Articles

Transformation of the Hungarian Constitutional Court: Tradition, Revolution, and (European) Prospects

By Gábor Spuller[*]

Abstract

The new Constitution and the new Act are changing the status of the Hungarian Constitutional Court by developing the Hungarian constitutional tradition, creating better collaboration between the Constitutional Court and the ordinary judiciary, and establishing an effective instrument for the protection of individual human rights. But the pattern of the Parliament reacting to the rulings of the Constitutional Court with constitutional amendments reduces the competences of the Constitutional Court. It is to be hoped that this process is coming to an end, because otherwise the achievement of the "paradoxical revolution of law" is endangered.

Due to the former extensive competences in terms of law review and its limited influence on ordinary jurisdiction, the status of the Constitutional Court caused problems. Because of the abstract nature of the procedures, the distance from the ordinary judiciary, and the power dilemma between the Constitutional Court and the Parliament respectively, the Government decided the main stream of its ruling up to 2012.

Now there are some important changes, especially the introduction of a widespread constitutional complaint. The abolition of the actio popularis is justified. The relationships between the state organs seem to be better clarified and adjusted. The European clause of the 1949/1989 Constitution, which was largely retained in the Fundamental Law, contains a fundamental concept, which is that the European Union is founded on strong sovereign

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Member States. On the other hand, the Fundamental Law strengthens Hungary's ties to Europe by making these an integral part of that law. As the Constitutional Court had not yet really applied the European Clause, it now has the opportunity to put these two concepts into practice and make them mutually compatible by enforcing them at a high level.

The discussions concerning the newest constitutional developments in Hungary mainly have their origin in the power struggle between the constituent majority of the Parliament and the Constitutional Court. It is not clear, however, how long this conflict will continue to be a matter falling solely within the national sovereignty of Hungary. Due to the parliamentary super-majority of the governing parties, the Constitutional Court is losing its power. Hungary is a unitary state; it is an open question whether there is any substitution needed to balance the power of the governing parties. Nevertheless, in spite of the substantial restrictions on reviewing the constitutionality of financial laws and the several amendments of the new Constitution, the Constitutional Court still plays a role in safeguarding democratic checks and balances. Indeed, it can have a positive impact on the European integration of Hungary. It has been granted new competences to guarantee constitutional unity within the Hungarian legal system and to complete the enforcement of individual rights. The Constitutional Court should make better use of its new granted competence to remedy any possible grievance entirely.

A. Introduction

After the fall of the Iron Curtain, there were a lot of democratic changes to the institutions and, in particular, the Constitutional Courts were introduced. After more than twenty years, due to political and economic pressures, new challenges and developments have emerged and caused serious concerns for EU-Officials primarily focused on new Member States. In July 2012, Mr. Barroso, the President of the European Commission, called on Mr. Ponta, Romanian Prime Minister, to refrain from undermining the decisions of the Romanian Constitutional Court.[1] Furthermore, the Romanian Constitutional Court asked the European Commission for Democracy Through Law (the Venice Commission) for support.[2] In response, the Venice Commission called for loyal cooperation by the Romanian state institutions in the interest of the State. It declared furthermore that Romanian Ordinance Number 38 is problematic from a constitutional viewpoint because it

[1] *See* José Manuel Durão Barroso, *Statement by President Barroso Following the Adoption of the Cooperation and Verification Mechanism Reports for Romania and Bulgaria*, EUR. COMM'N (July 18, 2012), http://europa.eu/rapid/press-release_SPEECH-12-565_en.htm.

[2] *See Calendar of Events: 92nd Plenary Session of the Venice Commission*, COUNCIL OF EUROPE, http://www.venice.coe.int/ (last visited Oct. 16, 2012).

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affects the status of a fundamental state institution—the Constitutional Court—and because the urgency of the measure has not been established.[3]

Later, in autumn 2012, the Commission evaluated the appointment of a member of a Constitutional Court in Bulgaria. It issued a warning to Bulgaria, because judges on the Constitutional Court must satisfy the highest standards of professionalism and integrity.[4] But it was not only in member States that joined the European Union since 2007 that problems existed. What was happening in Hungary, the neighboring country which had joined the EU four years before these states?

In January 2011, Hungary took on the presidency of the Council of the European Union for the first time since it joined the European Union in 2004. From the very beginning, the Presidency had to face internal political discord which was also felt at the European level. There were harsh debates in the European Parliament about the new Hungarian media law and about the new Hungarian Constitution. Hungary, which was always regarded as a model for the Central and Eastern European Countries, seemed to have "blotted its copybook."

Before making any detailed evaluation of the latest developments, it is necessary to examine recent history. A national crisis in Hungary started after an internal speech to fellow party members made by Ferenc Gyurcsány, the socialist Prime Minister at the time, was leaked to the public in September 2006. In the speech, Gyurcsány admitted that he had lied about the state of the economy to win elections. The whole system of political institutions seemed to lose legitimacy. The financial crisis of 2008 hit Hungary hard and Hungary entered a severe recession while net external debt was 46.3 percent of GDP,[5] one of the worst economic contractions in its history.

The conservative parties of Fidesz and Christian Democrats won more than two thirds of the parliament's mandates in the 2010 elections. With this super majority, the new Prime Minister, Viktor Orbán, implemented a large number of constitutional and institutional changes, which created an outburst of protests both in his homeland and in the European

[3] *See* Venice Comm'n, *Constitutional Issues in Romania: Government Emergency Ordinances, Parliament Decisions and Laws*, COUNCIL OF EUROPE Opinion No. 685/2012 (Sept. 5, 2012) (explaining the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance).

[4] *See* Atanas Slavov, *Challenges to Constitutional Supremacy in a New Democracy: A Critical Study of Bulgaria* 4 (Ctr. for Advanced Study Sofia, CAS Sofia Working Paper Series, 2011) (analyzing the Bulgarian constitutional system).

[5] *See* Edward Hugh, *Hungary Is Headed for a Substantial Recession as Foreign Exchange Lending Seizes Up*, A FISTFUL OF EUROS (Oct. 17, 2008), http://fistfulofeuros.net/afoe/hungary-is-headed-for-a-substantial-recession-as-foreign-exchange-lending-seizes-up/.

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community. The primary focus of the critics was the new Fundamental Law replacing the 1949/1989 Constitution in a speedy and enforced procedure by the constituent majority of the Parliament.[6]

With the Fourth Amendment to the Fundamental Law, the substantial criticism from the European institutions was deepened.[7] Later, with the Fifth Amendment, the government addressed some of these substantial concerns.

Let us embark upon a short glance back at the attempts to prepare a written constitution of Hungary. The first constitution was partly written in 1946 and published as Law 1/1946, when the newly elected Parliament proclaimed the Republic of Hungary following World War II. The increasing influence of the Soviet System undermined its democratic nature, leading to the second last version of Constitution of Hungary that came into force in 1949.

Until 1946, there was only a historical constitution in force in Hungary.[8] The law 20/1949 was in fact a break in legal and political terms from democratic tradition.[9] Just as in the

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[6] There are criticisms from experts. *See generally* GÁBOR ATTILA TÓTH, CONSTITUTION FOR A DISUNITED NATION (2011); Gábor Halmai, *Hochproblematisch, Ungarns neues Grundgesetz*, 61.12 OSTEUROPA 145–156 (2011); Gábor Halmai et al., *Gábor Attila Tóth Vélémény Magyarország alaptörvényéröl*, 55.26 ELET ÉS IRODALOM 1 (2011), *translated in* GÁBOR ATTILA TÓTH, CONSTITUTION FOR A DISUNITED NATION Appendix 455 (2011); Nóra Chronowski et al., *What Questions of Interpretation May be Raised by the New Hungarian Constitution?*, 6 VIENNA J. ON INT'L CONST. L. 41 (2012); ESZTER KIRS, FREEDOM AND RESPONSIBILITY IN THE NEW CONSTITUTIONAL SYSTEM OF HUNGARY, REVUE EST EUROPA 73 (numéro spécial 1, 2012). But there is not only criticism. *See* Balázs Schanda, *A New Constitution for Hungary*, 7.2 IUSTUM AEQUUM SALUTARE 153–158 (2011); Grégor Puppinck & Alessio Pecorario, *Memorandum of the Hungarian New Constitution*, EUR. CTR. FOR LAW & JUSTICE (Apr. 25, 2011), *available at* www.eclj.org. A good compendium of critical and positive voices of international experts agree. *See* JOSEPH KÁROLYI FOUNDATION & THE FRENCH INSTITUTE, UNE CONSTITUTION, POURQUOI FAIRE? ENTRE SPÉCIFICITÉS NATIONALES ET CONSENSUS EUROPÉEN, COLLOQUE INTERNATIONAL [WHAT IS THE PURPOSE OF A CONSTITUTION? BETWEEN NATIONAL IDENTITIES AND EUROPEAN CONSENSUS, INTERNATIONAL CONFERENCE] (2013).

