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Abstract

Dignity and solidarity are interrelated values, however social solidarity is somehow underdeveloped as a constitutional value. The paper reveals the substance of solidarity as a constitutional value and explains how effective protection of human dignity may trigger the enforcement of social security rights. For this purpose it analyses the more or less good practice of the Hungarian Constitutional Court before 2010. The illiberal Hungarian turn and the afterwards constitutional developments of the last seven years, however, enables us to learn what happens if the Constitutional Court literally interprets a non-solidary constitutional text and becomes the servant of a miserly governmental social policy.

Keywords: human dignity, solidarity, common European constitutional values, constitutional backsliding, Hungarian constitutional law

Introduction

The constitutional backsliding in Hungary since 2010 is well-known.[1] The 'rule by law' governance and the frequently amended new constitution of 2011/12 also reformulated the frameworks of the protection of human dignity and social solidarity. The decline of the standards in this field is spectacular and visible.

The paper intends to call the attention to the dangers of this path which may even challenge the European solidarity as well.

For this purpose a short section will be devoted to the notion of social solidarity and its realisation in Hungary in the pre-2010 constitutional practise. The Constitutional Court in the late 1990's was even willing to strike down austerity measures for the protection of social rights closely tying them to the protection of equal human dignity. Although social solidarity was underdeveloped societal practice for several reasons, the Constitutional Court strongly

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[1] M. VARJU and N. CHRONOWSKI, 'Constitutional backsliding in Hungary' *TvCR Tijdschrift voor Constitutioneel Recht* 2015/3, juli 296-310., Gábor Attila TÓTH (ed.), *Constitution for a Disunited Nation*, CEU Press, Budapest 2012, B. MAJTÉNYI, 'The Nation's Will as Trump in the Hungarian Fundamental Law' *European Yearbook on Human Rights* 2015, 247–259., A. L. PAP, 'Constitutional identity? The Hungarian model of illiberal democracy' In M. S. Fish, G. Gill and M. Petrovic (eds.): *A quarter century of post-communism assessed*, Palgrave Macmillan, London 2017, 161-186., Z. SZENTE, F. MANDÁK and Zs. FEJES (eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development: Discussing the New Fundamental Law of Hungary*, Éditions L'Harmattan, Paris 2015, P. SONNEVEND, A. JAKAB and L. CSINK, 'The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary' In *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania* (eds. A. von Bogdandy and P. Sonnevend), C.H. Beck – Hart – Nomos, Oxford – Portland, Oregon 2015, A. VINCZE, 'Wrestling with constitutionalism: the supermajority and the Hungarian Constitutional Court' (8) *Vienna Journal on International Constitutional Law* 2014/1.

committed itself to the protection of human dignity and this way guaranteed a higher profile for social (solidarity) rights, especially in case of social care based on neediness.
Then, as a contrast, the 'non-solidary' system of the Hungarian Fundamental Law and the new directions of the constitutional case law will be discussed. Ironically, during the elaboration of the new Hungarian constitution, the EU Charter of Fundamental Rights was taken as a starting point – at least, in the government's communication.[2]
In the meantime, social security does not appear as a fundamental right in the Hungarian Fundamental Law, but merely as something the State "shall strive" for, thus it only a state goal, which is a step backward in comparison with the former Constitution. Social insurance does not appear as a constitutional institution. Even in the time of adaption, the formulation of certain paragraphs of the new constitutions raised serious concerns regarding equal dignity. The member states has a wide margin of appreciation regarding their social security system, thus the rules of the Fundamental Law itself does not breach the EU law directly, but the new Hungarian constitutional regulation on social security does not guarantee the equal dignity and the former level of property protection. The recent case law of the Constitutional Court reaffirms the initial concerns, the dignity supported solidarity lost in the post-democratic transitions in the past seven years.

The notion of solidarity and defining it as a legal value[3]

At the level of individual behaviour, solidarity may be perceived as a frame of mind and as an act. The *feeling* of solidarity – which is more than sympathy and compassion, because it means a feeling of responsibility based on fate shared from some aspect – is a precondition for solidary *activity*. Solidarity may be *directed* at persons (mainly in a community built on personal relations, e.g. in families, groups of friends or colleagues), or at issues (mainly in larger communities, e.g. fight against starvation, aid provision to victims of natural disasters).
From the side of the individual, solidarity means that one voluntarily restricts the fulfilment and assertion of self-interest taking into consideration others' interests as well. The basic principle of conduct not based on self-interest can be altruism or equity; and it may be motivated by the improvement of others' welfare, the desire to give and goodwill directed toward the unknown members of society (*charitas*), to the enhancement of social welfare. All these lead to the support of institutions serving others' interests – which are expected to be "unprofitable" for the individual.[4]
The *scope of effect* or, rather, field of effect of solidarity extended primarily (and historically) to the micro- and small community (it existed in relations within the family, the religious and corporate community) – at a higher (universal) level it appeared only as a moral principle

[2] N. CHRONOWSKI, 'The new Hungarian Fundamental Law in the light of the European Union's normative values' *Revue Est Europa* – 2012 numéro spéciale 1, 111-142.
[3] See also N. CHRONOWSKI, 'Solidarity in the constitution and beyond?' In *Cross-border and EU legal issues: Hungary – Croatia* (eds. T. Drinóczi and T. Takács), Faculty of Law University of Pécs – Faculty of Law J. J. Strossmayer University of Osijek, Pécs – Osijek 2011, 109-113.
[4] E. OSTROM, 'Collective Action and the Evolution of Social Norms' 14 *The Journal of Economic Perspectives* No. 3 (Summer 2000) 153.

