949], Budapest: Új Mandátum Könyvkiadó, 2012, 92-109, 94.

[21] Attila Horváth, Alkotmányjogi javaslatok és reformok, 1790-1949 [Constitutional recommendations and reforms, 1790-1949] in: András Jakab, András Körösényi: Alkotmányozás Magyarországon és máshol [Constitution-making in Hungary and elsewhere, 1790-1949], Budapest: Új Mandátum Könyvkiadó, 2012, 92-109, 97.

[22] Please note that Hungarian feudalism was always relatively informal compared with feudal structures farther West, so the hierarchical pyramid was always flatter and the layers less well defined. The Crown doctrine emerges in this period to resist increasing efforts at control from Vienna, especially after the late counter-reformation.

Hungarian catastrophe, which is usually described as the conflict between independence and progress."[23]

Supremacy of the laws was established already in 1790 (Act XII of 1790), but it was the **1848 revolution** that contributed most to the creation of the so-called constitutional monarchy – without however a written constitution, but by amending the previous laws. This meant extending the jurisdiction of the Holy Crown to non-noblemen. A series of laws on the sanctity of private property (Act III of 1848, Article 32), representation of the people [Laws No. IV. and V.), but rule of law in the narrower sense was only addressed by Act XXVI of 1896 on administrative courts. Equality before the law was not expressly guaranteed, but Acts VIII-XIII of 1848 were covering the issue. Freedom of the press, academic freedom and freedom of religion were declared by Acts XVIII-XX of 1848.

After the revolution of 1848, the so-called April Laws introduced representative and responsible government. In the 1867 Austro-Hungarian Compromise establishing a dual monarchy of Austria and Hungary, a new balance was created between the Crown and the nation. (The 'Lands of the Crown of Saint Stephen, in Hungarian: 'a Szent Korona Országai' referred to the Hungarian territories of Austro-Hungary.[24]) Act XII of 1867 covered matters of common interest between territories of the Holy Crown and other countries under the Habsburg regime. The document talked about a common territory, common external policy, military and finances, and joint efforts to protect these, at the same time it guaranteed the constitutional independence of Hungary.

The Doctrine of the Holy Crown, refined by legal historians and political theorists, such as Imre Hajnik, Győző Concha, Ferenc Eckhart, Ákos Timon,[25] and most of all Count Albert Apponyi, got revived and reinterpreted in this period.[26] According to the new understanding, the subject of sovereignty was the Holy Crown itself, which comprised the king and – not the estates anymore, but – the members of the Crown. Citing Péter, Ferenc Hörcher concludes that it equals, "the modern (German Staatsrecht) concept of the state , [which] was always there in the Hungarian historical constitution, only called the Holy Crown," meaning that neither the monarch, nor the people, but the state is the subject of sovereignty.[27]

The relevance of the historical constitution and the Holy Crown Doctrine gained a different flavor and then faded away over the two great wars of the **20th century**. After the First World War, Charles IV abdicated the Hungarian throne. What followed was a very tumultuous period, including the establishment of a short-lived Soviet Republic in 1919.[28] The political situation was stabilized by the adoption of Acts I and II of 1920 that entrusted a "governor", Miklós Horthy with the temporary exercise of state power. This was the solution to a difficult brainteaser: how can the political elite guarantee legal continuity without reestablishing the Habsburg dynasty. As a result, the legitimacy of the political power was based on the Holy Crown Doctrine and Horthy became a de facto ruler instead of a king.

A very illustrious example of how useful the Holy Crown Doctrine was for Horthy was when he "organized a major national celebration for the Crown in 1937 and took full propaganda advantage of touring the country with the Crown in an open train. While he himself could not claim the title of

[23] Sándor Radnóti, A sacred symbol in a secular country: The Holy Crown, in: Attila Gábor Tóth: Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law, Budapest: CEU Press, 2012, 85-109, 93.
[24] "The jurisdictions under the Holy Crown" was a term of art already in Werbőczy's Tripartitum.
[25] On the Eckhart-Timon debate see Stfánia Bódi: The Importance of the Doctrine of the Holy Crown in the Hungarian Public Law Thinking with Special Focus on Werbőczy's Tripartitum, Polgári Szemle 12/1-3. 2016.
[26] *Id*. at 94.; Ferenc Hörcher: Is the Historical Constitution of Hungary Still a Living Tradition? A Proposal for Reinterpretation, In: Arkadiusz Górnisiewicz, Bogdan Szlachta (eds.): The Concept of Constitution in the History of Political Thought, Berlin, Boston: De Gruyter Verlag, 2017, pp. 89-110, 90.
[27] *Id*. at 101.
[28] NB. the first codified constitution in the history of Hungary was adopted in 1919 under the Hungarian Soviet Republic (A Magyarországi Szocialista Szövetséges Tanácsköztársaság alkotmánya)

king, he appeared nonetheless in the place of a king governing the country with a toxic mix of nationalism, xenophobia and disrespect for basic legality and constitutionalism."[29]

The concept also extended Hungarian jurisdiction well beyond the borders, therefore it "became the target of overheated fetishistic worship"[30] and in conjunction with adherence to the historical constitution gained a flavor of "romantic historicism and romantic nationalism",[31] revisionism and irredentism, hoping to reverse the Treaty of Trianon, which shrank the size and population of Hungary as a sanction.

The concept also contributed to anti-democratic tendencies, not introducing universal suffrage and not protecting individual rights. Beside favoring the aristocracy and the nobility, the theories also served the interest of the "Christian-national middle classes – as opposed to the large groups of agrarian paupers, and those city-dwellers who were of non-Hungarian origins, including the Jews, against whom they introduced a whole series of legislation, and half a million of whom they left preys of the anti-Semitic Nazi regime of the German Reich after the outbreak of the Second World War."[32]

Even though there is a benevolent understanding of the historical constitution too, [33] as one incorporating the idea of clear, foreseeable norms, sanctions or legal consequences attached to the laws, institutions exercising state coercion in case of breaches, fast and certain intervention of institutions in case of violation of the law, independent judiciary, etc., this idea did not gain ground when it was most needed.[34] Instead it is an "intellectual creation: a romantic, nationalist, self-defensive ideology of the noblemen", allowing them to keep their privileges and legitimizing authoritarian regimes.[35] Even today, it is connected to exclusionary ideas.[36] The contribution of the concept to scapegoating minorities as explained above alone shows how the historical constitution was not capable of fulfilling the minimum requirements of modern constitutionalism.

Pre-transition constitutions

The concept of the historical constitution had no chances to survive after 1945, since the Communist regime wanted to replace it by a written constitution signaling a complete break with Hungarian constitutional history.

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[29] Gábor Halmai, From the 'Rule of Law Revolution' to The Constitutional Counter-Revolution in Hungary, in European Yearbook of Human Rights 2012, 367-384, 382-3.

[30] Sándor Radnóti, A sacred symbol in a secular country: The Holy Crown, in: Attila Gábor Tóth, Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law, Budapest: CEU Press, 2012, 85-109, 95.

[31] Josef Karpat: Die Idee der heiligen Krone Ungarns in neuer Beleuchtung (1943-44), in: Manfred Hellmann, Corona regni: Studien über d. Krone als Symbol d. Staates im späteren Mittelalter, Darmstadt: Wissenschaftliche Buchgesellschaft, 1961, 349.

[32] Ferenc Hörcher: Is the Historical Constitution of Hungary Still a Living Tradition? A Proposal for Reinterpretation, In: Górnisiewicz, Arkadiusz; Szlachta, Bogdan (eds.): The Concept of Constitution in the History of Political Thought, Berlin, Boston: De Gruyter Verlag, 2017 pp. 89-110, 102.

[33] István Egyed: A mi alkotmányunk [Our Constitution], Budapest: Magyar Szemle Társaság, 1943.

[34] Nóra Chronowski: Jogállamiság – Gondolatok a magyar és az európai uniós jogfejlődésről [Rule of Law – Comparing Developments of Hungarian and European Union Law], Pro Publico Bono – Magyar Közigazgatás, 2016/4, 32–42.

[35] Attila Gábor Tóth: Lost in Transition, In: Rosalind Dixon, Adrienne, Stone (eds.), The Invisible Constitution in Comparative Perspective, Cambridge: Cambridge University Press, 2018, 541-562, 561.

[36] See for example this petition against "attacks against our families, children, faith and the Holy Crown" labelling LGBTI+ rights as a "damaging ideology". https://www.citizengo.org/hu/node/180554?fbclid=IwAR0kyOHZFW-bBBiQ8idIWmgPUBFYgFDi0qZsKL1pNI3Dxfjl_4etcHSBjcI This combination of homophobia and the Holy Crown is ludicrous in light of the fact that the physical Royal Crown itself is a combination of a female and a male crown, and embodies other diversities, too, such as Eastern and Western traditions and histories. The Royal Crown's lower diadem also known as *corona graeca* of Byzantine tradition was original designed for a woman, while the upper hemisphere also known as *corona latina*, which is of Western origin and which never constituted a crown in its own right, has elements of a male crown. Cecily J. Hilsdale: The social life of the Byzantine gift: The Royal Crown of Hungary re-invented, Art History 31/5, 2008, 602-631. I am grateful to Kim Lane Scheppele for calling my attention to this piece of research on the gender aspects of the Hungarian Royal Crown.

Act I of 1946 on the state form of Hungary laying down rules on the form and organization of government, is sometimes considered as the first written constitutional charter,[37] whereas many don't recognize it as such, and therefore the status of the concept of historical constitution between 1946 and 1949 is debated.[38]

When under the political tutelage of the Communist regime, Hungary was forced to become a 'People's Republic', Act XX of 1949 on the Constitution[39] was adopted in the spirit of the 1936 Soviet Stalinist constitution. Needless to say, the '49 Constitution did not adhere to the concept of modern liberal constitutionalism in any way. We cannot call the document a constitution in the sense that it was ill-suited both to constrain powers and to guarantee fundamental rights. Even though there were differences in the hardness of the regime over time, partially reflected by the laws and institutions, it would be futile to talk about the rule of law in Hungary until the regime change. The document remained in force until 1989, when it was not officially replaced, but a comprehensive series of amendments took place de facto rewriting the '49 Constitution.[40]

The '89 Constitution and the regime change

During the 1989 Eastern European "velvet revolutions", which all proceeded peacefully with the exception of Romania, the deconstruction of the Socialist regime involved roundtable negotiations, where delegates of the state party and representatives of the opposition agreed on new elections and some constitutional changes. The only exception remained Hungary, which formally failed to adopt a new constitution, but introduced an ambitious 1989 amendment.[41] The literature references the amended constitution, as the '89 Constitution, albeit the official numbering still remained Act XX of 1949. The comprehensive 1989 amendment and several smaller, but important ones in 1990 paved the way for Hungary becoming a functional democracy with substantial checks on governmental power. As Kriszta Kovács and Gábor Attila Tóth stated, "the Constitution agreed upon by the parties in 1989 was based on the principles of liberal democracy and the rule of law."[42] The rule of law was explicitly mentioned in the '89 Constitution, as a basic principle. According to Article 2(1) "The Republic of Hungary is an independent, democratic state based on the rule of law." The concept of the rule of law contributed to the successful completion of the regime change and to legitimizing the role of the HCC in this process. The concept became an umbrella term determining the philosophical frame of the new Hungarian constitutional order.[43] Separation of powers – albeit not having a textual reference in the constitutional text – had been realized where parliamentary law-making procedure required extensive consultation with both civil society and opposition parties and crucial issues of constitutional concern required a two-thirds majority vote of the Parliament. An independent judiciary ensured that the laws were fairly applied. The Hungarian Constitutional Court (HCC) has been

[37] Albeit, already on 23 June 1919 a constitution was adopted (A Magyarországi Szocialista Szövetséges Tanácsköztársaság alkotmánya) This text already contains the main guiding principles of Soviet-Socialist constitution-making, offered by the 1918 Constitution of the Russian Federation. See Márta Dezső, Klára Fürész, István Kukorelli, Imre Papp, János Sári, Bernadette Somody, Péter Szegvári, Imre Takács: Alkotmánytan I., Budapest: Osiris, 2007; Ottó Bihari: Alkotmány és államszervezet a Magyar Tanácsköztársaságban. Jogtudományi Közlöny, 24/ 6. 277 (1969).

[38] Attila Horváth, A magyar történeti alkotmány tradíciói [Traditions of the Hungarian historical constitution], Alkotmánybírósági Szemle, 2011/1, 57.