[7] *See* Venice Commission, *The Concerns of the European Commission Were Not Related to the Constitutional Court Per Se*, COUNCIL OF EUROPE, Opinion No. 720/2013, 012 (2013); Viviane Reding, *Hungary and the Rule of Law-Statement of the European Commission in the Plenary Debate of the European Parliament*, EUR. COMM'N (Apr. 17, 2013), http://europa.eu/rapid/press-release_SPEECH-13-324_en.htm?locale=en; EUR. PARL., RESOLUTION ON THE SITUATION OF FUNDAMENTAL RIGHTS: STANDARDS AND PRACTICES IN HUNGARY (July 3, 2013) http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0315&language=EN&ring=A7-2013-0229 (asking the Council to monitor the constitutional developments); Francis Delpérée et al., *The Hungarian Government has Provided an International and a German Legal Expertise: Opinion on the Fourth Amendment of the Constitution of Hungary* (Mar. 1, 2013); RUPERT SCHOLZ, RECHTSGUTACHTEN ZUR VERFASSUNGS-UND EUROPARECHTSKONFOMITÄT DER VIERTEN VERFASSUNGSNOVELLE ZUM UNGARISCHEN GRUNDGESETZ VOM 11./25. MÄRZ 2013 (Apr. 18, 2013), http://www.mfa.gov.hu/NR/rdonlyres/13EE294A-2676-4BA2-A394-325A8B96A074/0/GT_025.PDF.

[8] *See* ANTON RADVÁNSZKY, GRUNDZÜGE DER VERFASSUNGS- UND STAATSGESCHICHTE UNGARNS 97 (1990).

[9] *See* Georg Brunner, *Ungarn*, *in* VERFASSUNGEN DER KOMMUNISTISCHEN STAATEN 476, 477 (Georg Brunner & Boris Meissner eds., 1980); Imre Takács, *Az alkotmány és az alkotmányosság fogalma, in* ALKOTMÁNYTAN 9, 27 (István Kukorelli ed., 1992).

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United Kingdom, Hungary did not have a real tradition of a written constitutional charter. By adopting the constitution, the supremacy of the Soviet system was finally achieved in Hungary after all democratic resistance had been defeated by the Communist dictator Mátyás Rákosi.

This former Stalinist constitution was revised in 1989 due to the fall of the Iron Curtain. Although the revision was very sweeping in terms of the rule of law, fundamental rights, and democratic institutions, the framework and the roots remained largely unaffected. As a matter of fact, the whole body of the 1949/1989 Constitution was not internally consistent.[10] It was a compromise between the leading communist state party and the major part of the opposition, which was still not elected and not in power. The objective of the revision was transition. The intention was that a new constitution should be enacted by Parliament after the first democratic elections. The opposition won the elections very clearly; the former state party won only 8.5 percent of the vote. Then, almost all the new democratic parties changed their opinions and only amended the constitution in order to mandate that the new government address only the tasks of managing the economic and social questions of the transition.[11] Only the Fidesz party protested against this concept and remained in favor of a new constitution.[12]

In 1995 and 1996 there was an attempt by the liberal/social party coalition to draft a new constitution.[13] But due to political differences, the plan was eventually dropped.

Meanwhile, the revision of the 1949 Constitution incorporated the Constitutional Court.[14] It was already established before the first democratic elections and started work immediately. In 1993, the Hungarian Constitutional Court stated: "The Constitutional Court

[10] *See* ANDRÁS BRAGYOVA, AZ ÚJ ALKOTMÁNY EGY KONCEPCIÓJA 17–18 (1995); JÓZSEF PETRETEI, MAGYAR ALKOTMÁNYJOG I 70 (2002); HERBERT KÜPPER, DIE UNGARISCHE VERFASSUNG NACH ZWEI JAHRZEHNTEN DES ÜBERGANGS 8 (2007).

[11] *See* TAKÁCS, *supra* note 9, at 39–40; Gábor Halmai, *The Transformation of Hungarian Constitutional Law from 1985 to 2005*, *in* THE TRANSFORMATION OF HUNGARIAN LEGAL ORDER 1985-2005 1 (Andras Jakáb et al. eds., 2007).

[12] This fundamental concept survived and was later a decisive factor in the drafting of the constitution. *See* BÁLINT ABLONCZY, SUR LES TRACES DE LA CONSTITUTION 26–27 (2012).

[13] There was only a regulatory concept of the parliament. *See* Venice Commission, *Opinion on the Regulatory Concept of the Constitution of the Republic of Hungary,* CDL-INF002 (1996). The Secretariat of the parliamentary committee tried to reflect the process. *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] (Lamm Vanda ed., 1997).

[14] There is an English translation. *See* Act XX of 1949: The Constitution of the Republic of Hungary, WOLTERS KLUWER, *available at* http://www.wipo.int/wipolex/en/text.jsp?file_id=190398.

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has its own place in the constitutional order, it is not part of the judiciary . . . [I]t is a singular and one level institution of law."[15]

Due to its vast competences with regard to the Parliament and its activities, the work of the Constitutional Court became well known both in and outside of Hungary.[16] A very important task of the Constitutional Court was to reestablish the rule of law and to stabilize the transformation process.[17] It reconnected Hungary with the European heritage of common values.[18] But there were critics as well, because of its activist jurisprudence.[19] Twenty years later, members of the Fidesz party took the opportunity to take up their idea again and to set with the Christian Democrats a new constitution in force.[20] The Venice Commission received several requests concerning the Constitutional Law. There was an extraordinary accumulation of opinions,[21] including remarks of the Hungarian

[15] Alkotmánybíróság (AB) [Constitutional Court], AZ ALKOTMÁNYBÍRÓSÁGI HATAROZATAI ÉVES KÖNYVEK [ABHEK] 619–20 (1993). Note that the decisions of the Constitutional Court, which are not part of the Official Gazette, were published by an Edition of the Court until 2010.

[16] *See* GEORG BRUNNER & LÁSZLÓ SÓLYOM, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT (2000); *Verfassungsgerichtsbarkeit*, *in* UNGARN (1995); GÁBOR SPULLER, DAS VERFASSUNGSGERICHT DER REPUBLIK UNGARN 361–65 (2000) (containing an overall bibliography until 1998); Tamás Bán, *Presentation de la Cour Constitutionelle de Hongrie, Cahiers du Conseil Constitutionnel n° 13* (2003), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-13/presentation-de-la-cour-constitutionnelle-de-hongrie.52031.html; Kim Lane Scheppele, *Constitutional Negotiations*, INTERNATIONAL SOCIOLOGY 18, 219 (2003); HALMAI, *supra* note 11 at 5; PETER KOVÁCS, INTRODUCTION À LA JURISPRUDENCE DE LA COUR CONSTITUTIONNELLE DE LA RÉPUBLIQUE DE HONGRIE (2010); Oliver Lembcke & Christian Boulanger, *Between Revolution and Constitution: The Roles of the Hungarian Constitutional Court*, *in* CONSTITUTION FOR A DISUNITED NATION 269 (Gábor A. Tóth ed., 2012).

[17] *See* Andrzej Zoll & László Sólyom, *Die Rolle der Verfassungsgerichtsbarkeit*, *in* POLITISCHEN TRANSFORMATIONSPROZESSEN 36 (2002).

[18] *See id.* at 34.