(command) (in religious tenets, in theology and philosophy). Urbanization, industrialization and the appearance of a service-providing state led to a definition of solidarity to be implemented at a higher level: to the presumption that society was a solidary unit. Within this scope, spontaneous mechanisms of solidarity gave way to the state's policy of solidarity and to a "system of compulsory solidarity". The globalization of risks and dangers – crisis, pandemics, pollution, terrorism, etc. – necessitated the recognition and influence of solidarity in a new dimension, as the motivating force behind international union and cooperation – institutionalized to varying degrees – which is based on the restriction of the sovereignty of states and reciprocity. In summary, one may consider as fields of effect of solidarity the sub-national level, the national level and also the supranational and international level.

The weight and hierarchical position of any value is determined or, at least, strongly influenced by the level of harmfulness of the danger, disadvantage, harm or lack of value constituting its opposite.[5] In our case it must be examined *what can be considered the opposite of solidarity,* in other words, what disadvantages and dangers may be caused by the lack of solidarity. In a socio-political sphere lacking the value of solidarity, one may reckon with the phenomena of isolation, separation, selfishness, hostility, massification, nivellization and inadequate assertion of interest. As a consequence of these phenomena certain members and groups of society get into a momentary or lasting disadvantageous situation; their living conditions may become desperately hard. From a legal aspect, one is to examine what subsidiary help the state or public power (even one being established at the international level) may provide by its self-definition and participation, and by what legal means it may encourage the natural functioning of social solidarity.

The recognition and formulation of *solidarity rights,* which may be regarded as a result of international legal development, contribute to the assertion of solidarity as a legal value. This circle comprises some modern rights including the right to a healthy environment, sustainable development, proper feeding, consumer protection, the right to communication, protection of the future generations and the rights of the elderly as a manifestation of solidarity between the generations, as well as the right to peace, humanitarian aid or to the common heritage of humanity. However, with a view to the present state of legal development, these rights can be enforced only to a low degree or hardly at all, since neither their content, nor their subjects and obligors are adequately defined.

In legislation, *states* may utilize and assert the principle of solidarity in various ways, although *rules prescribing citizens' solidarity toward each other* are rather rare. As exceptions to this one may regard the obligation to provide help (that is, the criminalization of the failure to provide help) and the obligation of support in family law. The legal imprints of the moral minimum stemming from a family tie are parents' duty of childcare and education as well as the rights and duties of children.

The state *may encourage* voluntary, civil *solidarity mechanisms,* e.g. by tax discounts on the aid provided for the needy and by announcing grants for charitable persons and organizations that carry out their activities in the interests of others.

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[5] A. ÁDÁM, *Bölcselet, vallás, állami egyházjog [Philosophy, Religion, State Church Law…]* Dialóg Campus, Budapest-Pécs, 2007, 71.

Some sub-constitutional norms may contain *an element of solidarity as well* exceeding their primary objective, or at least, the idea of solidarity may also be detected among the problem impulses of the regulation. One may consider as such obligations relating to the protection of the environment and nature, the protection of public health and emergency management. In the world of work one may mention social partnership, conciliation of interests, coalitional freedom and trade union activity as well as the exercise of the right to strike. Solidarity may function as significant motivation behind some pieces of crisis-legislation. Finally, the public interest action relating to consumer protection – besides cost-effective litigation – and compulsory liability insurance – besides substituting for and distributing individual liability – may also be regarded, at least indirectly, as manifestations of solidarity flowing from a shared risk.

Non-legal means contributing to the implementation of norms carrying solidarity also include employment and social policies, anti-discrimination and labour market integration programmes and strategies.

Solidarity as constitutional and European value

Solidarity conceived as a constitutional value has three projections in the national constitutions: political solidarity, supra-national solidarity, and social solidarity taken in a narrow sense.[6]

Political solidarity may be grasped, on the one hand, in the national consciousness of belonging together and its expression in the constitution and, on the other hand, in constitutional norms referring to cases and situations where the community-forming and cohesive force of some political issues is moved to the forefront. The former is supported, for example, by provisions laying down national sovereignty, the institution of citizenship, the emblems and symbols expressing belonging to the nation, and – if it is relevant to the given state – rules relating to the diaspora. The extent and form of appearance of this aspect of political sovereignty in the Constitution are influenced by the given political community's concept of "nation". The other constitutional aspect of solidarity may be grasped in the rights relating to political participation and communication (especially, in the guarantee of the right to assembly and association, freedom of opinion and the right to petition).