[39] For a full account of the development of the Constitition see András Jakab: Az Alkotmány kommentárjának feladata in Jakab András (ed.): Az Alkotmány kommentárja, Budapest Századvég, 2009, 51-66.

[40] In 1995/96 there was a failed attempt by the liberal/social party coalition to draft a new constitution. The '89 Constitution thus remained in force until the entry into force of the 2012 Fundamental Law.

[41] Act XXXI of 1989 on the modification of the Constitution of 18 October 1989.

[42] Kriszta Kovács, Gábor Attila Tóth: Hungary's Constitutional Transformation, European Constitutional Law Review, 7:2(2011) 183-203, 202.

[43] Nóra Chronowski: Jogállamiság – Gondolatok a magyar és az európai uniós jogfejlődésről [The rule of law – Thoughts on the legal developments in Hungary and the European Union], Pro Publico Bono – Magyar Közigazgatás, 2016/4, 32–42.

created[44] exercising important corrective roles in a democracy based on the rule of law, and in particular filling in the rather incomplete constitution ruling on virtually every important matter of transition.[45] The HCC was given weighty powers with the unique possibility of reviewing cases *in abstracto* by way of a so-called *actio popularis*. The most important decisions had been rendered on the basis of such procedures. An effective fundamental rights protection mechanism has been established, and apart from the judiciary and the HCC, four ombudspersons and certain powers of the public prosecutors' office complemented the system of human rights protection.

After the regime change Hungary was the first "post-communist" country to join the Council of Europe and signed the European Convention on Human Rights and Fundamental Freedoms (ECHR or Convention) on 6 November 1990.[46] Before ratification it was decided to thoroughly scrutinize Hungarian legislation and make it compatible with Strasbourg case law. An Inter-Ministerial Committee was set up chaired by the then Ministry of Justice deputy secretary of state and composed of senior civil servants working in the various ministries. After seventeen months of study and analysis the report was submitted to the government. The conclusions were published in a Hungarian human rights law journal and were made available to all Members of Parliament.[47] This exercise and later the Strasbourg jurisprudence has had a major impact on enhancing the democratic process,[48] strengthening political pluralism[49] broadening the scope of freedom of expression including freedom of the press,[50] and solidifying democracy, openness, and transparency via freedom of information.[51] The ECtHR also had a significant impact on criminal justice.[52]

The 2012 Fundamental Law

In April 2010, in a free and fair election the center-right political parties Fidesz Hungarian Civic Union (Fidesz) and the Christian-Democratic People's Party (KDNP)[53] got 53% of the votes, which translated according to the election law[54] then in force into more than two-thirds of the seats in the Hungarian Parliament. Constitution-making was not on the agenda before the 2010 elections, it has

[44] Established by a comprehensive amendment to the 1949 Constitution (Act XX of 1949) through Act XXXI of 1989 of 18 October 1989, which granted the Court exceptionally wide jurisdiction. The specific law applicable to the HCC is Act XXXII of 30 October 1989.

[45] For a comprehensive evaluation see Christian Boulanger: "Europeanization Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and the 'Return to Europe'," in: Wojciech Sadurski, Adam Czarnota, Martin Krygier (eds.): *Spreading Democracy and the Rule of Law?* Dordrecht: Springer, 2006, 263–280.

[46] The ECHR and its eight Protocols were ratified on 5 November 1992 and incorporated into the Hungarian legal system through Act XXXI of 1993 on 7 April 1993 entering into force eight days later. The Act provides that the Convention and Protocols 1, 2 and 4 have to be applied as of 5 November 1992, Protocol 6 is applicable as of 1 December 1992, and Protocol 7 applied from 1 February 1993.

[47] For a detailed summary of the findings see Doc. H(95)2 of the Council of Europe published also in A. Drzemczewski: 'Ensuring Compatibility of Domestic Law with the European Convention on Human Rights Prior to Ratification: The Hungarian Model. Introduction to a Reference Document,' Human Rights Law Journal, 16 (7–9) (1995), 241–60.

[48] E.g. *Alajos Kiss v. Hungary*, No. 38832/06, 20 May 2010.

[49] E.g. *Bukta and others v. Hungary*, No. 25691/04, 17 July 2007, *Patyi and others v. Hungary*, No. 5529/05, 7 October 2008.

[50] Constitutional Court Decision No. 36/1994. (VI. 24.).

[51] E.g. *Társaság a Szabadságjogokért v. Hungary*, Application no. 37374/05, 14 April 2009.; *Kenedi v. Hungary*, Application no. 31475/05, 26 May 2009.

[52] E.g. *Barta v. Hungary* of 10 April 2009, Application number 26137/04, *Kmetty v. Hungary* of 16 December 2003, Application number 57967/00, *Balogh v. Hungary* of 20 July 2004.

[53] The cooperation between Fidesz and KDNP shall not be regarded as a coalition, rather as a party alliance created already before the elections. According to their self-perception their relation is similar to the party alliance between CDU and CSU in the Federal Republic of Germany. See http://kdnp.hu/news/megerositette-egyuttmukodeset-a-fidesz-es-a-kdnp-fotok-szerzodes. KDNP is a tiny party that would probably not get into Parliament on its own. The insignificance of KDNP allows me to abbreviate for the sake of brevity: whenever the term "Fidesz government" is used the Fidesz–KDNP political alliance is meant, unless otherwise indicated.

[54] Act C of 1997 on the Election Procedure.

not even been remotely mentioned during the electoral campaign[55], nevertheless on the basis of the alleged will of the Hungarian people, Fidesz engaged in major constitutional reconstructions right after forming a government. Despite the fact that in the overall assessment the '89 constitution fulfilled its function in a state based on European values, the main argument for replacing it was the false claim that it was a reminiscent from the Communist past.[56] In a dubious procedure,[57] the new constitution called Fundamental Law (FL) has been adopted by the majority of Parliament. It was passed on 18 April 2011 by Parliament by the two-third majority of MPs,[58] signed by the President[59] on 25 April 2011 and the document entered into force on 1 January 2012.[60]

When discussing Hungarian constitutionalism as it currently stands, the Fundamental Law shall be read in conjunction with the respective cardinal laws, which are supermajority acts of Parliament the adoption and modification of which can happen by two-third of the votes cast. Instead of being based on the rule of law, more often than not laws are passed with the exclusive aim of realizing short term political or financial profits.[61] Instead of general norms, laws are therefore tailored to individual persons' or groups' interests. The Hungarian Fundamental Law of 2011 and the constitutionally relevant cardinal laws were used as tools in deconstructing checks on the government that equals in Hungary the majoritarian unicameral Parliament.[62] The aim of this paper is not to give an enumeration of dismantling the rule of law in Hungary, from distorted election laws, media capture, through violations of judicial independence, infringement of fundamental rights, to harassment of civil society organizations, academics, and artists.[63] It shall suffice to say that Hungary, a country which was previously

[55] http://program2010.fidesz.hu/.

[56] The evidence for that statement was found in the citation of the old constitution, which still was Act XX of 1949. In the literature however, due to the major amendments during the political changes, the document has been referred to as the "1989 Constitution". Hungary became a member of the Council of Europe and the EU with this constitution, and these organizations themselves acknowledged that the document entirely fulfilled the requirements of the rule of law, democracy, human rights and set the preconditions for a market economy. I. Vörös, 'Hungary's Constitutional Evolution During the Last 25 Years', 63 Südosteuropa 2, 173–200 (2015), 177.

[57] Petra Bárd: The Hungarian Fundamental law and related constitutional changes 2010-2013, *Revue des Affaires Européennes: Law and European Affairs* 20:(3) pp. 457-472. (2013); Gábor Attila Tóth: *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, Budapest: CEU Press, 2012.

[58] Votes by MPs: http://www.parlament.hu/internet/plsql/ogy_szav.szav_lap_egy?p_szavdatum=2011.04.18.15:13:30&p_szavkepv=I&p_szavkpvcsop=I&p_ckl=39.

[59] Former Fidesz party leader Pál Schmitt was appointed as President by Fidesz in August 2010. Unlike previous Hungarian Presidents, he never exercised his veto powers during his 1,5 years in office. (His office ended prematurely due to a plagiarism scandal.) Accordingly – despite calls from civil society and parliamentary parties to the opposite – President Schmitt signed the Fundamental Law without making use of his presidential veto rights.

[60] See especially the Venice Commission Opinions 614/2011 of 28 March 2011 on three legal questions arising in the process of drafting the new constitution of Hungary, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)001-e and 621/2011 of 20 June 2011 on the new Constitution of Hungary, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e.

[61] Viktor Zoltán Kazai: «The Instrumentalization of Parliamentary Legislation and its Possible Remedies: Lessons from Hungary », Jus Politicum, n° 23, http://juspoliticum.com/article/The-Instrumentalization-of-Parliamentary-Legislation-and-its-Possible-Remedies-Lessons-from-Hungary-1309.html.

[62] Some argue that this point has been reached in the fall 2012. This view is shared among others by former HCC Judge Imre Vörös and representatives of the Eötvös Károly Institute. Others associate the deconstruction of the rule of law with the Fourth Amendment adopted in the spring 2013. The first HCC President and former President László Sólyom is among them.
See Szilvia Nagy: "Eltemetett demokrácia – Vörös Imre volt alkotmánybíró szerint államcsíny történt" *Vasárnapi Hírek*, 25 November 2012; Eötvös Károly Institute (László Majtényi, Zoltán Miklósi, Bernadette Somody, Máté Dániel Szabó and Beatrix Vissy): *A jogállam helyreállításának elvei nyolc tételben. Ajánlat a demokrácia híveinek*, September 2012, http://www.ekint.org/ekint/ekint.news.page?nodeid=557; László Sólyom: "A hatalommegosztás vége," *Népszabadság*, 11 March 2013, http://www.nol.hu/archivum/20130311-a_hatalommegosztas_vege

[63] For comprehensive evaluations see Attila Gábor Tóth, Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law, Budapest: CEU Press, 2012, or from among the most recent scholarship, for example Petra Bárd, Laurent Pech: How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The 'Hungarian

seen as a solidified democracy, was downgraded to a partly free state by Freedom House,[64] demoted from being a democracy at all to a competitive authoritarian regime by V-Dem,[65] and is considered in the literature to be a pseudo democracy.[66]

Needless to say, populism plays a major role in upholding the regime. Along negative measures silencing dissenting views, positive reinforcements are also introduced. Support by the electorate is enhanced through emotionalism, revolutionary rhetoric, catch phrases such as "law and order", "family", "tradition", "nation", symbolic lawmaking, and identity politics in general. Emotionalism has a nationalistic connotation unifying an allegedly homogenous Hungarian nation along ethnic lines,[67] and at the same time – by way of a negative definition – excluding from its members "others" including unpopular minorities (for example suspects, convicts, homosexuals, drug users, Roma, the poor) or anyone diverging from the "ordinary" (for example members of small churches or advocates of home birth). The friend/foe dichotomy is artificially created through punitive populism, scapegoating and lowering the protection of, sanctioning, criminalizing or aggravating criminal sanctions for the latter categories, partially through building on preexisting prejudices, partially by creating new enemies, such as multinational companies, or persons challenging Hungarian unorthodoxy at the international scene. Positive reinforcements are also applied vis-à-vis the institutions: once important positions are filled with "friends", long-term appointments guarantee their continuous support. The concept of the political becomes the existential basis for any other domain that reaches the level of politics, trumping state policies' moral, esthetic or economic dimensions,[68] and it also becomes the basic element of identity.

The foundational theory behind the Hungarian case is certainly not that of liberal democracy, an obvious fact, which shall only be emphasized so as to put contemporary critics, which are mainly coming from the liberal tradition, into perspective. The degree of criticism depends on the theoretical framework used, but one shall not fall into the trap of framing the tensions along ideological lines. Instead it shall be realized that the Hungarian case fits ill with *any*, even its self-proclaimed majoritarian or conservative ideological traditions: whereas it claims its authority from the two-thirds majority, it does not respond to the will of the people, but often engages in an elitist approach either patronizing the majority against their will or falsely claiming a certain minority's opinion to be the majority wish. A similar tension can be traced in national pride ignoring foreign standards and at the same time justifying national solutions by way of international examples.[69] The same tension can be

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model', RECONNECT Working Paper No. 4, October 2019, https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf

[64] See Freedom House, *Democracy in Retreat Freedom in the World 2019*, p. 13 and for an analysis of the significance of this downgrading, see R. Daniel Kelemen: "Hungary's democracy just got a failing grade", *The Washington Post*, 7 February 2019.