[19] *See* Béla Pokol*, Aktivizmus és az Alkotmánybíróság, in* MAGYARORSZÁG POLITIKAI ÈVKÖNYVE 150–55 (Sándor Kurtán et al. eds., 1993); *Aktivista Alapjogász vagy Parlamenti Törvénybarát, in* VILÁGOSSÁG 41–49 (1993); *A Parlamentarizmus vita Elsö Fordulója Után, in* TÁRSADALMI SZEMLE 49–57 (1994); THE CONCEPT OF LAW. THE MULTI-LAYERED LEGAL SYSTEM 78 (2001).

[20] English translation available under http://www.venice.coe.int/ or http://www.mkab.hu/.

[21] *See* Venice Commission, *On Three Legal Questions Arising in the Process of Drafting the New Constitution*, COUNCIL OF EUROPE, Opinion No. 614/2011, 001 (Mar. 2011); *On the New Hungarian Constitution*, COUNCIL OF EUROPE, Opinion No. 618/2011, 016 (June 2011); *On Act CLI of 2011 on the Constitutional Court of Hungary*, COUNCIL OF EUROPE, Opinion No. 655/2012, 009 (June 2012). *See* MICHAEL NEWCITY, JOURNAL OF EURASIAN LAW (2011).

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Government.[22] The European Parliament also questioned restrictions to the competences of the Constitutional Court.[23]

After the Fourth Amendment, there was again a wave of opinions. The European Parliament recommended introducing a monitoring of Hungary.[24]

It is unusual for the institutions of the European Union to deal with national constitutional affairs, which generally fall within the remit of the Member State's competences. The new Article 2 of the Treaty on European Union (TEU) was introduced by the Lisbon Treaty and stipulates that the Union is founded on the rule of law, fundamental principles of the national constitutions. Due to that, national constitutions are obviously a matter for the European Union as well. The European Union is a community based on shared values such as the rule of law.[25] What is new is that this rule is set out as a general principle such that it is binding on the Member States and is a constitutional principle.[26] Now one of the future main topics will be, when this article is to be put into practice and when national constitutions are changed: How much space is there for the member states to develop their particular model depending on their history.[27] In this context, it is possible to take into account the Council of Europe. Article 3 of the 1949 Statute of the Council of Europe addresses the rule of law as binding for its adherent members as well as the international organization itself.[28] Due to its vast activities, the Venice Commission is continuing to monitor Hungary's respect for human rights and democratic principles. Following the set of changes concerning the Court, it is worthwhile to take a deeper look at the legal status of the renewed Hungarian Constitutional Court.

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[22] *See* Venice Commission, *Remarks of the Hungarian Government on the Draft: Opinion on ACT CLI of 2011 on the Constitutional Court of Hungary*, Opinion 665/2012 (June 13, 2012).

[23] *See* EUROPEAN PARLIAMENT, RESOLUTION OF 5 JULY 2011 ON THE REVISED HUNGARIAN CONSTITUTION (July 5, 2011), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+V0//EN.

[24] *See id.* (illustrating that the green, liberal and socialist majority of the European Parliament overruled the conservative parties).

[25] *See* Case C-294/83, Les Verts v European Parliament, 1988 E.C.R. 1017, at para. 23.

[26] *See* Frank Schorkopf, *Recht der Europäischen Union, Kommentar*, Art. 2 EUV, para. 9, *in* THE LAW OF THE EUROPEAN UNION (Eberhard Grabitz et al. eds., 2012).

[27] *See id.* at para 20.

[28] Established in London on 5 May 1949 between the Governments of the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Irish Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Kingdom of Sweden, and the United Kingdom of Great Britain and Northern Ireland. EUR. COUNCIL, STATUTE OF THE COUNCIL OF EUROPE (1949), http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm.

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The Constitutional Court's predecessor was the Constitutional Law Council, working before the fall of the Iron Curtain. This Council was created in 1984 with competence to declare the unconstitutionality of a law, but not to annul it.

From 1989 onwards, the Constitutional Court as a new institution was vested with a broad range of ex ante and ex post powers of review as to the constitutionality of Regulations and Standing Orders of Parliament or the Government where they are normative in character. Everybody had access to the Constitutional Court via an ex post review without the necessity of establishing a special interest (actio popularis). It was a broad constitutional watchdog concept, introduced primarily not to maintain individual fundamental rights, but rather to maintain public constitutional order.

These powers of abstract, concentrated constitutional review via broad public participation without special interest were, on the one hand, unique in Europe. The Venice Commission stated that Hungary has become "an interesting model for the functioning of an actio popularis system within constitutional justice."[29]

But, on the other hand, a real, full-fledged constitutional complaint did not exist because the subject of the constitutional review was not the decision of the ordinary courts that embodies the direct violation of the fundamental right, but only the legal norm on which it is based. In this case, the Constitutional Court could in practice at least order the review of criminal proceedings. Actually, there was no competence to resolve organic litigations by the Constitutional Court, such as contradictory lawsuits between state organs, and the influence on the ordinary jurisdiction was very limited.[30]

B. Nature of the Hungarian Constitutional Court

The nature of the Court itself was always under discussion.[31] There were opinions which qualified the Court as a specialized organ for the application of constitutional law, or as a part of the Parliament and acting as a negative lawmaker.[32] Because of the Fundamental Law, there is no longer any doubt, especially due to the introduction of a fully-fledged constitutional complaint, and the judicial nature of the Constitutional Court is more pronounced. The Venice Commission confirmed the extension of the constitutional review to individual acts, because this strengthens effective protection of individual fundamental

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[29] Venice Commission, *On Three Legal Questions Arising in the Process of Drafting the New Constitution*, COUNCIL OF EUROPE, Opinion no. 614/2011, 001, para. 55 (2011).

[30] *See* SPULLER, *supra* note 16, at 381–82.

[31] *See* JÓZSEF PETRÉTEI, MAGYAR ALKOTMÁNYJOG II ÁLLAMSZERVEZET 142–44 (2001); PÉTER TILK, AZ ALKOTMÁNYBÍRÓSÁG HATÁSKÖRE ÉS MŰKÖDÉSE 17–21 (2002); SPULLER, *supra* note 16, at 361–65.

[32] *See* SPULLER, *supra* note 16, at 361.

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rights and could relieve the European Court of Human Rights of the workload of individual complaints.[33]

According to Article 32/A (4) of the 1949/1989 Constitution, everyone had the right to initiate proceedings before the Constitutional Court. This broad access to the Constitutional Court is now abolished, because twenty years after the fall of the Iron Curtain there is no longer any need to eliminate unconstitutional laws adopted prior to the revised Constitution. The Venice Commission noticed that the Constitutional Court received an annual case load of about 1600 actio popularis petitions.[34] Although there is a tendency on the international level such as in the OECD and EU to introduce legal standing without special interest in certain areas,[35] in matters of constitutionality, the actio popularis can be regarded neither as a European standard[36] nor as an innovative instrument. Rather, it could be regarded, as a useful temporary instrument introducing the rule of law in former totalitarian states.

The new constitutional order in Hungary emphasizes the qualities of the Constitutional Court as a court which could supervise rulings of the ordinary courts in matters of constitutionality. Therefore, leaving aside any doubts concerning the quality of the Constitutional Court as a court, the introductory and above mentioned self-statement of the Constitutional Court as being "not part of the judiciary . . . a singular and one level institution of law" has to be revised.

I. The Court Is Not Part of the Judiciary?

The American point of view characterizes the nature of judicial system as a procedure for solving conflicts (contradictory lawsuit). In countries following this example constitutional review is a more diffuse normative review exercised by ordinary courts.[37] The more continental European opinion emphasizes the application of law. Constitutional review is usually concentrated in a single institution.

[33] *See* Venice Commission, *supra* note 29, at para. 63.

[34] *See id.* at para. 59; LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY. THE HUNGARIAN CONSTITUTIONAL COURT (2000).

[35] This is especially the case in environmental law because unlawful actions are affecting future generations more than individual interests. *See* Jerzy Jendroska, *Citizen's Rights in European Environmental Law*, 9 J. FOR EURO. ENVTL. & PLANNING L. 1, 71–90 (2012).

[36] *See* Venice Commission, *supra* note 29, at para. 57.

[37] *See* Venice Commission, *On Individual Access to Constitutional Justice*, COUNCIL OF EUROPE, Study No. 538/2009, 039, para. 34 (Dec. 2010).