The requirement of *supranational* solidarity presents itself, on the one hand, in relation to global challenges. Among them mention could be made of managing climate change, combating poverty and famines, crisis management, ensuring sustainable development – all these require *global* solidarity on the part of mankind. On the other hand, organizations of defence and economic integration also emphasize the requirement of solidarity of participating states.

The constitutional expression of *social solidarity* may be found in the principles of the social state, social market economy, and social justice. The guarantees of this kind of solidarity are enshrined in social rights, and the constitutional clauses for the protection of social outcasts

[6] CHRONOWSKI, 'Solidarity' 116-119.

and the needy, which are implemented in the world of work (labour rights) and within the framework of the social care system (social security, health care, environment protection, consumer protection, rights of elderly, children, future generations). This group of rights is strongly related to the protection of human dignity and equality (non-discrimination and affirmative action). Social solidarity is a characteristic feature of the welfare state and it is related to the state's social welfare services functions; the purpose of laying it down in the Constitution may be to outline the legal guarantees of secure livelihood.

Solidarity *in the European Union* is a common value recognised also by the preamble of the Charter and Articles 2-3 of the TEU,[7] which can be considered as an identity-forming feature, and socially it may serve the supranational community-building.[8]

In other articles 'mutual solidarity' and fair sharing of responsibility are presented as principles which determine relations among member states in the domains of external and security policies, and of freedom, security and justice.[9]

Solidarity rights – as a separate chapter of the Charter of Fundamental Rights – were codified by the EU Fundamental Rights Convention in 2000 with regard to their close connection to the value of dignity. The principle of social solidarity also appeared in the case law of the CJEU as the foundation of social welfare system,[10] and in a range of judgments in the area of competition and freedom of movement law the principles of solidarity help to determine the proper balance between market principles and social protection objectives in EU law.[11] Solidarity inspires policies and legislation in the field of financials (e.g. ESM), asylum and border management (e.g. refugee relocation), and intra-EU labour mobility.

The solidarity polity of the European Union reaffirmed by law and policies of the institutions will however prevail if one considers Habermas's advice: "These European states assumed their present-day form of welfare states only after the catastrophes of the two world wars. In the course of economic globalization, these states find themselves in turn exposed to the explosive pressure of economic interdependencies that now tacitly permeate national borders. Systemic constraints again shatter the established relations of solidarity and compel us to reconstruct the challenged forms of political integration of the nation state. This time, the uncontrolled systemic contingencies of a form of capitalism driven by unrestrained financial markets are transformed into tensions between the member states of the European Monetary Union. If one wants to preserve the Monetary Union, it is no longer enough, given the structural imbalances between the national economies, to provide loans to over-indebted

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[7] Already the Preamble to the Treaty Establishing the European Coal and Steel Community Treaty (1951) recognized that 'Europe can be built only through real practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development'.

[8] J. OTTMANN, 'The Concept of Solidarity in National and European Law: The Welfare State and the European Social Model' [2008] 1 *Vienna Journal on International Constitutional Law* – www.icl-journal.com 36, 43-44.

[9] See A. W.M. GERRITS, 'Solidarity and the European Union: From the Welfare State to the Euro Crisis' <http://media.leidenuniv.nl/legacy/solidarity-and-the-european-union.pdf>; "The 'mutual defence clause' of Article 42.7 of the TEU requires member states to collaborate in the case of armed aggression; while the 'Solidarity Clause', framed in Article 222 of the TFEU, formulates an explicit demand on the member states to come to each other's assistance in the event of terrorist attacks, natural or man-made disasters."

[10] A. SOMEK, 'Solidarity Decomposed. Being and time in European citizenship' *University of Iowa Legal Studies Research Paper* 07-13, 2007, 4. Available at <ssrn.com/abstract=987346>

[11] A. SANGIOVANNI, 'Solidarity in the European Union' *Oxford Journal of Legal Studies* 2013, 1-29., 2.

states so that each should improve its competitiveness by its own efforts. What is required is solidarity instead, a cooperative effort from a shared political perspective to promote growth and competitiveness in the Eurozone as a whole."[12] It is undoubtedly a vice vision, however, the precondition of this objective would be member states that are loyal to the union and committed strongly to the principle of solidarity. Unfortunately, in the latest years in Hungary not just the loyal cooperation but also the internal social solidarity is undermined, which imperils the vision of social Europe and supranational solidarity as well.