[65] https://www.v-dem.net/media/filer_public/f0/5d/f05d46d8-626f-4b20-8e4e-53d4b134bfcb/democracy_report_2020_low.pdf

[66] To borrow the label recently used by Larry Diamond, "How Democratic Is Hungary?", *Foreign Affairs*, September/October 2019.

[67] Zsolt Körtvélyesi: "From 'We the People' to 'We the Nation'," In: Gábor Attila Tóth: *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, Budapest: CEU Press, 2012, 111-140.

[68] That is difficult to grasp for someone outside the scope of this paradigm. See Neelie Kroes rushing out of the room after a Hungarian politician broke his promise made a few minutes before they jointly addressed the public. Kroes threatens nuclear option against Hungary, 9 February 2012, http://euobserver.com/justice/115209 Francis Fukuyama was equally puzzled when a Hungarian State Secretary turned to the editors of the journal publishing his piece concerning some factual mistakes that did not have any influence on the message he tried to convey. Francis Fukuyama: "What's Wrong with Hungary?" *The American Interest* 6 February 2012, http://blogs.the-american-interest.com/fukuyama/2012/02/06/whats-wrong-with-hungary/

[69] Reference has for example been made to countries without a constitutional court, with voter registration, gerrymandering, states with vagrancy laws, life imprisonment without the possibility of parole. All elements enshrined in the FL and in cardinal laws can be found in one or another state. It is the combination of these that make Hungarian constitutionalism unique. This is what Kim Lane Scheppele called a Frankenstate. Kim Lane Scheppele:'The Rule of Law and the Frank-

seen in relation to the rule of law: the concept is not abandoned, but is said to have a different (perhaps Central Eastern European) understanding, and international players are called upon to respect this alternative understanding – without however expressly explaining what the Hungarian version of the rule of law incorporates. The Prime Minister went as far as doing away with the rule of law as a legal concept, virtually rendering any meaningful debate impossible by saying that the rule of law was a point of honor, and "whenever the rule of law is questioned, they step on our honor."[70]

The rule of law in the Fundamental Law and the concept of a historical constitution

The text of the Fundamental Law mirrors the above discussed contradictions, too. In an effort to still adhere to the concept of the rule of law – similarly to the '89 Constitution, Article B) (1) Fundamental Law declares that "Hungary is an independent, democratic state based on the rule of law." –, but filling it with partially novel content, the drafters attempted to revive the concept of the historical constitution and the Doctrine of the Holy Crown.[71] Already the preamble, the so-called National Avowal (in Hungarian: 'Nemzeti hitvallás') states that "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. We do not recognise the suspension of our historical constitution due to foreign occupations." There is a reference to these concepts in the actual body of the Fundamental Law, too, which in Article R)(3) states that "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution."

The above references caused significant controversies in the Hungarian constitutional literature. Most regarded them as symbolic, but legally irrelevant underpinnings of the legitimacy of the Fundamental Law. As Ferenc Hörcher formulates it somewhat euphemistically, the Doctrine of the Holy Crown "served as the foundation stone of Hungarian exceptionalism, an idea that Hungarian history and the constitution that grew out of it, in some ways represented a unique colour in European history, a kind of Sonderweg, which excludes any easy comparison with other countries' historical achievements."[72] Zoltán Szente formulates it more forcefully, contextualizing the adoption of the new constitution: since the document was too controversial, he argues, it was incapable of creating identity, and the lack of a political consensus had to be remedied. The governing parties thus referred to the ties between the Fundamental Law and the historical constitution as the ideological underpinning of the former.[73] András Jakab argued that the *Doctrine* of the Holy Crown "has not been codified into the

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enstate: Why Governance Checklists Do Not Work' (2013) 26 (4) *Governance: An International Journal of Policy, Administration, and Institutions*, pp. 559–562; Kim Lane Scheppele: 'Not Your Father's Authoritarianism: The Creation of the "Frankenstate"' (2013) *Newsletter of the European Politics and Society Section of the American Political Science Association.*

[70] http://abouthungary.hu/blog/pm-orban-when-they-question-the-rule-of-law-they-step-on-our-honor/

[71] The Holy Crown was mentioned already in Article 76 of the '89 Constitution, but only when describing the national coat of arms. No further meanings were attached to it. Later, under the first Fidesz government, Act I of 2000 was adopted on the Commemoration of the Saint Stephen's State Foundation and the Holy Crown, which however failed to mention the corresponding Doctrine.

In a rather controversial move, the Holy Crown was removed from the National Museum to the Parliament. On the parliamentary debate see Zoltán Tóth: Magyar közjogi hagyományok és nemzeti öntudat a 19. század végétől napjainkig [Hungarian public law traditions and national identity from the end of the 19th century to date], Budapest: Szent István Társulat 2007, or Sándor Radnóti: A sacred symbol in a secular country: The Holy Crown, in: Attila Gábor Tóth: Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law, Budapest: CEU Press, 2012, 85-109, 93.

[72] Ferenc Hörcher: Is the Historical Constitution of Hungary Still a Living Tradition? A Proposal for Reinterpretation, In: Arkadiusz Górnisiewicz, Bogdan Szlachta (eds.): The Concept of Constitution in the History of Political Thought, Berlin, Boston,: De Gruyter Verlag, (2017) pp. 89-110, 91.

[73] Zoltán Szente: A 2011. évi Alaptörvény és a történeti alkotmány összekapcsolásának mítosza [The myth of connecting the Fundamental Law of 2011 with the historical constitution], Közjogi Szemle, 2019/1, 1-8.

In the following subchapter mainly Szente's literature review is followed. See also the inaugural address of Imre Vörös, Member of the Hungarian Academy of Sciences, 2016 on the historical constitution in light of the jurisprudence of the

text, only the symbolic importance of the Holy Crown is mentioned, which does not imply the complicated and mystical elements of the Doctrine".[74] But this proved to be wishful thinking. Constitutional continuity via the historical constitution and the Holy Crown Doctrine gained relevance in the literature and the jurisprudence.

A small group of academics – some of whom became holders of important offices in the past ten years – made desperate attempts to show a genuine link between the historical constitution and the Fundamental Law. MEP József Szájer – who according to an urban legend wrote the Fundamental Law on his iPad[75] – stated that the constitution-maker's main intention was to recreate constitutional continuity, by embedding the Fundamental Law into the historical constitution. This explains in his view the choice of the document's title Fundamental Law, which is part of, but is less than the Hungarian constitution.[76] At the same time, he seems to be cherry-picking from the rules, only acknowledging the ones in harmony with the current understanding of values as living traditions. Attila Horváth,[77] Lóránt Csink and Johanna Fröhlich[78] also agreed with Szájer claiming that the Fundamental Law and the historical constitution together form the Hungarian constitution, or that there is some kind of a connection and continuity between the two. András Varga Zs. and Balázs Schanda suggested a different approach: in their view it is impossible to tell what the historical constitution is, and parts of it are surely in contrast with the law in force, but it can still be used as a frame of interpretation.[79] At first sight, this seems to be the loosest connection between the historical constitution and the Fundamental Law, but Varga Zs. also acknowledges Szájer's viewpoint about a strong connection, i.e. that the Fundamental Law was embedded into the historical constitution.[80] In Ádám Rixer's view even the period between 1944-1990 is to be included to the historical constitution – even though such

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Hungarian Constitutional Court, (in Hungarian: Imre Vörös: A történeti alkotmány az Alkotmánybíróság gyakorlatában), http://real-eod.mtak.hu/7635/1/A%20t%C3%B6rt%C3%A9neti%20alkotm%C3%A1ny%20az%20Alkotm%C3%A1nyb%C3%ADr%C3%B3s%C3%A1g%20%20gyakorlat%C3%A1ban.pdf

[74] András Jakab: On the Legitimacy of a New Constitution - Remarks on the Occasion of the New Hungarian Basic Law of 2011, in: Miodrag A. Jovanović – Đorđe Pavićević (eds): Crisis and Quality of Democracy in Eastern Europe, The Hague: Eleven 2012, 61-76., 69.

[75] József Szájer's blog post on the issue is no longer available (http://szajerjozsef.blog.hu/2011/03/01/a_vilagon_az_elso_alkotmany_amely_ipadon_irodik), but there are many references to it in the press. See e.g. https://hvg.hu/itthon/20110302_szajer_ipad_alkotmny

[76] József Szájer: Szabad Magyarország, szabad Európa. Újabb tizenöt év. Beszédek, írások, dokumentumok 1998-2013 [Free Hungary, free Europe. Another fifteen years. Talks writings, documents 1998-2013], Budapest, self-published, 2014, 825, 840-1.

[77] Renáta Fedorecz, János Radvánszki: "Kemény viták zajlanak" – Interjú Dr. Horváth Attila alkotmánybíróval ["Tough disputes are going on" – Interview with constitutional court judge Dr. Attila Horváth], 18 February 2018, https://arsboni.hu/kemeny-vitak-zajlanak-interju-dr-horvath-attila-alkotmanybiroval/ For his views on the historical constitution see Attila Horváth, "Nem ismerjük el az 1949. évi kommunista alkotmányt, mert egy zsarnoki uralom alapja volt, ezért kinyilvánítjuk érvénytelenségét" [We do not recognize the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid.], In: András Patyi (ed.): Rendhagyó kommentár egy rendhagyó preambulumról: Magyarország Alaptörvénye, Nemzeti hitvallás, [An unconventional commentary on an unconventional preamble: The Fundamental Law of Hungary, National Avowal] Budapest: Dialóg Campus Kiadó-Nordex Kft, 2019, 31-66.

[78] Lóránt Csink, Johanna Fröhlich: Egy alkotmány margójára. Alkotmányelméleti és értelmezési kérdések az Alaptörvényről, [On the margins of a constitution: Constitutional theory and interpretation issues in relation to the Fundamental Law] Budapest: Gondolat, 2012. 129.

[79] András Varga Zs.: Történeti alkotmányunk vívmányai az Alaptörvény kógens rendelkezésében [The achievements of our historical constitution in the cogent provision of the Fundamental Law] Iustum Aequum Salutare 2016/4, 83-89; Balázs Schanda: Alkotmányos értékek – alkotmányos identitás [Constitutional values – constitutional identity] In: Nóra Chronowski, Zoltán Pozsár-Szentmiklósy, Péter Smuk, Zsolt Szabó (eds.): A szabadságszerető embernek. Liber Amicorum István Kukorelli [For the freedom-loving man. Liber Amicorum István Kukorelli] Budapest: Gondolat Kiadó, 2017, 89-97.

[80] András Varga Zs.: Történeti alkotmányunk vívmányai az Alaptörvény kógens rendelkezésében [The achievements of our historical constitution in the cogent provision of the Fundamental Law] Iustum Aequum Salutare 2016/4, 83-89.

an interpretation goes against the letter of the Fundamental Law condemning dictatorships.[81] Varga Zs.'s interpretation is more viable: he argues that only the post-transition period is part of the historical constitution. László Sólyom offers an alternative understanding of the historical constitution, arguing that it is a flexible concept, which allows adaptation to ever changing circumstances, and reliance on the modern tenets of constitutionalism.[82] Accordingly, he also regards the case-law of the Hungarian Constitutional Court's first two decades as part of the historical constitution, and thus as an interpretative aid to the Fundamental Law.[83] (Retrospectively we know that László Sólyom's interpretation of the historical constitution did not correspond to the constitution-makers' wish, since the Fourth Amendment to the Fundamental Law did away with continuity between the first two decades of the HCC's jurisprudence and the case-law after the entry into force of the Fundamental Law. See *infra*.)

Let us point to the tensions and difficulties that the reference to the historical constitution and the Doctrine of the Holy Crown creates. First, as leading constitutional scholars agreed, the concept of the historical constitution is very uncertain, there is no consensus whatsoever on its content in the legal literature. It is unclear whether post-1989 developments are to be incorporated and which parts of it are reconcilable with Hungary's international obligations.[84] Imre Vörös forcefully summarizes the mainstream view with regard to the Holy Crown Doctrine: it "has no meaning … and is completely incomprehensible" in the constitutional law of the 21st century. He adds that the concept of the historical constitution remains undefined "and can therefore be applied to anything imaginable."[85] This again may lead to legal uncertainty.[86]

Little wonder that up until today there has been no theory of continuity developed, only scattered references to the historical constitution are known whenever it suits political interests. According to Zoltán Szente, this can be traced back to the limited knowledge about the historical constitution, but also to the fact that the Fundamental Law has in fact little to do with pre-1944 traditions.[87]

Second, as András Jakab and Pál Sonnevend have proven,[88] beyond the unclear content of the above concepts, several parts of it are unacceptable today or do not correspond to the republican regime form. Zoltán Szente who agrees with the above criticisms saying that claims of continuity are absurd and irreconcilable with the values of modern European constitutionalism.[89] As Szente adds – and this is our third point – constitutional continuity stands in contrast with not recognizing the 1949 constitution, suggesting a cherry-picking of Hungarian history depending on the liking of the constitution-

[81] Ádám Rixer: A történeti alkotmány lehetséges jelentéstartalmai [The historical constitution's possible meanings] Jogelméleti Szemle 2011/3, http://jesz.ajk.elte.hu/rixer47.html

[82] Cited by Zoltán Szente: A historizáló alkotmányozás problémái – A történeti alkotmány és a Szent Korona az új Alaptörvényben [The problems of historicizing constitution-making – The historical constitution and the Holy Crown in the new Fundamental Law] Közjogi Szemle 2011/3, 1-13, 1.