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With regard to the Hungarian Constitutional Court, only the continental view was applicable, but up to now, regarding the American approach, its judicial nature was very doubtful. The abstract constitutional review of law is usually unrelated to a contradictory lawsuit. With an auxiliary argument, you could at least say that there is a complaint concerning the unconstitutionality of law.

But now, firstly, because of the holistic enforcement of the constitutional complaint, the abolition of the actio popularis, and the introduction of competence of conflict, the working procedure of Constitutional Court is better suited to contradictory lawsuits. Secondly, there is a more consistent adaptation of the established procedural rules of the judicial system as well. The rule to not go beyond the application and the need for a petition is now widely enforced as a general principle of procedure.[38] Former useless restrictions regarding taking evidence are abolished and elements of public negotiation are strengthened.

Formerly, there were two ex officio procedures, covering the omission of constitutional duties and the review of conformity with international treaties. The first has now been abolished as a procedure in its own right, but as a smaller substitution during the ordinary constitutional review, there are still possibilities within the framework of decision-making to sanction the Parliament because of unconstitutional omissions.[39]

Further, according to the broad text of the former Act on the Constitutional Court, it was not clear when there should be an ex officio procedure. Therefore, the Constitutional Court had to describe precisely the conditions by means of several decisions.[40] This settled case law was partly adapted by the ACC. Now, similarly to the rulings of the German Constitutional Court, there has to be a direct and not separable conjunction with the law under review. Yet only under the same conditions, according to the Fourth Amendment of the Constitution, could the subject-matter of the ex post review be extended to other provisions.[41] This is apparently a matter of progress because the Constitutional Court is now less in the role of being simultaneously both prosecutor and judge of Parliament.[42]

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[38] *See* 1989. évi XXXII. törvény a Magyarország Alkotmánybírósága (Act XXXII of 1989 on the Constitutional Court) § 51; A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 24, § 4 (enforcing the need for a petition as a constitutional principle).

[39] Therefore, the Constitutional Court can still state that the legislative organ failed to fulfill its legislative tasks issuing from its lawful authority, when it comes up during the scrutiny procedure of the ordinary constitutional review. *See* Act XXXII of the Constitutional Court § 46.

[40] *See* SPULLER, *supra* note 16, at 119.

[41] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 24, § 4.

[42] *See* SPULLER, *supra* note 16, at 123.

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The Fourth Amendment of the Constitution strengthens the character of the Constitutional Court as a judicial body, because it includes the addition that the public and personal hearing of the representatives of the law-making institutions is generally required.[43]

Yet there are more judicial guarantees introduced; for example, in the case where the petition is procedurally unacceptable, the Secretary-General of the Constitutional Court can no longer send refusal letters on his own as before.[44]

The competences pertaining to the interpretation of the constitution and the resolution of legal disputes have to be considered together. The latter was in fact abolished in 2005, when that power was assigned to the Metropolitan Court of Budapest. Now it has been reintroduced and there are some improvements, such as the possibility to hear the involved parties[45] or a new precondition like the immediate connectivity of the conflict to the necessary interpretation of the constitution.

The procedure of interpretation was maintained. In Article 38.1, the lawmaker implemented previous case law of the Constitutional Court with regard to procedural preconditions of this procedure. Apart from that, the Constitutional Court may decide questions concerning the legal status, operation, tasks, or competences of state organs by interpreting the provisions of the Constitution when the petitioner is seeking an advisory opinion under the new precondition of endangering constitutional security and stability. By these provisions, the Constitutional Court may decide organic litigations in order to avoid future conflicts between state organs.

Altogether these competences focus on more concrete cases and, according to the new rules of procedure, they now share more similarities with civil proceedings.[46] It may be concluded that these new conditions are switching the focus towards contradictory lawsuits.

The chapters concerning the Constitutional Court and ordinary courts are placed closer together, following the chapters concerning the legislature and executive. At first glance, the tasks of the two organs seem to be different from one another: The Constitutional Court is the highest organ of constitutional protection, but the ordinary courts are entrusted with judicial activities. The origin of the Hungarian word for judicial activities

[43] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 24, § 7.

[44] *See* 1989. évi XXXII. törvény a Magyarország Alkotmánybírósága (Act XXXII of 1989 on the Constitutional Court); *see* SPULLER, *supra* note 16, at 339.

[45] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 57.1.

[46] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 57.9.

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means "service for justice."[47] It is related to individual cases. As the Constitutional Court is also serving justice, especially in the procedure of constitutional complaints, it performs the same function. The Constitutional Court became the final institution reviewing decisions of all judiciary courts. Although the Constitutional Court is literally not part of the system of ordinary courts, according to constitutional law related to organizational issues, it is now functionally part of the judicial power structure.

II. The Court Is Still a Singular Institution of Law

The Court remains a singular institution of law, because there are still some distinct differences between it and ordinary courts.

With respect to the Constitutional Court, as it was a new institution introduced after the fall of the Iron Curtain, the root of the abstract constitutional review is still operating: The scope of and the access to ex ante review have been broadened and the ex post review can still be initiated by means of a motion of the government, one-fourth of the members of Parliament, or by the Commissioner for Fundamental Rights and—after the Fourth Amendment—by the Supreme Court and the Public Prosecutor.[48]

The Venice Commission warmly welcomed the right of petition of the Commissioner.[49] Via such an intermediary body, there is more of an objective scope and filter than before when individual applicants had free access to a constitutional review of any kind of law by the Constitutional Court.[50] In fact, the Commissioner exercises his petition right in cases which are very important for public order in a broader sense.[51] In one case, the question of applicability of the European Convention on Human Rights was resolved[52] and in a very sensitive—and arguably the Court's most important case—the Constitutional Court had the opportunity to safeguard the new Constitution against hidden amendments by the governing parties coalition[53] and stated new boundaries for constitutional amendments.[54]

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[47] "Igazságszólgatás."

[48] The Commissioner for Fundamental Rights includes all the functions of the former Ombudsmen.

[49] *See* Venice Commission, *On the Act CLI of 2011 on the Constitutional Court of Hungary*, COUNCIL OF EUROPE, Opinion No. 665/2012, 009, para. 25 (2012).

[50] *See* Venice Commission, *supra* note 29, at para. 66.

[51] *See infra* notes 52, 53.

[52] *See* Az Alkotmánybírósági Hatarozatai (ABH) [Constitutional Court], Dec. 19, 2011, MK.12.20.166/2011, para III.1.

[53] *See* Az Alkotmánybírósági Hatarozatai (ABH) [Constitutional Court], Dec. 28, 2012, MK.12.29.45/2012.

[54] *See* Az Alkotmánybírósági Hatarozatai (ABH) [Constitutional Court], May 21, 2013, MK. 2.648/2013.

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It is still the Parliament which directly elects the judges, demanding the same high level of qualifications as before, but now it elects the President of the Constitutional Court[55] as well as the President of the Supreme Court. On the one hand, this new rule may weaken the autonomy of the Constitutional Court, but, on the other hand, it strengthens the democratic legitimacy.

The new Constitution increases the number of the judges from eleven to fifteen. There were many political critics, but this number was originally foreseen after the fall of the Iron Curtain. In addition, the term of office was increased from nine to twelve years and, following the recommendation of the Venice Commission, it was stated that the office is not renewable, both stipulations being introduced in order to guarantee judicial independence.[56]

The ruling majority has filled the posts with persons whose points of view are close to their own. Although there are concerns about the current composition, it can be expected that, as elsewhere,[57] due to the subject-related tasks, the members will not act as party soldiers.[58]

The Parliament elects the members with a two-thirds majority vote after considering the opinion of its own Constitutional Committee. The nomination is made by the Nominating Committee, which consists of members of the parliamentary factions of each political party represented in the Parliament. Actually, the former regulation was a better safeguard for representing parliamentary minorities, because the Nominating Committee was composed equally of members of the opposition and the majority.[59]

Similarly to the responsibilities of the members of the Parliament, the members of the Constitutional Court are protected against criminal proceedings. The salary levels are the same as the salaries of the members of the government.

Certain procedural rules of ordinary courts such as public negotiation, staying within the remit of the petition, and the principle of immediacy (meaning that the Court itself has to

[55] Critics from the Venice Commission. *See* Venice Commission, *On the New Hungarian Constitution*, COUNCIL OF EUROPE, Opinion No. 618/2011, 016, para. 94 (2011).