Social solidarity in the pre-2010 Hungarian constitutional law

The Hungarian Constitution of 1989/90 did not expressly lay down the principle of solidarity; however, it contained several rules inspired by some aspects of solidarity. The solidarity-oriented rules, institutions and solutions of the legal system may be traced back to them. At the same time, it is a problem that solidarity – similarly to other constitutional values – has become interiorized to a low degree in the members of the political community, to whom the Constitution is addressed and whom it is about. As opposed to other constitutional values – such as the rule of law, democracy, parliamentarism, freedom, security, human rights etc. –, the value-character and preciousness of which could be (could have been) learnt by society in the two decades following the democratic political transformation, the value of solidarity could have taken root in the era of socialism too as a community-organizing factor. This is what happened, for example, in Poland and Czechoslovakia, where solidarity against the dictatorial state and regime had developed and influenced social practice before the years of political change. In contrast, in Hungary the Kádár era was favourable for achieving modest individual prosperity and influenced public atmosphere in the direction of self-interest pursuing behaviour. As a result of these circumstances, Hungary has a lower level of social solidarity, and consequently, also lower levels of law-abidance than other post-socialist countries with a similar line of development. On the other hand, there is a high demand for government intervention and high expectation of solutions of redistribution, in many cases without the recognition of the justified need for readiness to individual sacrifice. The outlined attitude of the political community may serve as explanation to the question why solidarity as a constitutional value has such a low impact on the actual state of reality in Hungary.[13]

In spite of the above, there were some solidarity-related provisions in the former Hungarian Constitution, which oriented the Constitutional Court in contributing to a more inclusive and solidary society through the means of constitutional law.

In the former Constitution political solidarity was not over-emphasized, one might find only provisions giving expression to *political solidarity* indirectly, e.g., in the provision concerning the sense of responsibility for the fate of Hungarians living outside the borders (Article 6 (3) – responsibility clause), the institution of the Head of State designed to express national unity

[12] J. HABERMAS, 'Democracy, Solidarity and the European Crisis' In *Roadmap to a Social Europe* (eds. Anne-Marie Grozelier, Björn Hacker, Wolfgang Kowalsky, Jan Machnig, Henning Meyer and Brigitte Unger) 2013, <http://www.abetterway.ie/download/pdf/roadmap_to_social_europe_sej_oct_2013.pdf#page=9> 11.

[13] CHRONOWSKI, 'Solidarity' 124.

(Article 29), or the recognition of the rights of the national and ethnic minorities defined as participants in the sovereign power of the people (Article 68). The *international dimension* of solidarity were manifested primarily in the foreign policy objectives of the state formulated in the Constitution (Article 6), the provision about the acceptance of international law (Article 7 (1)), the authorization relating to European integration (Article 2/A) as well as in compliance with certain policies (Article 57 (4)).

The *rules* of the Constitution inspired by *social solidarity* and giving expression to the social responsibility of the state were: providing support for those in need (Article 17), the protection of the young (Article 16), the right to social security (Article 70/E) and health (Article 70/D). In a wider sense and having regard to the tendencies of international legal development, solidarity may be associated with the right to a healthy environment (Article 18) and the right to access to culture (Article 70/F), freedom of coalition and the right to strike (70/C), parents' duty to educate their children (Article 66), and the obligation to contribute to public revenues, which constitutes the financial base of institutions of solidarity encouraged or organized by the state (Article 70/I).

In its practice, the Constitutional Court has invoked the principle of solidarity primarily by interpreting the right to social security and the social security system guaranteeing this right, however, the case law was not coherent in this field. The Constitutional Court was divided and somehow uncertain when the question of social rights and security was tabled. In the two decades of the liberal constitutionalism three approaches characterised the Court in its relation to social rights.[14] In the early 1990's the Constitutional Court represented the idea that social rights merely prescribe state duties, and on that basis the state guarantees certain social allowances to the citizens. The relevant articles of the constitution present the titles of the allowances in general.[15] That time the Court did not decide clearly whether these duties are just aims for the state or they do implicate subjective individual rights upon which claims may be filed in social matters.[16] However, the Court took the standpoint that "for the period covered with allowance the social insurance care must be guaranteed",[17] and explained it with the necessity of protection of acquires rights. Doing so, the case law connected the issue with the rule of law principle, because in these early years the constitutional protection of property rights was underdeveloped.[18] In another early decision, the Court interpreted the social rights as aims of the state, but emphasized that compared to other duties the state shall much more strive for the establishment of effective institutions to enforce these rights. In 1994 the Court ruled: "Social rights are implemented both by the formation of adequate institutions and by

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[14] ZS. BALOGH, 'Paradigmaváltás lehetőségei a szociális jogok védelme terén' [Changing paradigm in the field of protection of social rights] *Jogtudományi Közlöny* 2005/9, 367., L. SÓLYOM, *Az alkotmánybíráskodás kezdetei Magyarországon*, Osiris, Budapest 2001, 658.; M. LANGFORD, 'Hungary – Social Rights or Market Redivivus?' In *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (ed. M. Langford). Cambridge University Press, Cambridge 2008, 252-260.