[83] András Stumpf: Sólyom László az új alkotmányról [László Sólyom on the new constitution], 18 April 2011, http://valasz.hu/itthon/solyom-laszlo-az-uj-alkotmanyrol-37067

[84] Zoltán Fleck, Gábor Gadó, Gábor Halmai, Szabolcs Hegyi, Gábor Juhász, János Kis, Zsolt Körtvélyesi, Balázs Majtényi, Gábor Attila Tóth: Vélemény Magyarország Alaptörvényéről [Opinion on the Fundamental Law of Hungary] Fundamentum 2011/1, 61-77, 76.

[85] Imre Vörös: Hungary's Constitutional Evolution During the Last 25 Years, Südosteuropa 63:2 (2015), 173-200, 186.

[86] Imre Vörös: A történeti alkotmány az Alkotmánybíróság gyakorlatában [The historical constitutional in the jurisprudence of the Constitutional Court] Közjogi Szemle, 2016/4, 44-57.

[87] Zoltán Szente: Az Alaptörvény és az alkotmányos változások szakmai és tudományos reflexiói 2010 után. Fundamentum, 19:2-3 (2015) 62-70.

[88] András Jakab, Pál Sonnevend: "Continuity with Deficiencies: The New Basic Law of Hungary," European Constitutional Law Review 9:1 (2013), 102-138, 108.

[89] Zoltán Szente: Az Alaptörvény és az alkotmányos változások szakmai és tudományos reflexiói 2010 után [Professional and academic reflections on the Fundamentl Law and constitutional changes after 2010] Fundamentum, 19:2-3 (2015) 62-70.

maker or the constitutional court interpreting the Fundamental Law.[90] The tension is described by Péter Apor and Péter Sólyom as a pretense that there was an "eternal legal frame sustained from St. Stephen until 1944,"[91] which lost its legitimacy only temporarily until the date of the entry into force of the Fundamental Law, whereas the National Avowal states that "we do not recognize the suspension of our historical constitution due to foreign occupation." Fourth, this amalgam of the Fundamental Law and the historical constitution is a very dubious interpretation in disregard of the very different and contradictory nature of the concepts. As Gábor Schweitzer explains, "the most important formal characteristic of the historical constitution was that it was not summarized in a comprehensive written document, its content was never incorporated into a charter, but it was determined by a general consensus based on customs".[92]

Fifth, as Jakab and Sonnevend show, whereas the Fundamental Law claims a return to the historical roots of Hungary, its normative content is based on the '89 Constitution.[93] Not only is the rule of law clause identical, but also the content of the rule of law is similarly addressed by the black letter law, and also the HCC – at least in the early years after the entry into force of the Fundamental Law – tried the most to make the previous jurisprudence survive. (See *infra*.)

The jurisprudence of the HCC

The main interpreter of the rule of law in Hungary is the Constitutional Court. The preambles of both Act XXXII of 1989 on the Constitutional Court and Act CLI of 2011 replacing it refer to the HCC's role in creating the rule of law, and maintaining it, respectively

The first two decades after the regime change

It is impossible to give a comprehensive overview of the jurisprudence of the HCC on the rule of law. The rule of law is one of the most used concepts in the case law, and often the HCC references it, even if not the rule of law, but a specific constitutional right or value is assessed and interpreted.[94]

The HCC captured the crucial difference between the '49 and '89 Constitutions in the concept of the rule of law, and defined the regime change as a "rule of law revolution". The respective HCC Decision 11/1992. (III. 5.) states that "by way of the constitutional amendment of 23 October 1989, practically a new Constitution entered into force, which introduced a fundamentally novel state, legal and political system by stating that 'The Republic of Hungary is an independent, democratic state based on the rule of law.' From a constitutional law perspective this is what the political category of regime change means".[95] Or as the first President of the HCC, later President of the Republic stated, "the Hungarian Constitutional Court continuously demonstrated that the law draws the boundaries for politics, and that this is the main difference as compared to the previous system, where law was the tool of politics."[96]

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[90] Zoltán Szente: A 2011. évi Alaptörvény és a történeti alkotmány összekapcsolásának mítosza [The myth of connecting the Fundamental Law of 2011 with the historical constitution], Közjogi Szemle, 2019/1, 1-8.

[91] Péter Apor, Péter Sólyom: The New Constitution of Hungary: Historical Narratives and Constitutional Identity, 8 March 2012, https://ssrn.com/abstract=2276398

[92] Gábor Schweitzer: A magyar királyi köztársaságtól a Magyar Köztársaságig [From the Hungarian royal republic to the Hungarian Republic] Pécs: Közjog- és tudo-mánytörténeti tanulmányok, Publikon Kiadó, 2017. 148-9.

[93] András Jakab, Pál Sonnevend: "Continuity with Deficiencies: The New Basic Law of Hungary," European Constitutional Law Review 9:1 (2013), 102-138, 106

[94] Fruzsina Gárdos-Orosz: Jogállamiság, In: Fruzsina Gárdos-Orosz, Iván Halász (eds.): Bevezetés az alkotmányjogba: alapfogalmak [Introduction into constitutional law: definitions], Budapest, Magyarország: Dialóg Campus, (2019) pp. 49-59., 59.

[95] HCC, 11/1992. (III. 5.) decision, Point III.1.

[96] László Sólyom: Az alkotmánybíráskodás kezdetei Magyarországon, [The beginnings of constitutional adjudication in Hungary], Budapest, Osiris, 2001, 693.

The Hungarian Constitutional Court played a major role in interpreting the rule of law.[97] With the help and inspiration from the German *Rechtsstaat* doctrine, the HCC completed the "rule of law revolution". In Decision 9/1992. (I. 30.), the HCC declared the rule of law to be the most basic value of the republic. HCC Decision 11/1992. (III. 5.) did not interpret the rule of law as a complementary rule, but as a separate constitutional norm, the alleged violation of which alone could be the basis of a constitutional procedure, which could lead to the annulment of a law – an interpretation which helped to enrich and make the rule of law visible in the transitional democracy. The HCC's starting point in Decision 11/1992. (III. 5.) was that Article 2 of the '89 Constitution on the rule of law was a statement and a program to be completed at the same time, and its respect and enforcement was the obligation of state authorities. This also meant that political objectives could only be realized within the framework of the constitution; that the supremacy of the Constitution had to apply; and that the HCC had to guarantee this supremacy through its norm control.[98]

The HCC emphasized material rule of law beyond a formal understanding, comprising of the rule of the laws, the legality of applying the law, legal certainty, protection of rights, independence of the judiciary, fair trial, human dignity, human rights and equality.[99] In Decision 36/1992. (VI. 10.), the HCC ruled that the state can only function democratically, if democracy based on the rule of law and the protection and operation of the constitutional order incorporated respect for and protection of rights and freedoms.

Among others, the HCC ruled on the foreseeability and limited nature of exercising state power,[100] the prohibition of arbitrariness,[101] the transparent functioning of the state,[102] the need for democratic legitimacy of state powers,[103] the legality of lawmaking,[104] the efficient functioning of constitutional organs.[105]

Separation of powers was not expressly mentioned by the Constitution (it is mentioned by Article C) Fundamental Law), therefore the HCC derived it from the rule of law, and considered it to be the most crucial basic principle of Hungarian constitutionalism.[106]

Incorporating specific judgments into law was considered to be an abuse of law,[107] and sufficient time needs to be granted for preparing for the application of a given law.[108] The richest body of case-law

[97] In the following we base the analysis on Nóra Chronowski: Jogállamiság – Gondolatok a magyar és az európai uniós jogfejlődésről [Rule of Law – Comparing Developments of Hungarian and European Union Law], Pro Publico Bono – Magyar Közigazgatás, 2016/4, 32–42; Nóra Chronowski: A jogállamiság még mindig program... [The rule of law is still a program…] In: Nóra Chronowski, Zoltán Pozsár-Szentmiklósy, Péter Smuk, Zsolt Szabó (eds.): A szabadságszerető embernek: Liber Amicorum István Kukorelli [For the freedom-loving man. Liber Amicorum István Kukorelli] Budapest: Gondolat Kiadó, 2017, 35-44; Tamás Győrfi, András Jakab: Jogállamiság [The Rule of Law], in: András Jakab (ed.): Az Alkotmány kommentárja [Commentary of the Constitution], Budapest: Századvég, 2009, 155–210. and Iván Halász (ed.): Alkotmányjog [Constitutional Law], Budapest: Dialóg Campus Kiadó, 2018, 32-39.

[98] See also HCC Decision 131/2008. (XI. 3.).

[99] László Sólyom: Introduction to the Decisions of the Constitutional Court of the Republic of Hungary. In: László Sólyom, Georg Brunner (eds.): Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court, Ann Arbor: University of Michigan Press, 2000, 38. So-called avenues of interpretation – exercise of state powers, separation of powers, the legality of administration, lawmaking, and legal security – were identified by József Petrétei: Magyarország alkotmányjoga I. [Constitutional Law of Hungary I.], Pécs: Kodifikátor Alapítvány, 2013, 90–94.

[100] HCC Decisions 56/1991. (XI. 8.), 1/1995. (II. 8.)

[101] HCC Decision 35/1994. (VI. 24.)

[102] HCC Decision 60/1994. (XII. 24.)

[103] HCC Decisions 16/1998. (V. 8.), 30/1998. (VI. 25.), 30/1998. (VI. 25.)

[104] HCC Decision 751/B/1990.

[105] HCC Decision 12/2006. (IV. 24.)

[106] HCC Decisions 31/1990. (XII. 18.), 38/1993. (VI. 11.), 41/1993. (VI. 30), 55/1994. (XI. 10.), 2/2002. (I. 25.), 50/2003. (XI. 5.), 62/2003. (XII. 15.)

[107] HCC 5/2007. (II. 27.)

[108] HCC Decision 28/1992 (IV. 30.)

is connected to legal certainty,[109] and as the HCC stated, its achievement is the main responsibility of the lawmaker,[110] and it extends beyond norm clarity[111] also to the foreseeable operation of state institutions,[112] the prohibition of retroactive laws,[113] the protection of acquired rights,[114] fair trial in administrative procedures,[115] political neutrality and impartiality of state administration,[116] or the rich concept of constitutional criminal law.[117] (For lead HCC cases on the rule of law, please see the Annex.)

In the overall setting, one cannot but agree with László Sólyom: the HCC fulfilled its promise and greatly contributed to the successful closure of the regime change.[118]

HCC case-law after the entry into force of the Fundamental Law

After the entry into force of the Fundamental Law, the constitutional theory and expectations are very similar to the ones developed in light of the '89 Constitution in the first two decades of the HCC.