[56] *See id.* at para. 95.

[57] *See* HORST SÄCKER, DAS BUNDESVERFASSUNGSGERICHT 44 (1989).

[58] Lately, the rapporteur of one of the most important decisions, which nullified semi-constitutional provisions and caused an "outrage" of the ruling majority, was István Stumpf, and his appointment was supported by Fidesz. *See infra* note 122.

[59] Although there were limits due to overruling tactics of the ruling majority. *See* SPULLER, *supra* note 16, at 236.

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hear the evidence and cannot delegate this function) are not entirely enforced. Other methods or means of taking evidence than those provided by the ACC may not be used.[60]

The decisions of the Constitutional Court are generally not only binding towards the interested parties, but towards everyone.[61] In three forms of procedure, the Constitutional Court acts as an advisor to the Parliament, the Government, or the Judiciary: In the principal interpretation of the Fundamental Law, in granting an opinion on the Dissolution of a Local Representative Body, and in granting an opinion on the Withdrawal of the Recognition of a Church.[62] The principal interpretation of the Constitution as a specific form of procedure somehow places the Constitutional Court on a higher level than the lawmaker.

In conclusion, it may be stated that the Constitutional Court has a double nature as the final court giving an extraordinary remedy and as a singular institution of law.

C. Constitutional Court as a Constitutional Organ

In the constitutional juridical literature, the expression "constitutional organ" is not customary. In Germany, the Constitutional Court introduced it successfully in order to gain equivalent status to other state organs such as the parliament, chancellor, and president, although this is still not acknowledged by every German scholar.[63] Indeed this expression states the special characteristics of the status of any Constitutional Court. For instance, according to the Opinion of the German Constitutional Court,[64] the most important criteria are the competences written into the constitution.

Until 2012 there was a clear hierarchy: The Hungarian Parliament was at least nominally the highest organ of state power.[65] But now, it is only the highest organ in representing the nation.

[60] *See* 1989. évi XXXII. törvény a Magyarország Alkotmánybírósága (Act XXXII of 1989 on the Constitutional Court) § 57.10.

[61] *See id.* § 39.1.

[62] *See id.* § 34–35.

[63] *See* STEFAN KORIOTH & KLAUS SCHLAICH, DAS BUNDESVERFASSUNGSGERICHT, paras. 31–36 (2012).

[64] *See Denkschrift des Bundesverfassungsgerichts* [*Memorandum of the Bundesverfassungsgericht] 27 June 1952*, 6 JAHRBUCH DES ÖFFENTLICHEN RECHTS 144 (1957).

[65] *See* 1949 CONSTITUTION § 19.1.

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The nature of the Constitutional Court as a constitutional organ is strengthened by the Fundamental Law and the ACC. In the new formulation, the Constitutional Court is the supreme organ as it has the task of protecting the Constitution.[66]

I. Organizational and Procedural Autonomy

The principle of cooperative and independent decision-making is guaranteed. From the point of view of the rule of law, there is progress in that there is finally a legislative delegation of power to the Constitutional Court to draft its own statute of the organization and ruling.[67] Its autonomy is now improved and more clearly guaranteed, because the approval of Parliament is no longer needed for the statute of the Constitutional Court. A legal loophole in the decision-making of the Constitutional Court, which existed for a long time due to the disapproval of the Parliament, has finally disappeared.[68]

The proceedings are now clearly determined by public interest, so once a procedure has been initiated, with the sole exception of a constitutional complaint, the petitions submitted to the Constitutional Court shall not be withdrawn.[69] Thus, after the petitioner has initiated the procedure, his role becomes that of participant in an ex officio procedure. It is true that he may withdraw his application, but the Constitutional Court retains discretion to continue or to close the procedure.[70] This is progress and enhances the procedural autonomy of the Constitutional Court. In this case, the lawmaker rightly did not follow settled case law.[71]

II. Budgetary Autonomy

The budgetary autonomy of the Court is very high, even higher than in Germany, because the Constitutional Court draws up its own budget plan, which automatically becomes part

[66] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 24.1; Act XXXII of the Constitutional Court § 2. In the former Act on Constitutional Court it was only mentioned in the Preface: "The Parliament enacts in order . . . to establish the supreme organ to protect constitutional order . . . followed law."

[67] *See* 1989. évi XXXII. törvény a Magyarország Alkotmánybírósága (Act XXXII of 1989 on the Constitutional Court) § 50.1.

[68] *See* SPULLER, *supra* note 16, at 276.

[69] *See* 1989. évi XXXII. törvény a Magyarország Alkotmánybírósága (Act XXXII of 1989 on the Constitutional Court) § 53.6.

[70] *See* Rules of Procedure of the Constitutional Court § 67.2 lit. c.

[71] *See* Az Alkotmánybírósági Hatarozatai (ABH) [Constitutional Court], Dec. 29, 1998, MK.I.2.42/1998; ABHEK 532, 533 (1998).

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of the State Budget Bill submitted by the government.[72] In addition, this autonomy is even greater now than before because there is strict interdiction of deterioration of the Constitutional Court budget plan.[73]

III. Competence by Constitution and Immediateness of Constitution

Remarkable changes in the new constitution particularly concern the legal status of the Constitutional Court. There are now written guarantees of competences like the ex ante, ex post review, and the constitutional complaint. These constitutional provisions are more precise and extensive.[74] As there is an exhaustive enumeration of the most important competences of the Constitutional Court in the Fundamental Law, the status of the Constitutional Court as a constitutional organ is strengthened.

Until now the legal status of the Constitutional Court was not obvious because the original structure of the 1949/1989 Constitution was still embedded in the early Stalinist era.[75] Even after the revision, the old constitution was especially silent and rudimentary concerning the Constitutional Court. To find out more about the competences and tasks of the Constitutional Court, one had to study the former Act on the Constitutional Court.

Now, the Fundamental Law emphasizes international obligations as it stipulates the duty of the Constitutional Court to examine legislation and any constitutional provisions for conflicts with international agreements and, when one is found, to annul national legislation or to resolve the conflict.[76]

The former exclusive right of the President of the Republic to initiate an ex ante review is extended to further applicants, although restricted to the government, Parliamentary Committees, and members of Parliament—only admissible by a vote of the Parliament as an entire institution.[77] There were different concerns raised.[78] Concerning the inability of the minority to initiate such a procedure, there had been in the past such a possibility for the minority of members of Parliament, but because of the restrictions of the

[72] *See* 1989. évi XXXII. törvény a Magyarország Alkotmánybírósága (Act XXXII of 1989 on the Constitutional Court) § 4.

[73] *See id.* at § 4; *supra* note 49 at para. 6. The Venice Commission welcomes this new guarantee.

[74] *See* Péter Tilk, *Az Alkotmánybíróság az Alaptörvényben*, *in* KÖZJOGI SZEMLE 7 (2011).

[75] *See* Klárá Fürész, *Az Alkotmányvédö Szervezet*, 35 UNI. OF BUDAPEST 19, 21 (1995); SPULLER, *supra* note 16, at 359.

[76] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 24, § 2.f.

[77] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 6, § 2.

[78] *See* Nora Chronowski, *Az Alkotmánybíráskodás Sarkalatos Átalakítása* 08 (MTA Law Working Papers, 2014).

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Constitutional Court and the procedural circumstances of the lawmaking procedure, the minority could almost never really exercise its right of motion for an ex ante control. The right of the minority was finally abolished in 1998 due to political interactions in the power struggle between the Constitutional Court and the Parliament.[79]

Regarding the extension of the right to initiate an ex-ante review to representatives of political majority, other critics are pleading for maintaining the exclusive right of the President of the Republic. But, due to political changes between 1994 and 1998, the *ex ante* review by the state President, who was politically allied with the ruling socialist/liberal parliamentary super majority, was not exercised.