[15] CC Decision 32/1991. (VI. 6.) AB, ABH 1991. 147, 163

[16] CC Decision 772/B/1990. AB, ABH 1991. 516, 522. SÓLYOM, op. cit. 663. See e.g. CC Decision 45/1991. (IX. 10.) AB, ABH 1991. 206, 208. P. SONNEVEND, 'Szociális jogok, bizalomvédelem, tulajdonvédelem' [Social rights, protection of legitimate expectations and private property] In *A megtalált Alkotmány? A magyar alapjogi bíráskodás első kilenc éve*, Indok, Budapest 2000, 367.

[17] CC Decision 11/1991. (III. 29.) AB, ABH 1991. 34, 35. SÓLYOM, op. cit. 663.

[18] SÓLYOM, op. cit. 653.

the rights of the individual to have access to them, which rights are to be specified by the legislature. In a few exceptional cases, however, certain social rights to be found in the Constitution have an element of subjective (justiciable) right."[19] The first turning point came in 1995, when the government tried to adopt severe austerity measures to control the increasing public debt.[20] The Constitutional Court refused the economic crisis-argumentation of the government and went into the in-depth analysis of right to social security. A range of decisions dealt with the constitutionality of deprivation from social allowances.[21] The Court created effective constitutional protection without deducing subjective rights; instead, it referred to the principle of legal certainty, the protection of acquired rights and legitimate expectations, the requirement of gradual reduction of allowances and in case of insurance-based social cares the measures of private property protection were applied.[22]

In the third stage the so-called minimum-decisions were adopted and the Constitutional Court established that the right to social security means a minimum allowance guaranteed by the state through the system of social cares which is indispensable for human dignity to prevail. More precisely, the Court ruled that right to social security shell guarantee the minimum livelihood necessary for human life, and this based on the right to life and human dignity.[23] The state shall ensure the protection of right to life and human dignity in the evolvement and operation of the state insurance and social care system. Thus the state is obliged to care for the very essential conditions of human existence – e.g. in case of homelessness the state shall intervene in all situations when the life of a human being is directly in danger.[24] Later the Court ruled that human dignity functionally implies a claim for care.[25]

Although the case law was controversial and uncertain and never reaffirmed clear justiciable and enforceable individual social rights, moreover it accepted the even the discretion of the legislation,[26] still, the Constitutional Court triggered social solidarity by introducing a minimum-standard and thus a limitation for the governmental margin of appreciation regarding the level of social care and benefit – this was the right to human life and dignity. In the absence of 'social justice' or 'social state' principle, the human dignity meant the very core of the social rights and social solidarity in the pre-2010 constitutional order. This guaranteed a minimum level of constitutional protection also to the vulnerable groups beyond the protection of the social interests of the middle-class.

Finally, it could also be interesting to examine when the principle of solidarity plays no role in the practice of the Constitutional Court. For example, in its Decision on the wealth tax adopted in 2010, the Constitutional Court does not mention it either as a reason or as an aspect of interpretation – despite the fact that, concerning the proportionality (fairness) of

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[19] CC Decision 28/1994. (V. 20.) AB, ABH 1994. 134, 138.
[20] It was the so-called „Bokros-package" after the name of the then minister of public finances, Lajos Bokros.
[21] CC Decision 43/1995. (VI. 30.) AB, ABH 1995. 188.
[22] A. SAJÓ, 'How the Rule of Law Killed Hungarian Welfare Reform' 5 *E. Eur. Const. Rev.* 31 (1996)
[23] CC Decision 32/1998. (VI. 25.) AB, ABH 1998, 251, 254.
[24] CC Decision 42/2000. (XI. 8.) AB, ABH 2000, 329.
[25] CC Decision 37/2011. (V. 10.) AB, ABH 2011, 225, 235.
[26] LANGFORD, op. cit. 259.

contributions to public revenues, social solidarity serves as a (not so hidden) underlying motivation.

The 'non-solidary' system of the Hungarian Fundamental Law of 2011/2012

During the Hungarian constitution making in 2011 it occurred – and the Hungarian Government inquired from the Venice Commission[27] – whether and to what extent it was necessary to incorporate the Charter rights into the national constitution. The Venice Commission emphasised 'that up-dating the scope of human rights protection and seeking to adequately reflect, in the new Constitution, the most recent developments in the field of human rights protection, as articulated in the EU Charter, is a legitimate aim and a signal of loyalty towards European values.' However, the Commission also underlined that the incorporation of the Charter as a whole or of some parts of it could lead to legal complications. Thus, as the Commission suggested, it should be taken into account that the interpretation of the EU Charter by the CJEU might deviate from the one provided by the constitutional Court of Hungary; the interpretation of the substantive provisions of the EU Charter is dependent on the ECHR and the case-law of the ECtHR; in the case law of the ordinary domestic Courts it might lead to problems that they should distinguish between the application of the Charter within and outside the scope of Union law. All these may lead to the erosion of constitutional autonomy of the member state. The Venice Commission recommended 'that it would be more advisable (…) to consider the EU Charter as a starting point or a point of reference and source of inspiration in drafting the human rights and fundamental freedoms chapter of the new Constitution.'[28]