In the first year after the entry into force of the Fundamental Law, the HCC addressed the following issues in relation to the rule of law: norm collision, the rule of law as protection of trust, the rule of law as the guarantee of granting sufficient time to prepare for the application of a law, norm clarity, acquired rights, prohibition of retroactive laws, legal security, risk allocation in crime prosecution, unity of the case-law, abuse of lawmaking, norm clarity.[119]

A certain trend can be identified based on the HCC decisions of the past few years. Reasonings based on the rule of law are much less visible than before, and rule of law arguments are only raised with regard to too short periods of *vacatio legis* and non-retroactivity of law. Legal certainty and protection of acquired rights seems to be less protected. This, according to Nóra Chronowski can be traced back to multiple factors, such as the new role and powers of the HCC, the scrapping the possibility of *actio popularis*, and the fact that in a constitutional complaint procedure violation of rights have to be claimed, i.e. infringement of the rule of law in itself is insufficient.[120]

Some of us identified the greatest weakness of the Fundamental Law in the lack of a possibility of a comprehensive constitutional review of and remedy for constitutional violations by the legislature. "This is because the Fundamental Law reduces the room of maneuver of the Constitutional Court and maintains the procedural and material restrictions introduced in 2010. The Fundamental Law lays down that with regard to ex post norm control and constitutional complaint procedures, that the HCC must not review the content of or annul acts on public finances, with the exception of four 'protected

[109] HCC Decisions 34/1991 (VII. 15.), 10/1992 (11.25.), 25/1992 (IV.30.)
[110] HCC Decision 9/1992. (I. 30.)
[111] HCC Decision 26/1992. (V. 30.), 42/1997. (VII. 1.)
[112] HCC Decision 9/1992. (I. 30.)
[113] HCC Decision 25/1992. (IV. 30.)
[114] HCC Decision 32/1991. (VI. 6.)
[115] HCC Decision 165/2011. (XII. 20.)
[116] HCC Decision 29/2011. (IV. 7.)
[117] HCC Decisions 10/1992. (II.25.) and 11/1992. (III. 5.). For one of the earliest academic pieces of literature see András Szabó: Büntetőpolitika és alkotmányosság [Criminal Policy and Constitutionalism] Jogtudományi Közlöny 1995/9, 418–424.
[118] László Sólyom: The Rise and Decline of Constitutional Culture in Hungary, in: Armin von Bogdandy, Pál Sonnevend (eds.), Constitutional Crisis in the European Constitutional Area, Oxford: Hart, 2015, 5–32.
[119] For a comprehensive overview see Fruzsina Gárdos-Orosz: Jogállamiság, In: Fruzsina Gárdos-Orosz, Iván Halász (eds.): Bevezetés az alkotmányjogba: alapfogalmak [Introduction to constitutional law: definitions], Budapest, Dialóg Campus, (2019) pp. 49-59., 55-56.
[120] Nóra Chronowski: Jogállamiság – Gondolatok a magyar és az európai uniós jogfejlődésről [Rule of Law – Comparing Developments of Hungarian and European Union Law], Pro Publico Bono – Magyar Közigazgatás, 2016/4, 32–42, 37; Nóra Chronowski: A jogállamiság még mindig program... [The rule of law is still a program…] In: Nóra Chronowski, Zoltán Pozsár-Szentmiklósy, Péter Smuk, Zsolt Szabó (eds.): A szabadságszerető embernek: Liber Amicorum István Kukorelli [For the freedom-loving man. Liber Amicorum István Kukorelli] Budapest: Gondolat Kiadó, 2017, 35-44, 40.

fields of fundamental rights', as long as the state debt exceeds half of the gross domestic product. "As a result of the restriction of the procedure of the Constitutional Court, numerous fundamental rights (especially, for example, the right to property, social rights, the freedom of enterprise and the right to a profession) became 'defenceless'."[121] Among other things, the Fourth Amendment to the FL was used to further weaken the HCC by repealing earlier case-law of the HCC (see *infra*), and by depriving it of the competence to declare a constitutional amendment unconstitutional on substantive grounds.[122]

In one of the most significant decision, 45/2012. (XII. 29.) the HCC stated that formal rules of law-making as laid down in the Fundamental Law are fundamental constitutional obligations that need to be respected when the Parliament acts as a constitution-making power, and the HCC has the power to oversee whether the Parliament complied with these obligations. Transgressing these limits must result in annulment of the respective laws. According to the HCC, all modifications and amendments to the Fundamental Law must fit into the document so that it creates a coherent whole. (Obligation of incorporation, in Hungarian: beépülési parancs) Subject-matters outside the scope of the Fundamental Law cannot be incorporated into a separate law of constitutional nature. Importantly, in this case the HCC explicitly declared that the Court in subsequent cases may use the arguments appearing in its decisions rendered prior to the entry into force of the FL provided that the content of the provision in the FL is identical or similar to that of the previous Constitution and if the rules of interpretation of the FL permit the use of the arguments.[123] As former President of the HCC, current ECtHR judge Péter Paczolay stated, the HCC only reinforced its previously stated principles. It could not have done otherwise: in his view constitutional protection based on the rule of law cannot be built on a different starting point.[124]

The Hungarian Parliament saw the matter differently. As if in response to the above finding of the HCC, the fourth amendment to the FL[125] repealed the rulings of the HCC given prior to the entry into force of the FL.[126] This was interpreted to mean that HCC Decision 22/2012 (V.11.) is overwritten by the constitution-amending power, and the HCC is no longer bound by its earlier rulings and may not even make reference to them. After the Fourth Amendment the Hungarian constitutional Court addressed the issue once again in Decision 13/2013 (VI.17.), and came again to the conclusion that it was still possible to reference reasons, legal principles, and constitutional issues developed by former HCC decisions on a case by case basis, if a detailed reasoning is given to why such an exercise was needed, and if there are no impediments to references to former decisions, given the substantive and contextual correspondence of the respective provisions in the Constitution and the Fundamental Law, and the interpretative rules of the latter.[127] However, the HCC added that due to the fourth amendment to the FL, it may disregard legal principles elaborated in earlier decisions even if the text of the given provision in the FL and the previous Constitution is identical.[128]

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[121] Nóra Chronowski, Márton Varju, Petra Bárd, Gábor Sulyok: Hungary: Constitutional (R)evolution or Regression?, In: Anneli Albi; Samo Bardutzky (eds.): National constitutions in European and global governance: Democracy, rights, the rule of law - national reports, The Hague: T.M.C. Asser Press, 2019, 1439-1488, 1441-1442.

[122] According to newly inserted Article 24 Section (5) "The Constitutional Court may only review the conformity of the Fundamental Law and an amendment to the Fundamental Law with the procedural requirements of the Fundamental Law pertaining to the adoption of the Fundamental Law or its amendments."

[123] "the principal statements expressed in the Constitutional Court's decisions based on the previous Constitution shall remain applicable as appropriate also in the decisions interpreting the Fundamental Law." HCC Decision 22/2012. (V. 11.) para 41.

[124] Péter Paczolay: Az Alkotmánybíróság alkotmányvédő szerepéről [On the Constitutional Court's role of constitutional protection] Alkotmánybírósági Szemle, 2014/1, 105-110.

[125] Adopted by the Hungarian Parliament on 11 March 2013.

[126] Article 19 of the fourth amendment to the FL, incorporated as point 5 in the Closing and Miscellaneous Provisions of the Fundamental Law.

[127] 13/2013. (VI. 17.) AB decision, paras 31-34.

[128] Constitutional Court Decision No. 13/2013. (VI. 17.), para. 30–1.

As foretold by Imre Vörös, arbitrary interpretation of the historical constitution and by consequence, the Fundamental Law started to appear in the case-law. With regard to the forced early retirement of judges, the HCC stated in Decision 33/2012. (VII. 17.) that the new rules violated judicial independence. Reducing the retirement age can only happen gradually, within a sufficiently long transitional period. This was the first decision where the HCC relied on the achievements of the historical constitution, referencing not only the concept, but also two laws on judicial independence from the 19th century. The Constitutional Court noted that it has the duty to determine which elements of the historical constitution are to be regarded as relevant achievements under the Fundamental Law.

Arbitrariness and cherry-picking is more apparent in HCC Decision 22/2016 (XII. 5.).[129] In a government-friendly ruling, the HCC signaled it would support Orbán's "constitutional identity" justification for defying EU migration law. When delivering its abstract constitutional interpretation in relation to the European Council decision 2015/1601 of 22 September 2015 establishing provisional measures benefitting Italy and Greece, to support them in better coping with an emergency situation characterized by a sudden inflow of nationals of third countries in those Member States, the HCC stated the following:[130] 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, in the course of exercising its competences, examine the existence of an alleged violation on the basis of a relevant petition.[131] According to the HCC "constitutional identity equals the constitutional (self-)identity of Hungary", and its content is to be determined by the HCC on a case-by-case basis based on the Fundamental Law, its purposes, the National Avowal and the achievements of the Hungarian historical constitution. As explained earlier, the latter is so vague, and the National Preamble is written in a language that is so far from legal precision, that this definition can only be understood as granting a *carte blache* type of derogation to the executive and the legislative from Hungary's obligation under EU law. As Gábor Halmai put it, it was "nothing but national constitutional parochialism, which attempts to abandon the common European constitutional whole."[132]

Albeit the Fundamental Law's rule of law clause corresponds to that of the '89 Constitution, and the HCC still references earlier case law, a significantly different jurisprudence is in the making. This can partially be explained by the capturing of the HCC, partially by the fact that the rule of law is more than the black letter law, institutions and procedures. Without a rule of law culture, or as Zoltán Fleck put it "in an environment beyond the rule of law, one cannot efficiently make use of the different rule of law institutions."[133]

Vagueness constitutionalised – the identity judgment and its aftermaths

The Constitutional Court had an important intermediary and instrumental role in the introduction of the concept of the constitutional identity into the constitutional law of the System of National Cooperation.

[129] For a contextual discussion see Petra Bárd, Laurent Pech: How to build and consolidate a partly free pseudo democracy by constitutional means in three steps: The 'Hungarian model', RECONNECT Working Paper No. 4, October 2019, https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf

[130] 22/2016 (XII. 5.) HCC decision.

[131] Case 22/2016 quoted and translated by Gábor Halmai: "Abuse of constitutional identity: the Hungarian constitutional court on interpretation of article E) (2) of the fundamental law" (2018) 43 Review of Central and East European law 23, 34-35.

[132] Gábor Halmai, "Absolute Primacy of EU Law vs. Pluralism: the Role of Courts", 2018: https://me.eui.eu/wp-content/uploads/sites/385/2018/05/IJPL_Special_Issue_Concluding_remarks_Halmai_final.pdf.

[133] Zoltán Fleck: Szakmai és politikai érvek a közigazgatási bíráskodás kapcsán [Professional and political arguments in relation to the administrative adjudication] Közjogi Szemle, 2016/4. 16-19, 17.

The Constitutional Court – parallel with and in the course of the government's struggle against EU asylum policy – established and 'transplanted' the notion of Hungary's constitutional identity in the 22/2016. (XII. 5.) CC decision,[134] which related to the EU relocation quota for resolving the refugee crisis of 2015.

The case started with the petition of the Ombudsman. On 3 December 2015, the Commissioner for Fundamental Rights applied to the Constitutional Court for interpretation of the Fundamental Law. The specific constitutional problem underlying the petition was according to Ombudsman the violation of the constitutional prohibition on collective expulsion when implementing EU decisions on the transfer of asylum seekers residing in Italy and Greece to Hungary. As there is no deadline for the Constitutional Court to take a decision on such petitions, the specific case was dormant until November 2016.

A failed attempt to amend the Fundamental Law in October 2016 also belongs to the genesis. The government intended to set new substantive limits on joint exercise of power with other EU member states in order to protect the Hungarian constitutional identity and prohibit the resettlement of foreign population in the territory of Hungary. There was an invalid referendum (2 October 2016) on EU refugee relocation quota in the background of the issue.[135] The government's plans with the referendum and the subsequent constitutional amendment failed that time but the Constitutional Court gave a helping hand by establishing in the aforementioned decision that "upon a relevant motion and in the course of exercising its competences it may review whether the joint exercise of powers with other EU member states or by way of the EU institutions violates human dignity, or another fundamental right, the sovereignty of Hungary or its constitutional identity based on the country's historical constitution."

Although the decision attracted attention primarily by the institutionalization of the topos of "identity based on a historic constitution" the operative part itself sets three control measures: the Constitutional Court may examine whether the joint exercise of competences under Article E (2) of the Fundamental Law violates (i) human dignity and other fundamental rights, or (ii) Hungary's sovereignty or (iii) its identity based on its historical constitution. Seemingly the sentence was strongly inspired by the German Constitutional Court's case law, but the historical constitution based identity is new and different. While the German Basic Law constitutes an eternity clause [GG Art. 79(3)] which was a reference point for the German CC in its Lisbon-judgment[136] in which the constitutional identity doctrine was elaborated, the Hungarian Fundamental Law does not contain a similar provision. The Hungarian decision is therefore a borrowed one,[137] but this, like all legal transplants,[138] has unintended consequences.

The Hungarian Constitutional Court anchored the constitutional identity in the historical constitution, which is again a vague concept with uncertain boundaries.