The concerns about politicization expressed by the Venice Commission have not yet materialized.[80] The phase of the legislative process concerned is very short and similar to settled case law of the Constitutional Court.[81] According to the first recommendation of the Venice Commission, the *ex ante* review is only exercised after the law is adopted.[82] During the former period of the *ex ante* review from 1990 to 1998, after the Constitutional Court had clarified the procedural conditions in its judgment on 8 December 1992,[83] there were only two judgments initiated by motion of the parliament.[84]

More importantly, the exercise of this prerogative by the President has important implications for the system of checks and balances in Hungary. The Constitutional Court recently annulled provisions of the new Act on Election Procedure based on the petition of the President of Hungary—even though he had been appointed by the super majority of the Christian Democrats and Fidesz.[85]

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[79] *See* Gábor Spuller, *Der Einfluss des Verfassungsgerichts der Republik Ungarn im Gesetzgebungsverfahren des ungarischen Parlaments*, *in* 48 JAHRBUCH DES ÖFFENTLICHEN RECHTS 367, 386–389 (Peter Haeberle ed., 2000). This abolishment was due to the liberal/social majority.

[80] *See supra* note 49, at para. 25; *see also* Kriszta Kovács & Gábor Attila Tóth, *Hungary´s Constitutional Transformation*, 7 EUROPEAN CONSTITUTIONAL L. REV., 183, 201 (2011).

[81] *See* Venice Commission, *Remarks of the Hungarian Government*, COUNCIL OF EUROPE, 045, para. 45 (2012).

[82] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 6, § 2; *supra* note 29 at para. 45.

[83] *See* Alkotmánybíróság (AB) [Constitutional Court] ABHEK 92, 317 (1992).

[84] *See* SPULLER, *supra* note 79.

[85] *See* Alkotmánybíróság (AB) [Constitutional Court] ABH, Jan. 4, 2013, MK.I.7.1/2013. Beforehand, some Election rules were scrutinized by the Venice Commission as well. *See* Venice Commission, *Joint Opinion with the Council for Democratic Elections on the Act on the election of Members of Parliament of Hungary*, COUNCIL OF EUROPE, Opinion No. 662/2012, 012 (2012).

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According to settled cases of the Constitutional Court, this competence may be of importance in case of amendments to the founding European Treaties before they are enforced because after their ratification they are no longer regarded as international treaties in terms of the jurisdiction of the Constitutional Court.[86] In a recent decision under the Fundamental Law, the Constitutional Court pronounced a decision to continue qualifying amendments of the European Treaties prior to their national transformation by law as international treaties in order to exercise its ex ante review competence.[87]

Now, the Court could extend the scope and the basis of the *ex ante* review in an ex officio procedure to certain provisions regarding international treaties.[88] Competences like the resolution of legal disputes[89] and the control of the orders of autonomous self-governmental units[90] are more focused on constitutional affairs. Furthermore, as there are now no more standing orders of Parliament and Government to be reviewed by the Constitutional Court, the Constitutional Court will now be able to concentrate on real constitutional issues.

IV. Political Rulings: Irreplaceable and Equal Rights

Although the Constitutional Court's influence on the lawmaking procedure is weaker after the constitutional changes, it is still great because of its competence of ex ante and ex post review and the interpretation of the Constitution.

According to Hungarian constitutional law, the Constitutional Court is not irreplaceable, but in case of the Constitutional Court's abolition, a substitute must be created. The Constitutional Court could be abolished only by amendment of the Constitution. Then there must be an equivalent organ in order to guarantee the review of law because it is a requirement of the fundamental principle of the rule of law according the foundation rules of the new Constitution.[91]

[86] *See* Alkotmánybíróság (AB) [Constitutional Court], Apr. 28, 2008, MK.61/2008; ABHEK 546, 550 (2008).

[87] *See* Alkotmánybíróság (AB) [Constitutional Court] May 8, 2012, MK.22/2012, para. 58.

[88] *See* 1989. évi XXXII. törvény a Magyarország Alkotmánybírósága (Act XXXII of 1989 on the Constitutional Court) § 23.1.

[89] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 36.1.

[90] *See* 1989. évi XXXII. törvény a Magyarország Alkotmánybírósága (Act XXXII of 1989 on the Constitutional Court) § 37.1.

[91] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. B, § 1.

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V. Conclusion

Altogether we come to the following conclusion: As for the more constitutional guarantees of the Constitutional Court, their legal status is much clearer and better protected against political interference than before. The Constitutional Court is now more equivalent to other constitutional organs such as the government, parliament, and state president.

D. Is the Constitutional Court Still a Court Sui Generis and a Constitutional Organ Sui Generis?

Gábor Spuller asserted in 1998 that the Constitutional Court of Hungary is "enjoying as a court and a constitutional organ sui generis a leading position in the Hungarian state and constitutional order."[92] Due to the recent set of constitutional changes, this statement must be reassessed.

While the Federal Constitutional Court in Germany clearly assigns itself to the judiciary,[93] in Hungary this has not been the case until now. According to the foundational rules of the Constitution, the functioning of the state shall be based on the principle of separation of powers.[94] The wording of the old constitution lacked this specificity, albeit this principle was still applied according to the rulings of the Constitutional Court.[95] It is worthwhile to mention the fact of its being now regulated in the Fundamental Law as one of the fundamental rules of a state.

Yet, the principles of separation of powers and the three archetypes of state powers—legislative, executive, and judicial—are more clearly assigned to the Hungarian state organs and better enumerated in the Fundamental Law.

The chapters in the Fundamental Law on the president and the government as executive powers begin directly after the chapter on lawmaking powers—parliament and national votes. The Constitutional Court and the ordinary courts then follow as their controlling powers. In the 1949/1989 Constitution, the government's chapter was far away from the president's and the Constitutional Court's chapter was far away from that on the ordinary courts.

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[92] *See* SPULLER, *supra* note 16, at 395.

[93] *See* Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 2 BvB 2/51, 6 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 300, 304 (Mar. 21, 1957).

[94] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. II(1).

[95] *See* Alkotmánybíróság (AB) [Constitutional Court] ABHEK 1990, 136, 137 (describing the most important rule of organization and action of the Hungarian state organization).

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The scope of the constitutional control regarding the lawmaking organs is generally better clarified by restrictive provisions. The dominant role of the Constitutional Court regarding the lawmaking procedure of Parliament within the state organization has declined after the abolition of the actio popularis. Instead, the government seems to be more powerful.

As already mentioned above, although reduced, the influence of the Constitutional Court on the decision-making activities of parliament is still substantial, thanks to procedures such as action for failure to adopt legislative acts, ex ante and ex post review, and interpretation of the Constitution. The latter is used as well during preparation of a lawmaking procedure or of an enforcement of international treaties and may be of particular interest. Recently, there was a question regarding the nature of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. The Court held that in terms of Hungarian constitutional law, the Treaty has the same quality as an amending or founding treaty of the European Union.[96]

By taking into account now the relationships to other state organs, including the European institutions, new conclusions may be drawn concerning the actual legal place of the Constitutional Court in the constitutional order.

I. Relationship to the Ordinary Jurisdiction

One basis of the relationship to the ordinary jurisdiction was the ex post control of norms initiated by a judge.[97] This procedure of references for preliminary rulings is maintained in Section 25, which provides that:

> If a judge, in the course of the adjudication of a concrete case in progress, is bound to apply a legal regulation that he or she perceives to be contrary to the Fundamental Law, or which has already been declared to be contrary to the Fundamental Law by the Constitutional Court, the judge shall suspend the judicial proceedings and, in accordance with Article 24 (2) b) of the Fundamental Law, submit a petition for a declaration that the legal regulation or a provision thereof is contrary to the Fundamental Law, and/or the

[96] Alkotmánybíróság (AB) [Constitutional Court] May 8, 2012, ALKOTMÁNYBÍRÓSÁG HATÁROZAT [ABH] 22/2012. (V. 11.) (English translation available).

[97] *See* 1989. évi XXXII. törvény a Magyarország Alkotmánybírósága (Act XXXII of 1989 on the Constitutional Court) art. 38(1) (Hung.).

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> exclusion of the application of that legal regulation which is contrary to the Fundamental Law.[98]

But, furthermore, the power of review is extended to conflicts with international treaties.[99] According to the decision taken by the Constitutional Court in May 2011, the judge is obliged to initiate the procedure that goes directly to the Constitutional Court.[100] In addition, the Fourth Amendment introduces a new right for the President of the Supreme Court to initiate abstract constitutional control without specific interest.[101]

Article 6 of the Fifth Amendment changes Article 24(2)(b) of the Fundamental Law, which now provides that the Constitutional Court shall "review immediately but no later than ninety days any legal regulation applicable in a particular case for conformity with the Fundamental Law upon the proposal of any judge."