It must be noted that the draft of the new Constitution was not sent to the Venice Commission on time, thus the Opinion of 28 March 2011 contained general comments and not evaluated any particular provisions of the draft constitutional text. Meanwhile the governing party alliance published (on 7 March 2011) and submitted to the Parliament (on 15 March) a draft, which originally did not follow precisely the spirit and the content of the Charter. After a short – approximately one month – parliamentary debate, the adopted Fundamental Law contains more or less the same rights as the Charter in its relevant Chapter ("Freedom and Responsibility"), and some sentences of the Charter were finally incorporated, but – compared to the Charter – the content of the rights enumerated by the Fundamental Law is less detailed and the text raises the possibility of wider limitation of rights. The Venice Commission in its second opinion, which was given upon the request of the Parliamentary Assembly of the Council of Europe and was published on 20 June 2011, examining the final

[27] The Venice Commission was addressed three legal questions by the Deputy Prime-Minister and Minister of Public Administration and Justice of Hungary. One of the questions was the following: 'To what extent may the incorporation in the new Constitution of provisions of the Charter of Fundamental Rights enhance the protection of fundamental rights in Hungary and thereby also contribute to strengthening the common European protection of these rights?'

[28] European Commission For Democracy Through Law (Venice Commission) Opinion no. 614/2011, Strasbourg 28 March 2011, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, points 21., 25-28., 32. Available at <http://tasz.hu/files/tasz/imce/2011/opinion_on_hungarian_constitutional_questions_enhu_0.pdf> .

text revealed several criticalities that should be eliminated by utilising the common European values during the interpretation.[29]

Although the value of *human dignity* is recognized in the preamble[30] and in Article II of Fundamental Law,[31] the rights connected with the right to life and human dignity might be interpreted restrictively. Just a few examples to highlight, from the point of view of solidarity, why the Fundamental Law constitutes a lower profile than the former Constitution did.[32] Article XIX(3) initially gave reason for concern from the viewpoint of equal dignity, as it contains the new measure of 'usefulness of activity to the community', which may be taken into account in deciding on the nature and extent of social aids.

Another rule is contradicting the principle of dignity – and the societal solidarity, humanity in wider sense – after the 4th amendment: it is the issue of criminalizing homelessness. Article XXII(3) of the FL reeds as follow: 'In order to protect public order, public security, public health and cultural values, an Act of Parliament or a local ordinance may declare illegal staying in a public area as a permanent abode with respect to a specific part of such public area.' The amendment was a reaction to the former decision of the Constitutional Court on the Petty Offence Act,[33] in which the Court stated that the punishment of unavoidable living in a public area fails to meet the requirement of the protection of human dignity. The Venice Commission criticized the constitutional rank of the regulation, because it aims to prevent the review by the Constitutional Court.

One more issue is worth mentioning, which is also challenging primarily the right to fair trial, but interferes with the value of dignity, (international and societal) solidarity and humanity as well: the Hungarian anti-immigration laws that were adopted since 2015 with the intention to stop refugees at the borders of the country.[34] The political context of these measures is the

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[29] European Commission For Democracy Through Law (Venice Commission) Opinion no. 621/2011, Strasbourg 20 June 2011, Opinion on the New Constitution of Hungary, <http://www.venice.coe.int/webforms/documents/CDL-AD%282011%29016-E.aspx>.

[30] 'We hold that human existence is based on human dignity.' This sentence more or less expresses that human life and human dignity indivisible values creating a unity. Thus also in the future the monist approach based on the unity of body and soul prevails, which was elaborated by the Constitutional Court in 1990. 'Human life and human dignity form an inseparable unity and have a greater value than anything else. The rights to human life and human dignity form an indivisible and unrestrainable fundamental right which is the source of and the condition for several additional fundamental rights. The constitutional state shall regulate fundamental rights stemming from the unity of human life and dignity with a view to the relevant international treaties and fundamental legal principles in the service of public and private interests defined by the constitution. The rights to human life and dignity as an absolute value create a limitation upon the criminal jurisdiction of the State.' CC Decision 23/1990. (X. 31.) AB, point V.2.

[31] Article II of the FL: 'Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception.'

[32] For the former case law see C. DUPRÉ, 'The Right to Human Dignity in the Hungarian Constitutional Case Law' In *The Principle of Respect for Human Dignity,* Council of Europe, Strasbourg 1999, 68-79.

[33] CC Decision 38/2012. (XI. 14.) AB, see the press release here: <http://hunconcourt.hu/sajto/news/provisions-of-the-act-on-contraventions-criminalizing-people-living-at-public-areas-permanently-are-against-fundamental-law>.