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[134] Available at <https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016.pdf>
See to this, Ágoston Mohay and Norbert Tóth: Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law, American Journal Of International Law 111 (2017) 2, pp. 468-475; Beáta Bakó: The Zauberlehrling Unchained?: The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires- and Fundamental Rights Review in Hungary, ZaöRV (2018) 4, pp. 863–902, Gábor Halmai: Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law, Review of Central and East European Law 43 (2018) 1, pp. 23-42

[135] Zoltán Szente: The Controversial Anti-Migrant Referendum in Hungary is Invalid, in Constitutional Change 11 October 2016, available at <constitutional-change.com/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/>

[136] BVerfGE 123, 267 – *Lissabon*.

[137] BVerfG, 21.06.2016 - 2 BvR 2728/13; 2 BvR 2728/13; 2 BvR 2729/13; 2 BvR 2730/13; 2 BvR 2731/13; 2 BvE 13/13. – OMT, for direct borrowing see especially para. 142 of the German, and para. [34] of the Hungarian judgment.

[138] Attila Vincze: Ist die Rechtsübernahme gefährlich? Zur Rechtswirklichkeit und Tragfähigkeit des Konzepts eines Verfassungsgerichtsverbundes anhand des Beispiels der Verfassungsidentität. Zeitschrift für öffentliches Recht, (2020) pp. 193-214., Gunther Teubner: Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences, The Modern Law Review, 1998/1. 11–32.

In principle, any violation of any norms which relate to the designated control areas (dignity and human rights, sovereignty, constitutional identity), even those beyond the Fundamental Law (historical constitution), may be considered, when the CC reviews the joint exercise of power within the EU. Opaqueness is enhanced with the statement that *ultra vires* and identity control are two different standards, which are although in contact with each other, but "the two controls relating to them must in some cases be carried out with respect to each other" (Reasoning [67]).

According to the Court Hungary's constitutional identity is not a list of closed and static values, at the same time, some elements of it were highlighted by the body, with a strong exemplary character: freedoms, the division of power, the republic as the form state, respect for public law autonomies, freedom of religion, the exercise of legitimate power, parliamentarism, equality of rights, recognition of judicial power, protection of the nationalities living with us. These are some of the achievements of the historical constitution in the interpretation of the Constitutional Court, on which the Fundamental Law and the entire Hungarian legal system rest. In addition, the protection of constitutional identity may arise in cases affecting the living conditions of individuals, in particular their privacy and personal and social security, as well as their independent decision-making responsibilities, which are protected by fundamental rights, and in the case of the linguistic, historical and cultural traditions of Hungary. According to the reasoning of the Constitutional Court, Hungary's constitutional identity is a value that was not created by the Fundamental Law, it merely acknowledges its existence. Hungary cannot therefore relinquish it, as long as it has sovereignty and until this moment the Constitutional Court also remains obliged to protect this constitutional identity. (Reasoning, [62]–[66])

It is also stated about the constitutional identity, that "it 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 – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood" (Reasoning [67]).

In this form, constitutional identity is an opaque and alterable standard which, at the time of the decision, was not even based on the text of the FL.[139] However, according to the decision, the text does not even have to assume or refer to this, because the Fundamental Law just acknowledges this constitutional identity. It is, therefore, *ab ovo* existing absolute, or as formulated by the Constitutional Court: Hungary can only be deprived of its constitutional identity "through the final termination of its independent statehood" (Reasoning [67]).

It seems by establishing Constitutional identity, the CC identified a higher rule above the FL, and gave itself a very wide margin of appreciation regarding – seceded from and independent of the text and content of the Fundamental Law – what is constitutional and what is not.

The most significant in the aftermath of the decision is that the failed seventh amendment to the Fundamental Law in 2016 was reloaded in 2018, and this time it was adopted. The Seventh Amendment to the Fundamental Law added the following to Article E (2) in 2018[140] in order to specify the necessary degree of joint exercise of powers: "The exercise of powers under this paragraph shall be in conformity with the fundamental rights and freedoms enshrined in the Fundamental Law, nor shall it restrict the inalienable right of disposition of the territorial unit, population, form of government and state system of Hungary."[141] With this, the provision on the protection of fundamental rights and

[139] Ironically, justice András Zs. Varga also pointed out this, see concurring opinion of András Zs. Varga: Reasoning [111]: the decision "did not explain the legal basis for this finding".

[140] Seventh Amendment to the Fundamental Law of Hungary (28 June 2018) Article 2)

[141] Explanatory memorandum to the proposal for a Seventh Amendment to the Fundamental Law: 'The proposed addition to Article E would specify and fill with content the 'as necessary' version of the current paragraph 2, which would essentially mean a clear clarification of the exercise of EU competence.' It is also clear from the explanatory memorandum that this is necessary in order to respect the national identity of the Member States as set out in Article 4 (2) TEU and to protect the constitutional self-identity.)

state sovereignty became part of the Europe clause, while the protection of constitutional identity was formulated under Article R (4) as a general duty of all state bodies.[142]
Together with the fact that it was now placed into the text of the FL, the Constitutional Court did not apply yet the constitutional identity control standard against EU law until June 2021. It just fuelled the government's freedom fight and offered a new stick to the deconstruction of rule of law based constitutional language.

What can constitutional identity mean?
However, the concept of constitutional identity has a peculiar theoretical background and popularity, for understanding the constitutional backsliding of Hungary joining to this scientific and public debate seems almost useless. Constitutional identity became popular not only in the conference rooms of constitutional lawyers, but even in political kitchens where ideologies, discourses and metaphors are being made. For the first sight the concept seems eligible for using as counter-concept answering the huge wave of global constitutionalism. However, the national movements for constitutional identity differ from the new authoritarian urge against constitutionalism per se. When a Hungarian minister quote passage the EU Charter on member states' constitutional identity against the European critics of killing rule of law, the argument is basically sham.
After the glorious constitutional revolutions from the very end of the 1980's in which institutional borrowing, adaptations, the usual arsenal of Westernization dominated the lawmaking of newly freed states, the revival of nationalism, ethnocentrism, fundamentalism and new authoritarianism resurrected the old ghosts of anti-Western, anti-modernization and anti-liberal ideological fragments. New democratic constitutions attempted to give guarantees for stabile development of constitutional values in the spirit of universal rights. Looking back from the ruins of this then hopeful building the universal justification at last proved to be weak.
A comparable diversity of views is apparent when it comes to answers to the question of how a prevailing constitutional regime may be persuasively justified. The various answers involved can be roughly classified into three distinct categories: First, justifications based on history or ***tradition****; second, justifications based on actual or hypothetical* ***consent****; and, third, justifications based on normative precepts that are either conceived as being* ***universally valid*** *or as being valid for all those affected by the particular constitutional regime sought to be justified." (Rosenfeld, 5-6.)*

There is no consensus over the key tasks of rule of law and constitutionalism, the wide institutional heterogeneity mirrors the divergent European historical heritages. Consequently, institutional disparity on the European legal field gives large discretionary authority for national political elites. Common European values serve as *universal* basis for constitutional and legal developments in the member states, but they are weak normative measures without at least one of the two other (*tradition*, *consent*) justification sources.

Round-table talks as an unprecedented experiment in Hungarian tradition could not serve the justification based on social consent. Despite all the institutional and legal benefits, the transitional constitutionalism remained symbolically weak, actors around the drawing table were contingent, the consensus made at the end of the process did not cause social enthusiasm.[143] This low intensity of the involvement of the political community might be related to the softness of the last decades of Communist dictatorship. All the controversial, dividing issues of the vision of good society, democracy and constitutional legitimacy were under the surface, set aside by the imperious institutionalisation of rights and balancing among authorities. On this institutional level the burning dispute of the Hungarian elite groups, the task of adapting Western institutions seemed to be settled. All over the historical experiments of building modern state modernist and anti-modernist forces heavily collided

[142] The *National Avowal* was also supplemented with a new sentence: "We hold that the defence of our constitutional self-identity, which is rooted in our historical constitution, is the fundamental responsibility of the state."
[143] For the sociological analysis of the transformation see: Bozóki András: Gördülő rendszerváltás, L'Harmattan, 2019

over the legitimacy of foreign institutions. The question of whether constitutional rights and institutions are capable of travel has not been reached permanent resting point, the national doubts were shaded by the swift transitional institutional design. During the Hungarian modernization conservatives are always against the adaptation of foreign impact, resisting the forced western modernization counted as national heroic deed and duty. Between universal and particularistic legitimation, language, aspirations there was a huge gap, which was ethnically coloured. The universalist principles were always identical with treachery and its supporters must fear for the lack of enough social support. At the dawn of the post-Communist Hungarian democracy Constitutional Court had to undertake the weight of the decision on termination of death penalty, because experts and politicians were sceptical about the modern humanitarian commitment of the voters. Parliamentary representation (political parties) did not take the responsibility of shaping public sentiments and values. Constitutional Court remained connected to this calling in minds, activist judges could be blamed for all the inconveniences caused by foreign liberal rights. However, this same Constitutional Court consistently rejected other universal values such as equal rights of homosexuals or equality among churches. The progressive body proved highly conservative in social and ethical questions.

Three decades later prominents of the ruling right-wing regime openly question the community membership of those who oppose the government actions. The "two Hungary syndrome" is now as virulent as in the first half of the 20th century. The exclusionary definition of Hungarian identity and violent homogenisation are the cornerstone of this political ideology. In the eyes of these politicians liberal critics have no real Hungarian citizenship, they are "foreign hearted". The phrase of "constitutional identity" must be understood accordingly, the identity argument during the rule of law disputes should be grasped in this sense, with this inner background.

Traditionally Hungary is a home of two warring parts of the political community, the 1989/90 constitutional process couldn't eliminate this historical gap, institutionally gave options for constructing a unified community, but missed this options by neglecting symbolic, pedagogic work on it. *"A polity with a long history of discrimination and oppression of ethnic minorities, for instance, would be most in need of strong constitutional anti-discrimination rights."*[144] Likewise a polity with a long tradition of divisions and hatred would be most need of strong constitutional tools of consensus and peacemaking. Meanwhile Western experts emphasized property rights, which was much less endangered.

Constructing constitutional identity needs imaginations similar to nation-building. *"The two imagined communities, the national and the constitutional, differ though they may overlap and though they may comprise the same exact membership or closely intertwined ones. Constitutional identity is constructed in part against national identity and in part consistent with it."*[145] Inventing and reinventing constitutional traditions are processes which utilize the historical experiences, skills and language originated in the Enlightenment. Both the birth of the modern nation state and the philosophy of Enlightenment were problematic, disputed, truncated. Modern democratic constitution was never accepted. The lack of Enlightenment tradition, the late nation-state building, the deficiencies of the constitutional development made the emancipation from feudal structures illusory.

With this historical background a brief rejection of constitutional identity would be an appropriate response, because in the hands of political actors the concept is rather empty container, with some ideological fragments. Even the fact, that its usage always implies an anti-modernist, anti-liberal connotation and toxic contempt of open society and European values, a placid overstep might be understandable. In case of further attempts for taking into serious consideration, the term constitutional identity must be deprived from its "Kremlinian" surface.

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[144] Michel Rosenfeld: The identity of the Constitutional Subject. Selfhood, Citizenship, Culture, and Community, Routledge, 2010. p. 11.
[145] op. cit. p. 12.

The real question which deserves deeper inquiry affects the process of identity construction in post-communist Hungary. And a further task of role legal texts can play in identity-making during and after transition. Even the populist identity politics has some rational and historical core, otherwise it could not work.

As it is well-known in the modern social sciences identity is something which is constructed by classification, categorization and boundary work, and this activity is always a moral project.[146] Identity construction is also a collective thing, the self is formed during interactions in social context, in social situations. Some representations of our different communities play determinate role in the never ending process of personal identity constructing. The collective, a web of different collectivities rests in the individual mind. From this Durkheimian starting point those collective mechanisms deserve particular interest which create the relevant distinctions between us and them, between our own group and others, foreigners. Creating distinctions is relational, the other is always necessarily on the scene as a basis of comparison, to define differences, to exclude. One of the most radical metaphor and often brutally concrete and real is the fence, wall dividing parts of the world into separate entities which are defined normatively. Surrounding oneself with likeminded, similar, familiar, already known is not only comfortable, but defend ourselves from the dangers stemming from the foreign, unknown, deviant, aliens. Closed societies or communities which lived for a long period in isolation, the feeling of uncertainty and fear might be stronger than in open and tolerant societies. In the modern history of Hungary hatred of neighbouring people, contempt of minorities, xenophobia, ideological enemies were decisive, essential emotions under strategic manipulations by the non-democratic political orders. From this cultural perspective the heated fence building of the Hungarian government against the hordes of immigrants and the intensive utilization and intensification of anti-migrant feelings for political aims seems a direct corollary of the historical traditions. The machinery of propaganda functions efficiently: the billboards on the streets, the continuous broadcasting of distorted news, the whole political discourse is familiar from the 20th history of Hungary.