The Fifth Amendment introduces a deadline of ninety days in order to accelerate the procedure. However, although it is understandable that the proceedings before the ordinary courts should be sped up, this deadline still seems very tight.[102]

The further possibility of giving individuals a remedy to enforce their individual rights via constitutional complaint against unconstitutional laws was introduced very slowly and by pressure of the Constitutional Court. In addition to the criminal court's decision in 1999, there was at least a reopening of proceedings provided against civil courts decisions applying unconstitutional law.[103] But this remedy was used very restrictively because the provisions provided for the Constitutional Court were very exceptional.[104] Then, it took nearly five years to obtain a remedy against administrative proceedings. When the petitioner was successful, in general, only the first petitioner could get individual relief because of the applicability of the principle of res judicata.

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[98] 2011. évi CLI. törvény a Magyarország Alkotmánybírósága (Act CLI of 2011 on the Constitutional Court) § 25.

[99] *See* Aniko Raisz, *A Constitution's Environment, Environment in the Constitution—Process and Background of the New Hungarian Constitution*, Special Edition 1 REVUE EST EUROPA 37, 56 (2012), http://www.est-europa.univ-pau.fr/est-europa-la-revue/recherche/recherche-par-pays/209.html.

[100] *See* Alkotmánybíróság (AB) [Constitutional Court] May 6, 2011, ABH 35/2011. (V. 6.), pts. 1 and 3 (Hung.).

[101] A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 24(2)(e).

[102] *See* European Commission for Democracy through Law (Venice Commission), Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Opinion No. 720/2013, CDL-AD(2013) 012, para. 118 (June 17, 2013), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e.

[103] *See* TILK, *supra* note 31, at 91–92.

[104] *See* Nóra Chronowski, Tímea Drinóczi & József Petrétei, *The Governmental System of Hungary*, *in* GOVERNMENTAL SYSTEMS OF CENTRAL AND EASTERN EUROPEAN COUNTRIES 299, 360 (Nóra Chronowski et al. eds., 2011); *See infra* note 246.

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Altogether, due to the legal preconditions, up to 2011 this remedy was not as important in practice as the ex post review of legislative acts—actio popularis.[105] There had been in fact only a few ordinary court decisions reopened via constitutional complaint. In addition, the ordinary courts generally did not always follow the decisions of the Constitutional Court[106] because the Constitutional Court was implemented as a new institution outside the ordinary judiciary system.[107]

The influence of the Constitutional Court was weak in relation to the judicial branch because there was no constitutional review of court rulings. Due to the absence of a real constitutional complaint, there was a substantive failure to guarantee the individual enforcement of fundamental rights.[108] The Constitutional Court—in order to ensure constitutionality—exercised a certain interpretation of law, but some ordinary courts continued with the unconstitutional interpretation. There were no other legal means of redress available to the Constitutional Court than to annul the legal provision. In order to overcome the problem of non-application of the Constitutional Court's decision, the Hungarian Constitutional Court adopted the approach of the Italian Constitutional Court and developed the concept of diritto vivente (living law).[109]

The use of diritto vivente was criticized because it distorted the difficult relationship of the Constitutional Court to the lawmaker as well.[110]

Another problem arose concerning the constitutional review of the Supreme Court's normative decisions because these decisions are issued to secure the unity of judicial statutory interpretation. After years of hesitation, in 2005 the Constitutional Court decided to review the normative decisions of the Supreme Court.[111]

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[105] *See* BRUNNER & SÓLYOM, *supra* note 16, at 83; *see also* SPULLER, *supra* note 16, at 208–211.

[106] *See* András Sajó, *Contemporary Problems of the Judiciary in Hungary*, *in* THE SOCIAL ROLE OF THE LEGAL PROFESSION (1993); KÜPPER, *supra* note 10, at 83.

[107] *See* László Sólyom, *To the Tenth Anniversary of Constitutional Review*, *in* A MEGTALÁLT ALKOTMÁNY? A MAGYAR ALAPJOGI BÍRÁSKODÁS ELSŐ KILENC ÉVE (CONSTITUTION FOUND? THE FIRST DECADE OF HUNGARIAN CONSTITUTIONAL REVIEW ON FUNDAMENTAL RIGHTS) (Gábor Halmai ed., 2000); TILK, *supra* note 31, at 227–29.

[108] *See* ZOLL & SÓLYOM, *supra* note 17, at 39.

[109] *See* TILK, *supra* note 31, at 84; European Commission for Democracy through Law (Venice Commission), Study on Individual Access to Constitutional Justice, Opinion No. 538/2009, CDL-AD(2010)039rev., para. 212 (Jan. 27, 2011), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)039rev-e.

[110] *See* SPULLER, *supra* note 16, at 93–94.

[111] *See* Alkotmánybíróság (AB) [Constitutional Court] Dec. 13, 2005, ABH 42/2005. (XI. 14.) (Hung.); Péter Paczolay, *The Jurisdiction of the Hungarian Constitutional Court, Report for the Seminar: Models of Constitutional Jurisdiction, Ramallah*, *in* RAMALLAH, CDL-JU(2008)040 (2008).

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In order to solve this dilemma it was already proposed to consider a change of the focus of the competences.[112] The principle of constitutional unity in particular demands a control of judicial power as well. However, due to the overburden of applications via actio popularis, Hungary has been well advised to aim at a thoughtful restraint of jurisdiction concerning the legislative powers.

After the ratification of the Fundamental Law, we should emphasize the role of article 24. Subsection (2) items (c) and (d) of the Fundamental Law: These two provisions foresee now a constitutional complaint either concerning the constitutionality of the applied law (by the courts) or of the decision-making of the Courts.[113] This double path of constitutional complaint is to be welcomed because it definitively enforces individual rights.[114]

Although the Venice Commission stated that the distinction between the two procedures in the ACC needs further clarification,[115] as already pointed out, one of the reasons for this distinction is the progressive introduction of the constitutional complaint since the fall of the Iron Curtain. As this sort of constitutional complaint was retained by the ACC as a specialized procedure, meanwhile—now more than seven years later—the constitutional complaint against decision-making of the ordinary courts was added to relieve the workload of the European Court for Human Rights. The first-mentioned procedure has erga omnes effects of the ruling.[116]

Similar to the German regulation, all of its decisions on individual acts are binding for all state organs, when the applied norm is annulled. The former constraints preventing extension of the decision to other petitioners in pending cases, thus granting them relief, are successfully abolished. For the latter procedure, the provisions mentioned are not

[112] *See* SPULLER, *supra* note 16, at 382–85; *See also* Péter Paczolay, President of the Constitutional Court of Hungary in his Speech to the Hungarian Parliament (Mar. 22, 2011), *in* Special Edition 1 REVUE EST EUROPA 205 (Edina Posa trans., 2012).

[113] *See* A Magyar Köztársaság Alkotmánya [Constitution of the Republic of Hungary] art. 24(2)(c)–(d).

[114] *See* HERBERT KÜUPPER, UNGARNS VERFASSUNG VOM APR. 25, 2011 (HUNGARY'S CONSTITUTION FROM APR. 25, 2011) 167 (Frankfurt 2012).

[115] *See* Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, Opinion No. 665/2012, CDL-AD(2012)009, para. 26 (June 19, 2012), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)009-e.

[116] *See* 2011. évi CLI. törvény a Magyarország Alkotmánybírósága (Act CLI of 2011 on the Constitutional Court) § 39(1) (Hung.) ("Unless otherwise provided for by this Act, the decisions of the Constitutional Court are binding on everyone."); 2011. évi CLI. törvény a Magyarország Alkotmánybírósága (Act CLI of 2011 on the Constitutional Court) § 41(1) (Hung.) ("If the Constitutional Court, within the framework of proceedings specified in Sections 24 to 26, declares that any legal regulation in force or any provision thereof is contrary to the Fundamental Law, it shall annul the legal regulation or provision in whole or in part.").