[34] Hungarian Helsinki Committee: Hungary: Recent legal amendments further destroy access to protection, April – June 2016, <http://www.helsinki.hu/wp-content/uploads/HHC-Hungary-asylum-legal-amendments-Apr-June-2016.pdf>, accessed on 01.05.2017.

increasing hostility towards refugees and domestic civilians (NGOs) helping them, which was triggered by the government.[35]

As to the traditional social solidarity,[36] Article XVII of the Fundamental Law regulates solidarity in more details in the world of employment than the former Constitution did, and for that purpose the EU Charter was taken as a basis. The FL ensures fair and just working conditions for the employees, and guarantees a right to employees, employers and their representatives 'to bargain and to conclude collective agreements, and to take any joint actions.' The employees have the right to hold strikes in defence of their interests.

Article XVII(1) prescribes the obligation of employees and employers to cooperate, and the purpose of this cooperation (ensuring jobs, making the national economy sustainable and other community goals), but does not mention either the social dialogue, or the system of social and economic interest reconciliation, or the workers right to information and consultation within the undertaking (cf. the latter with Article 27 of the Charter). The FL does not contain either the protection in the event of unjustified dismissal[37] (cf. with Article 30 of the Charter), or any guarantees to reconcile family and professional life (cf. with Article 33 of the Charter, containing the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child). Article XVII(2) of the FL although refers to the protection of parents in the workplace, but the level of this protection depends on the measures adopted by the State, thus it is not a fundamental right.

Social security does not appear as a fundamental right in the FL, but merely as something the State "shall strive" for, thus it only appears to be a state goal, which can be evaluated as a step backward in comparison with the former Constitution. Already before the entering into force of the Fundamental Law, the former Constitution was amended in order to create constitutional basis for changing pension system and get rid of early retirement benefits.[38] In Article XIX(1) of Fundamental Law among the titles to statutory subsidies (within the group of people in need) old age is not listed; it appears alone, separately from the categories of neediness, in paragraph (4). Social insurance does not appear as a constitutional institution, instead, in Article XIX(2) the expression 'a system of social institutions and measures' is used as the means of achieving the defined state goal. The paragraph (3) of Article XIX raises serious concerns as it refers to uncertain measures: 'The nature and extent of social measures may be determined by law in accordance with the usefulness to the community of the beneficiary's activity.' What is useful to the community and who decides on the usefulness in certain cases? Might the social support be withhold in the absence of "useful activity" on this constitutional bases, even if the person concerned is needy and the cause of the situation falls outside his or her own fault? The principle of "self-responsibility" stipulated in Article O) is

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[35] G. HALMAI, 'Hungary's Anti-European Immigration Laws' at <http://www.iwm.at/transit/transit-online/hungarys-anti-european-immigration-laws/> on 4.11.2015.

[36] CHRONOWSKI, 'The new Hungarian' 131-133.

[37] It is no surprise. Until 31 May 2011 the government officers and until 7 April 2011 the public servants were dismissed without reasoning, by this time annulled the Constitutional Court the challenged laws. See CC Decision 8/2011. (II. 18.) AB and 29/2011. (IV. 7.) AB. Later the European Court of Justice ruled that Hungary violated the Convention when enabled layoff without reasoning, *K.M.C. v. Hungary,* Judgment of 10 July 2012.

[38] Act LXI of 2011 (published on 14 June 2011).

also weakened by the regulation of the Fundamental Law relating to social security, especially by the obligation of the State to maintain a general state pension system based on social solidarity. As a basis for the state pension system (as a constitutional institution) the Fundamental Law specifies exclusively social solidarity, although the system is based on individual financial contribution, thus the right to property,[39] and the principle of individual responsibility should also be guaranteed. The member states has a wide margin of appreciation regarding their social security system, but it is worth to mention that the Hungarian constitutional regulation on social security initially does not properly guarantee the equal dignity and the property protection, which is unfortunately reaffirmed by the case law of the Constitutional Court in the past five years.

Solidarity reinforced by dignity is lost – new approach of the Hungarian Constitutional Court

The Constitutional Court recognised in 2012 that the Fundamental Law completely abandoned the approach of the former Constitution on right to social security, thus found necessary to distinguish and overrule the former case law. The Court emphasized that no fundamental rights are provided by the new constitutional regulation on social security, instead, only state duties and aims are prescribed in Article XIX.[40] This article mentions rights just in two cases, first the right to state pension of the elderly prescribed by law, and second the right to statutory subsidies in certain situations (maternity, illness, disability, handicap, widowhood, orphanage and unemployment for reasons outside of his or her control). These are far not enforceable right, their protection depends on the opportunities and economic situation of the state.[41] On the basis of the amendment to the former Constitution in 2011 and the new constitutional environment the Court found legitimate and just that the government reconstructed the system of early retirement, substituted the pensions with aids and allowances, which are completely ex gratia subsidies thus not even fall under the protection of private property. The constitutional protection of property is applicable to those social subsidies in the future where individual financial contribution justifies it. The ex gratia subsidies are subject to the legislative discretion thus they are not protected as fundamental or constitutional rights – the only criterion that they cannot based on arbitrary decision.[42] From the argumentation of the Court references to human dignity or social solidarity have totally disappeared.[43]