Interjection on the legal culture

The backsliding of new democracies to some type of authoritarian regimes can be explicable diversely, the post-communist death of the rule of law forms a difficult puzzle for the contemporaries for the time being. Even the role of the cultural factors is highly disputed, despite the long list of serious literature on the cultural embeddedness of constitutionalism, rule of law and democracy. The initial euphoria of system change evaporated soon, it clearly turned out, that the "rule of law orthodoxy", institutional optimism which was based on the idea, that Western legal institutions are able to function independently from their social context, what's more they will transform this social, cultural environment is irresponsible but inevitable folly. *"When democratic mechanisms are implemented in a society without a democratic tradition or without efforts to build one, or when antagonistic subcultures or communities coexist, democracy may serve as the means by which an organized cabal or subgroup in society seizes the reigns of government power, then utilizes the law to advance its particular agenda, while claiming the legitimacy conferred by democracy."*[147] Meanwhile on the surface the terminology and references of the politicians, lawyers, public actors dutifully use the concept of rule of law. However, this superficial use does not mean language modification, public discourse remained far from the acceptance of the values of rule of law. From 2010 the arguments of sovereignty, national traditions started to dominate the scene, however not without antecedents. Constitutional identity as governmental ideology performs its function as an umbrella term, to replace the feeble right-based reasoning with a well-known reference to community feeling. This speech modification is one of the most detectable sign of the shortages of cultural background of constitutionalism. It might be misleading to move out from the results of the usual political surveys about acceptance

[146] Wayne H. Brekhus: Culture and Cognition, Polity Press, 2015

[147] Brian Tamanaha: On the Rule of Law, Cambridge University Press, 2004

of democracy, most of the time these surveys tell nothing about a political community's real relationship to democratic rules, actions and values. In the case of the post-communist countries among the macro quantitative researches the world value survey inform about the odds of social support for values essential for democratic society.[148] Hungary stands closer to East-Balkan societies from the perspective of trust, tolerance, cooperation, values which are inevitable for a working democracy. Hungary in this comparison belongs to the closed societies.[149]

Constructing identity

According to the mainstream social science literature identities are fluid, changeable, context dependent, thus might be open for concentrated manipulation and as such identity constructions can be used strategically as resource. Societies and other collectivities are open to varying degrees to manipulation, those societies which have solid and established norm and value systems, the cognitive and emotional toolkit is more equipped are more resistant against the external (political) manipulations. With the term of Ann Swidler the unsettled societies are keen of accepting ready-made ideologies and other "canned", prepackage value choices.[150] Big social transformations, as we know from the classic anomie studies, favor value distortions and disturb the norm system, old behavioral patterns cease to function, learned, long-established patterns are not valid any more. Settled societies have firm norm structures and intermediary channels for successive generations. Thanks to the deep crises of democracy (the loss of the democratic will of the community) excessive populism takes advantage of norm confusion caused by social changes. Modern populist phenomena are not simply against elites and establishments, but are based on exclusive identity constructions.

The consequences of identity politics, that is using identity constructions for political aims, mostly grasping and keeping power, became evident after the collapse of Communism. It seemed for a while, that there is no universal ideology other than liberalism. But, according to Fukuyama's new book on identity, the original aim of the liberalism, namely the recognition of equal rights of individuals, has faded in the light of the multiculturalist ideology, which demands equal respect for all cultures.[151] This change breeds populist revolt against the new challenge of relativization of group identities and mobilized old essentialist group definitions which separate the own group from outsiders, foreigners and gave impetus for hatred. The overall instability and uncertainty as a general sentiment of the global contemporary time formed fertile soil for the harsh answer to this challenge. The revival of group identities naturally distanced the stabile, fixed fields of us as nation or ethnic from the universal indeterminacy and "homelessness".

The sociological concept of identity has dual property, on the one hand from a social science perspective identity is always multiple, we all have overlapping identities depending from the context and situations. On the other hand, these fragments are always socially constructed by different agents and methods. The fact that identity is multidimensional, in other words the modern multiple self is living in a complex web of intersecting social standpoints, there is no single master identity.[152] It is continuously changing, what we always experience is a situation-dependent emphasis of different elements of the identity-web. One of the purposes of the populist identity politics is to diminish this complexity, which might be promising for many in a fearful, demanding environment.

For this politics some strategies by which identity is usually constructed come in handy, easily used up ideologically. In the political discourse actors usually apply the strategy of essentializing, where the noun *Hungarian* signs the value of national identity as a dominant attribute ("We Hungarians…") It is also used in some context when the expression *Hungarian* has a mobilizing effect or call ("Who is Hungarian with us."). In the political uses of identity strategies the presence of converters is also

[148] www.worldvaluessurveys.org

[149] Tamás Keller: Hungary on the world values map, Review of Sociology, 2010/1. 27-50 (https://www.academia.edu/1214354/Tamas_Keller_-_Hungary_on_the_World_Values_map)

[150] Ann Swidler: Culture in Action: Symbols and Strategies. American Sociological Review, 51 (2), 1986. 273-286.

[151] Francis Fukuyama: Identity: The Demand for Dignity and the Politics of Resentment, Farrar, Straus and Giroux, 2018

[152] Bernard Lahire: The Plural Actor, Polity, 2011

strong who are moving into different spaces to activate actors and they have different resources for this as state funds, supports, institutions, statuses. In their activity the identity mark functions as modifying adjective, "good Hungarians deserve support, places, positions, etc." Thus identity in a political discourse is some kind of possession, can be presented as strategic resource. And as such it is unequally available, identity inequality might compensate or strengthen other social differences. Some actors in the public sphere under the tutelage of the state preferred identity politics can show high authenticity value while having low functional or professional status. ("He works bad, but is a honest Hungarian.") This logic is equivalent with the argument that some legal institutions can have low democratic value but it belongs to our millennial legal tradition. Authenticity and historical time legitimize legal institutions in the context of identity politics, any questions on democratic or rule of law qualities are superfluous. Anybody who dare to use liberal testes falls into the sin of betrayal, in worst cases high treason. The global, commercial, foreign are easily devalued, adapted institutions are legitimately deformed according to local, national usages as a form of "adaptations".

Boundary-work with moralising is also part of the repertoire of identity politics, by which symbolic borders between in-group and out-groups are created, recreated and confirmed. When a politician argues against a European decision on the humanitarian treatment of the refugees by saying that European decision-makers attacked our border-fence because the foreign interests cannot take into consideration our own inner authentic living conditions, he redraws the moral content of the wall. With the same momentum this argumentation defines value-hierarchy: refugees, migrant people are dangerously alien from our culture, in worst case from our biological clearness. Because identity constructions are dynamic, it is a good aim of populist manipulations. Constitutional identity in the political discourses most of the time is referring to the exclusionary definition of national traditions and it has nothing to do with legal history or legal development. The "Thousand-year old Hungary of St. Stephen" or the Holy Crown has a simple political layer of meaning which is independent of the legal history, although this political surface is also old enough as a result of the invention of the Hungarian history.

Here I do not argue against the term constitutional identity, I simply say, that it is context-dependent, the political strategies, purposes and actual wording determine the seriousness of the identity argument. In a case where a government simply seeks pretense for evading universal legal values, the constitutional identity functions as a populist phraseology. In this sense even constitution-making can serve pure equivocation, as the Hungarian example shows.

Since identity is dynamic, ever-shifting phenomenon, which means that it is varying temporally and spatially according to audience, situation and other contextual factors, follows that individuals have to make an effort to create a sense of self-continuity. A consistent life story needs active narrative work. That is identity is not something *"deep in our personality but rather consists of being recognized by others as being the same person."*[153] Sometimes this consistency work, making harmony between past and present needs reparative narrations. Especially after historical cataclysm or regime change facing the past can be dramatic, confrontation with an other, foreign world can be formidable. Political ideologies offer easy short-circuits instead of processing or facing of the past. While the legal settlement of the lustration in Hungary is truncated and didn't give any opportunity for satisfying historical justice, the past remained a part of the populist arsenal, open for rewriting according to political interests. Constitution and other symbolic lawmaking especially the codified break of continuity became tools of this ideological pressure. The failure of transitional justice nourished the populist use of the past and gave options for hiding and forgetting personal assistance or contribution to the past dictatorships and also for diversion (sublimation) of the aggression to new enemies as "Brussels the new Moskau" or cosmopolitan liberals.

[153] Brekhus, 142. p.

Turning points, watershed moments, revelations, repentances in the personal life-stories, the fate experiences as main directing forces in the structuring process of narrations have central role in constructing identity and ensuring its continuity. According to our research historical divisions are pale in personal narrations, the continuity has strong organising force.[154] Political discourses on the new revolution from 2010, the constitutional identity as a tool of waking up the non-democratic pre-war ghosts and language wanted to shape the political consciousness in one specific authoritarian direction. In parallel with the "new" cultural policy (Kulturkampf) against cosmopolitan, global, multicultural, liberal values.

Codes of identity

As individual identity is dynamic, collective identities are also under constant construction and reconstructions. New, collapsing, rival discourses characterize the process of identity construction within a more comprehensive cultural scene in connection to other discourses and codes. A wholesale change of the political system usually opens a new narrative field. The liberal constitutional code of the democratization after the collapse of Communist rule didn't attempt to stabilize itself as identity construction, not even the European accession process could open the topic of European Hungary as a project to be done. It was suffocated in the empty reiteration, that Hungary has been always European. After 2010 the opportunity of building a politically useful identity construction fell on the populist authoritarianism's lap. Although the options were not limitless: there were no way back to the *traditionalist* code partly because the strong universalist political environment (democratization, Human rights, Europeanization, modernization, Westernization), partly because that box was originally empty. The possible traditionalist code was without content, no traditionalist rituals to step back. A traditionalist ritual can be for example a ceremonial opening of the parliamentary session or a solemn speech of the President representing the unity of the nation.

The Hungarian national identity which can be used by the legal intellectuals to construct a new code was the mostly feudalistic, the two usually mentioned legal historical symbols are the Werbőczy Tripartitum and the Holy Crown.[155] The tenet of Sacred Crown (Szent Korona tan) is obviously inappropriate for a modern European state and clearly contradicts the development of the Hungarian constitutional development after 1989. Mentioning the medieval customary norms collected by the petty nobleman Werbőczy after the peasant revolt of Dózsa (1514) was antagonistic and conservative.

The *universalist* code could not become the source of the national identity despite the wide social expectations for European membership. EU in recent form is not suitable entity for identity construction for those nations which lose their traditionalist roots during the first half of the 20th century. There was no way back and no basis for a new national identity with universalist code. Only the new rule of law institutions, eminently the first Constitutional Court tried to construct some elements of a new discourse, but without proper social embeddedness. *"The missionary zeal of universally constructed communities does not just open the borders to include outsiders, but insists on overcoming all borders and differences."*[156] Strangers are let in, they are allowed by pedagogy and proselytisation (persuading). The long and bitter history of minorities in modern Hungary can be characterized as enforced assimilation, which is also inappropriate for serving a solid basis for universalist code.

While the simultaneous presence of different, even antagonistic codes are usual, there are some combinations with high tensions. European common values, Human rights, tolerance are hardly compatible with homogeneity, forced nationalisation, personal subordination to authority.

Normally working with the codes, elaboration and polishing identity belong to the intellectuals who have interpretative monopolies on cultural fields. However their relations to political centres, political elite groups and the state play critical significance. During the new Hungarian culture war governed

[154] Fleck et al.: A jogtudat narratív elemzése, ELTE Eötvös Kiadó, 2018

[155] Péter László: Hungary's Long Nineteenth Century. Constitutional and Democratic Traditions in a European Perspective, Brill, 2012

[156] Bernhard Giesen: Intellectuals and the Nation. Collective Identity in a German Axial Age, Cambridge University Press, 1998.

by the high centre of the regime against the intellectual autonomies, non-intellectual appointed political figures announced their claim to define cultural identity of the community. Thus the cultural work of elaboration of identity became the task of party-politics, became the issues of everyday political battles. The public as the audience and addressee of the cultural and political work of identity-elaboration became also manipulated with the help of elimination of media pluralism and freedom. Audience can receive only primitively formed messages, ideological fragments. The inevitable trivialization of ideas during the "nationalization" or communicating identity forming cultural nourishment, in the hands of populist politicians became primitive and rancorous demagogy. Which are also institutionalized by politically selected culture financing, compulsory national educational program, etc. The usual discourse rituals of identity-forming cultural work which should be taken place in academic, literary, journalistic circles was distorted into political loyality enforcement rituals.
"...discourses about collective identity and constructions of new codes of identity do not occur in a cultural vacuum. On the contrary, they are incorporated within a comprehensive cultural fabric, and show a large number of horizontal connections to other discourses and their underlying codes."[157]
From the perspective of an aggressive identity politics, the elimination of all the horizontal discourses, dismantling all the autonomous cultural places seem necessary. In this cultural sense the Hungarian regime from 2010 is totalitarian.