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[39] Cf. the first sentence of Article XIII(1) of the FL: 'Every person shall have the right to property and inheritance.'
[40] CC Decision 40/2012. (XII. 6.) AB, 9/2016. (IV. 6.) AB.
[41] CC Decision 28/2015. (IX. 24.) AB.
[42] CC Decision 32/2015. (XI. 19.) AB, reasoning [32], CC Decision 25/2016. (XII. 21.) AB, reasoning [24]
[43] See CC Decision 40/2012. (XII. 6.) AB, press release: The Constitutional Court has declared that the adopted Article XIX of Fundamental Law and the still applicable Article 70/E para 5 of the previous Constitution authorise the law-maker expressly to reduce the pension or to modify it to social benefit if those who receive it are under the general retirement age, or even to terminate it in case of incapacity of work. Based on these regulations, the Hungarian Parliament adopted the Act that ensures health care insurance instead of retirement benefits for people with reduced ability to work. The Constitutional Court has declared that the Act contains transitional provisions because it took the previously declared age, the rate of disability and the previous forms

The level of protection of the social rights may be reduced by the state, argues the Court, and the state duties are restricted to – on the one hand – the establishment of an institutional system in which the constitutional rights may prevail, and – on the other – the statutory rights shall be outlined for the access to the social institutions. The Court noted that the Fundamental Law just reaffirmed the limited economic capacity of the state and respected the fact that the former welfare model was unsustainable.[44] However, some kind of constitutional protection is still not excluded, because the certain situations enumerated by the Fundamental Law – although do not generate subjective, justiciable fundamental rights but – create 'constitutional background' to the statutory rights.[45]

While the Constitutional Court was reluctant to find any unconstitutionality in the governmental reconstruction of the social security system, the European Court of Human Rights in a subsidiary way guarantees some remedy although the protection of social rights fall beyond the scope of the Convention. A recent case[46] concerned a social security benefit paid to the applicant, who had received a disability benefit for almost ten years, which was then withdrawn. The claim to re-start the payments was dismissed, because a legislative change had meant that the applicant was no longer eligible to receive the benefit.

The ECtHR found in particular that Article 1 to Protocol 1 on protection of property had applied to the case, because the applicant had had a legitimate expectation that she would receive the pension, if she had satisfied the criteria set out in the former legislation. The refusal to grant her the benefit had been in accordance with the law (as it arose from the new legislation), and had been in pursuit of a legitimate purpose (saving public funds). However, it had not been proportionate: in particular, because it had involved the complete deprivation of a vulnerable person's only significant source of income, resulting from retrospectively effective legislation that had contained no transitional arrangements applicable to the applicant's case.

Conclusion

The degree of solidarity manifested in the social security system depends on the size of the circle of members of the community involved in the system, the scope of the problems covered by it, the degree of intervention it leaves to the executive power and the degree of fairness of the model of redistribution applied by the system. Consequently, the distribution of risk is not determined individually but along a standard of equality adopted jointly by the whole society. Thus, problems constituting the subject of individual consideration earlier become politicized: what should happen in the case of illness, disability, old age,

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of benefits into consideration when disposes the disbursement of benefits from 1 January 2012. Therefore, the concerned part of the Commissioner's petition has been dismissed. The Constitutional Court has declared as well that the regulation regarding the termination of eligibility for disability benefits does not infringe the Fundamental Law as the reasons of the termination are that the need thereof expires and an income necessary to minimal subsistence is ensured.

[44] CC Decision 25/2016. (XII. 21.) AB, reasoning [21]

[45] CC Decision 28/2015. (IX. 24.) AB, reasoning [34]

[46] *Béláné Nagy v. Hungary* (application no. 53080/13), Judgment of 13 December 2016 (Grand Chamber)

unemployment or parenthood is determined based on the principles of regularity, predictability and equality instead of eventuality and defencelessness.[47] All this leads to the recognition of the fact that individuals are not equal only in their civil and political rights but also in their risks on the basis of equal dignity. While the formal belonging together of the political community finds expression in citizenship, interdependence caused by personal and individual neediness and risk are manifested in social rights and institutions. The Hungarian constitutional system and its actors do not recognise this, and leaves the vulnerable groups of the society unprotected.

Legal provisions expressing and implementing solidarity must be based on wide public social consensus. If the principle of solidarity is expressly laid down in a constitutional text, this fact may encourage its assertion in legislation and the application of law because it enjoys (constitutional) judicial protection. Moreover, the assertion of the principle of solidarity in (constitutional) law (legal acts) may contribute to the more effective implementation of social justice and tolerance as well as social inclusion. Naturally, this presupposition is only realistic if solidarity is a social practise and enjoys real social acceptance. A deeply divided and disunited, non-solidary society – such as the Hungarian – cannot contribute to the democratic European political and social system.

[47] P. BALDWIN, *The Politics of Social Solidarity* Cambridge University Press, Cambridge 1990, 2.

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