Primordial code in Europe?

The democratic content of the constitutional identity could be constitutional patriotism, which according to the original meaning can be the result of the democratic development of political community connected to the patriotic code.[158] In Hungary modernization, transforming the legal system often divided the nation, the chance of patriotic reevaluation of the constitutional development encounter obstacles. Successful constitutional revolution, which could in the long run unite the nation and give solid basis for patriotic pride is unknown.
Under such historical circumstances connecting the national identity to modern constitutionalism was failed. It is telling that the official texts, including Fundamental Law and loyalist interpretations signed the *Golden Bull* (1222), the customary *Tripartitum* (1514), the *Pragmatica Sanctio* (1723) and the *Holy Crown* idol as the milestones of glorious legal development. They all have something to do with the privileges of the noble order, and as such inappropriate for displaying the national unit. Another telltale sign of the fundamental emptiness of the concept of constitutional identity is its swift and complete disappearance from the spaces of the everyday life. The term is used almost exclusively in external relations, particularly against the European rule of law reproaches. For internal ideological persuasion the constitutional argument is unknown, it has no interpretable social content, unsuitable for strengthening national identity. For this aim, to fill the gap or vacuum left by the weakness of patriotic code, the *primordialism* appeared on the scene. In its original sense primordialism is a construction built on the imagination of barbaric, hostile otherness, who cannot be assimilated and cannot be let in, even connections with them are dangerous. Differences, the dividing lines were constructed by the nature, given and unalterable. Normal reaction of the community is purification, isolation and homogenization, all the tenderness or concessions for foreign elements come together with the disruption of the inner values of our community. This type of identity is based on naturalizing, thus national identity cannot be altered such as race or gender, the boundaries are eternal, divine and stabile. European migration policy goes completely opposite direction, the migrant is the constant and efficient diabolical element, the imagined enemy which is much more important for a primordial community than the imagined community. No matter how anachronistic it is in a European member state, the prevailing ideology is based on this identity construction. The post-communist far right ideologies such as different kind of racism emerged parallel of the breakdown of Communist rule, which had suppressed them for decades under the surface. In the governing position the populist right

[157] Giesen op.cit. 49-50. p.
[158] Jürgen Habermas: Citizenship and National Identity: Some Reflections on the Future of Europe, Praxis International. 12:1, 1992 1-19.

has invested a lot into the reconstruction of the primordial identity discourses, the shocking primitiveness of the political propaganda seems efficient. But it is much more than Eastern prejudices or populism. Primordial code is not just working, but all other alternatives are weak and underdeveloped, this is the mother tongue of the regime well understood by the natives, for foreigners the foreign language of constitutionalism can be used, but that code remains alien. Liberals, Soros-founded NGO's, the opposition speak that foreign language, whereby they serve foreign interests, enemies of the people, they are not part of the nation.[159] This political creating of enemy is well-known in Hungary, the political tradition in this regard is alive. Attacks against gender-consciousness, acute and furious illiberalism, disgrace of Western multiculturalism go hand in hand with essentialist, primordial self-reference and militarism. This latter can not only defend the community's purity, but it is part of the Hungarian substance. The hate campaign and governmental whipping of the public abhorrence against a harmless argumentation of a newly elected district mayor of Budapest is symptomatic in today's Hungary.[160] The sentence on the "grim formation of the ruling middle" was enough to provoke aggressive street demonstration. The "white, Christian, heterosexual" as central characteristics must be defended against the liberals, who attacked these natural elements of our identity.

What is missing?

How can we explain the inefficiency of the efforts to build a patriotic code which could be fitted together with modern constitutionalism and European values? This question lies behind the much known quandary of Hungary's backsliding into authoritarianism. We cannot evade completely the culturalist arguments, historical analysis of mentality and political culture inform about the long-term processes which led to this state. Now I stress only one factor of this complex historical problematic.[161]

For reinventing the traditional code in post-communist Hungary, the adequate traditions, routines, taken for granted elements which could symbolise the continuity in political and legal culture were missing. It is more accurate to say, that the post-transition elite groups have missed the opportunity for constructing and imagining a collective unity. Collective, commemorative rituals known by all members were somehow corrupted by the political animosity. From the very beginning the heritage and memory of the 1956 Revolution rather divided the politics, during the national anniversaries the historical sites and events were intensively used for political (party) identity making with strong demarcating, excluding attitudes. Even the only democratic national symbol of national cockade became weapon against the imagined inner "foreigners", not Hungarians in spirit. This expropriation of common references, rituals, symbols, places reached its peak under the Orbán regime. During the European accession process the idea of Hungary among other European nations emerged for a short time thanks to the widespread social expectations. "Hungary in Europe" could have been based on the idea of accepting other communities, different collectivities as entirely conceivable and legitimate, where the outsider, stranger is not enemy, it has no demonic properties. For now Europe, European institutions in the governmental communication are the dangerous enemies endangering our peculiar identity. The souverignity and "constitutional identity" arguments against European and liberal colonizers serve the same ideological aim of simulating a strong central power which will defend the real national community. The community imagined by excluding and militant populism. The speaker of the

[159] https://hungarytoday.hu/kover-interview-opposition-eu-third-reich/

[160] Peter Niedermüller, originally a cultural anthropologist in a TV studio said the following: "If we look at what remains once you strip off those hated ones we already mentioned here, the non-Hungarians, the 'others', the migrants, the Roma, and I don't know who else, then remains only a grim formation in the middle. These are the white, Christian, heterosexual males—pardon me, there are some women among them. This is [Fidesz's] ideal picture of a family. This is terrible because if we look around in the world, we can see that the so-called white nationalists are made up of precisely this group, I'm sorry to say." https://hungarianspectrum.org/tag/peter-niedermuller/

[161] For a more detailed analysis see Zoltán Fleck: History, institutions and ideas of Rule of Law in Hungary (manuscript), 2020

Parliament, László Kövér took off the European flag from the Building of Parliament in 2014, ever since the European symbols became the sign of "foreign-heartedness".[162]
The historical process of traditionalization via constitutionalization continuously failed, during the Hungarian modern legal and political history, firstly because of the lack of democratic constitution-making. The inevitable tensions between modernization and preserving identity during time of big changes should be tempered by intellectual efforts. Traditionally intellectual circles are divided ideologically from the very beginning of the modernization, and the political authority often took advantage of this split. What is tragically missing from the Hungarian scene are the patriotic and democratic codes. The enlightened patriotism, which became dominant in Germany from the end of the 18th century, was set in motion by the educated middle (in Germany: Bildungsburgertum) in a liberal climate in which virtue and cultural conviction formed patriotism, free intellectuals played the role of the carriers of national identity, performed this cultural work. It is highly important from the perspective of constitutional values and development of the state, that this was also the period when the idea of Rechtstaat was born in the spirit of German patriotism. The romantic love of the country, the ungraspable notion of the nation as non-earthly task was embedded in the German cultural genius far from state and politics and mediated by the language. The enlightened patriotism and later the counter concepts of the romantic identity of the Volk and nation were both mobilized the national cultural elite groups. In contrast, Hungarian non-state intellectuals were weak and of foreign (mostly Jewish and German) origin. Thus these circles couldn't construct an Enlightened or counter-Enlightened national identity.
In times of the formation of modern political and state structures in Germany upon the patriotic national identity democratization appeared as extension of the identity code to new social groups. *"... the nation is no longer the fatherland of the educated, and it is certainly not the unutterable mystical ground of identity, but the subject of politics, which posits itself in antithesis to the authority of the principality and of particular economic interests. The teachers became the carriers of a democratic concept of the people."*[163] In possession of cultural authority university professors had political responsibility to give models for political activity, civic service, progressiveness. This intellectually and culturally flourishing period in Germany created the conceptual and behavioural basis of the constitutional development. By the Bismarckian state-centered modernization cultural intellectuals lost their positions in constructing cultural identity. The nation became a statist project, "Realpolitik", which elicited the pessimism of the intellectuals, but conservative statism (the cults of war and Kaiser) didn't eliminate the mental and intellectual grounding of the patriotic and democratic codes. The long 19th century of the Austria-Hungary gave space for another kind of modernization, the Settlement (1867) in the long run contrasted the monarch and the nation, the independent statehood remained questionable, only some fragments of the Rechtsstaat reforms were introduced in Hungary.[164] The dissolution of the Monarchy, the lost war and territories by the Versailles Treaties strengthened the exclusionary identity constructions on the basis of feudalistic social setting.

Constitutional identity as professional illusion

The term constitutional identity now is in political, ideological use. East-European new authoritarian leaders completely changed the original intent of the European Charter, and turn this concept against the common values. As in the case of many other concepts, such as dialogue, rule of law or democracy different political cultures mean different things, there is a huge semantic gap between the parts of Europe. East-European lawyers who try to reconceptualize constitutional identity play from the playbook of the authoritarian government. The bitter and meaningless attempts for giving content to the concept are seriously ahistorical. Theoretically during the first decade after the transition could be a fruitful period for constructing new constitutional identity in the proper sense of the word. But the only intellectual term in this field was the "invisible constitution" formulated by László Sólyom, the

[162] https://budapestbeacon.com/president-hungarian-parliament-orders-removal-eu-flag/
[163] Giessen op. cit. p. 106.
[164] Péter op. cit.

first President of the Constitutional Court. The "invisible constitution" was not a collective self-identity of the institution, but a general metaphor of the right-centered activism of Sólyom-led Constitutional Court. The practice of the Constitutional Court from the very beginning used the historical references because every legal order is based on the past, there are not blank slates. The dominant selective mechanism of legal interpretation was value-laden, the openly non-democratic and anti humanist periods were not used as a reference. The historical legal interpretation is a normal way of professional legal methodology and not to be confused with the "historical constitution" embedded in constitutional identity of the authoritarian regime. The practice of the Constitutional Court as prime interpretator and developer of the Constitution despite the strong expectations and illusions of the legal elite could not become the basis of the constitutional identity of the political community. Firstly because it has no historical reference points, historically and socially accepted antecedents, for example concept and theory of rule of law. The activity of the Court was from the very beginning was under political attacks. Secondly the jurisprudence of the Court was contradictory, it has no unified methodology of interpretation and constitutional judges used non-legal factors for their basis of decisions, they themselves jeopardized the picture of solid value coherence of the constitutional interpretation. This eclectic and political role-set opened the way for heavy political critics and after 2010 the serious attack, which paradoxically gave a new role for the Constitutional Court in the function of a clearly political committee without constitutional relevance. *"The performance of the Constitutional Court in the protection of fundamental rights and the positive social effects of its operation are difficult to question, no matter how debatable it was in the legal sense. The best justification for constitutional judicial activism is seen by many in the results of the protection of fundamental rights. At the same time, although AB's activities in this area are fundamentally positive, its performance is controversial. Constitutional court activism has not always been aimed at a broad interpretation of fundamental rights, as in the 1990s AB clearly recognized a kind of conservative moral value in several issues that deeply divided society, such as abortion, euthanasia or the rights of homosexuals."*[165] The pragmatism of constitutional interpretation was political in nature and carried conservative vision on social and moral issues, while liberal in cases concerning classical rights. This is why now oppositional forces on the democratic side hesitate to accept a strong constitutional right system and prefer social solidarity and welfare rights, sometimes close to the classical popularist arguments. The low quality political culture and the inability of political actors to compromise have plunged Constitutional Court into a dubious political role which was more resistant than the activism of the first years. With such a background the court decisions with high authority had a morally and socially conservative social idea which was closer to the "professorial vision", regardless of the need of a society living in a transformative period. Consequently, the most powerful body on the field of post-transformative Hungary missed the possibility to actively influence the constitutional identity. The first democratic legal elite carelessly left this concept as a prey for authoritarian beasts. From this perspective they continue the Hungarian legal tradition.

[165] Szente Zoltán: Az Alkotmánybíróság értelmezési gyakorlata 1990-2010, p. 513.

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