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applicable, but the Constitutional Court has the competence to extend the invalidity of a particular court's decision to the decisions of other courts and authorities.[117]

Giving the citizen a real remedy by allowing him to effectively address a complaint is real progress, especially because beyond all the politicization of the EU, the European Union is above all a Union of citizens. Maintaining the distinction between the two procedural modes is a comprehensible way to incorporate earlier rulings of the Constitutional Court concerning the application of unconstitutional law and to develop its settled case law.

Now consistently reflecting a new relationship to the ordinary courts, the chapter in the Fundamental Law on the Constitutional Court is placed right before the chapter on the Courts.

In fact, due to the communist era, many judges applied law in a very literal manner in order to preserve freedom against the rulings of the communist party by exercising legal positivism. More than twenty years after the fall of the Iron Curtain, this approach will change according to the new interpretation rule of the Fundamental Law,[118] obliging the judges to apply the law in accordance with its goals and the Fundamental Law. Therefore, it is no surprise that, in the preface to the Act on the Constitutional Court, a remarkable principle was amended: The task of the Constitutional Court should also be to ensure the coherence of the legal system. From this point of view, a more consistent constitutional law system can be expected.

According to the first commentary of the basic law, "the modification in the competences of the Constitutional Court must result in a paradigm shift both in the judicial praxis and in constitutional adjudication."[119]

Although the Constitutional Court stays institutionally separate from the ordinary courts, the ACC is very clear in stating that the decisions of the Constitutional Court are also binding on ordinary courts "as to the constitutional issue."[120]

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[117] *See* 2011. évi CLI. törvény a Magyarország Alkotmánybírósága (Act CLI of 2011 on the Constitutional Court) § 43(4) (Hung.).

[118] *See* A Magyar Köztársaság Alkotmánya [Constitution of the Republic of Hungary] art. 28.

[119] LÓRÁNT CSINK & BALÁZS SCHANDA, THE BASIC LAW OF HUNGARY: A FIRST COMMENTARY 304 (Lóránt Csink et al. eds., 2011).

[120] 2011. évi CLI. törvény a Magyarország Alkotmánybírósága (Act CLI of 2011 on the Constitutional Court) § 43(3) (Hung.). The Venice Commission appreciates this provision. *See* European Commission for Democracy through Law (Venice Commission), Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, Opinion No. 665/2012, CDL(2012)037, para. 36 (May 29, 2012), http://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)037-e.

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Recently, the Constitutional Court reiterated that its control of the competence of the Kuria (Supreme Court) to secure judicial unity by means of normative decisions should not affect the independence of the ordinary judiciary. There is still a distance, but it is an open question as to whether and how this statement of the decision in 2005 will further be applied.[121]

The need for a more effective and consistent jurisdiction and protection of fundamental rights by means of better collaboration between the Constitutional Court and the ordinary courts is generally recognized.[122] While there is a stronger and broader control of the ordinary judiciary, there is also greater encouragement given to the ordinary judiciary to consult the Constitutional Court thanks to the accelerated preliminary rulings and the right to initiate abstract constitutional control. In the future, the relationship between the two institutions will be closer and better defined. The preliminary rulings and the constitutional complaints are guarantees for a better collaboration in order to ensure constitutional unity. In fact, in 2012 there was already a shift: While pending and newly started ex post review procedures dropped to 25, the constitutional complaints procedures increased significantly to 728 cases.[123]

II. Relationship to Parliament

Since the work of the Constitutional Court commenced, there has been always been a conflict between Parliament and the Government.[124] The institution of the Constitutional Court was an important part of the checks and balances of power in the Hungarian state organization. However, the balance has changed since 2010, and the Constitutional Court has been losing power with regard to legislative acts and as a constituent power, resulting in a new constitutional establishment as provided for in the Fundamental Law 2012.

The starting point of the Fundamental Law was a crisis prior to the 2010 elections, in which the former government had reigned despite its supporting party being in a minority position. There was a strong demand for new elections. Public budgetary debt was increasing rapidly. After the elections, the new government had to tackle huge public finance problems in order to comply with the European criteria for state budgets. There did not seem to be many means to resolve the issue. In this extraordinary situation, a

[121] *See* Alkotmánybíróság (AB) [Constitutional Court] June 17, 2013, ABH 13/2013 (VI. 17.) (points 2–3 and dissenting opinion of Béla Pokol, para. 148).

[122] *See* Nóra Chronowski, Tímea Drinóczi & József Petrétei, *Multidimensional Protection of Universal Human Rights in Hungary*, *in* THE UNIVERSALISM OF HUMAN RIGHTS 371, 387 (Rainer Arnold ed., 2013).

[123] In 1995, there were 390 new cases of ex-post control and 20 new cases of constitutional complaint. *See* THE CONSTITUTIONAL COURT OF HUNGARY, STATISTICS (1995), http://www.alkotmanybirosag.hu/dokumentumok/statisztika.

[124] *See* SPULLER, *supra* note 16, at 391.

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serious conflict between the Constitutional Court and the new government and Parliament arose because the new government and Parliament undertook strict financial measures that violated the constitution.[125]

In summary, there had previously been conflict due to the broad competences of the Constitutional Court. In addition, because of the lack of any real control of the practice of the ordinary courts, the Constitutional Court tried to enlarge its competences through the concept of diritto vivente. In this way, the Constitutional Court added a supplementary possibility of nullifying legal norms, thus actually deepening the conflict with the legislature. Because Hungary is a unitary state and there is no vertical separation of powers, the Constitutional Court was said to be a fourth power guaranteeing the checks and balances in the Hungarian State.

Once again, as in 1998, Parliament started to change the rules in reaction to uncomfortable decisions of the Constitutional Court. As the government decided to introduce a "crisis tax" imposed on banks, foreign retail, and telecommunication firms, the majority of Parliament had again expected a constitutional decision annulling this new tax. Therefore, the Parliament decided to preventively limit the scope of the Constitutional Court in order to find a solution in this crucial situation.

This was the first time such a conflict resulted in an amendment of the 1949/1989 Constitution together with the former Act on the Constitutional Court, which refers quite explicitly to the Constitutional Court's competences. This law reduced the full scope of control over the constitutionality of the budget and tax legislation. From then on, Parliament's acts could only be annulled by the Constitutional Court if they violated the right to life and dignity, the right to protect personal data, or the rights to freedom of thought, conscience, or religion, and the rights relating to Hungarian citizenship.[126]

This procedural limitation was introduced when the Lisbon Treaty was already effective. There were many petitions against these amendments before the Constitutional Court seeking to annul them. But the Constitutional Court rejected the petitions for examination of the conflict with a treaty of the European Union as unreviewable.

The Hungarian State has to guarantee compliance with international Treaties.[127] The petitioners stated that the European Treaties, especially the Lisbon Treaty, are to be regarded as international treaties under the present constitution and alleged a violation of the European Treaties—for example, rule of law—by the contested amendments.

[125] *See* KOVÁCS & TÓTH, *supra* note 80, at 192–95.

[126] *See* Law No. 119/2010.

[127] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 7(1) (codified in The Fundamental Law of Hungary (2011) art. Q(2)).

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However, the Constitutional Court has established that the founding and amending treaties of the European Union are not considered treaties under international law in respect to establishing the competence of the Constitutional Court, but that these treaties as European Union law are part of the domestic law because Hungary has been a Member State of the European Union since 1 May 2004. In effect, with regard to the competence of the Constitutional Court, domestic law is not considered international law.[128]

Nevertheless, there was a constitutional review on the merits of these amendments under the measures of Hungarian law and of the 1949/1989 Constitution. In its judgment of 11 July 2011, the Constitutional Court abstained from disrespecting settled case law and did not repeal these amendments because there is no power to review amendments of the constitution, at least substantially.[129]

This decision was crucial for the future of the constitutional review because, on the one hand, it became obvious that the power of the Constitutional Court to act against reductions of its competences is limited, but, on the other hand, the Constitutional Court made an appeal to the Parliament and Government highlighting the boundaries of their power. It held that there are still at least some formal constraints because the Constitutional Court expressed serious concerns about the lawmaking procedure.[130]

During the new legislative period, a new lawmaking practice was introduced and the constitution was changed nine times in two months. These amendments were almost entirely initiated by single members of the pro-government parliamentary group in order to accelerate the procedures. There was no time allowed for the special Parliamentary Committee to gather information, identify problems, and assess the possible results.

The Constitutional Court stated that these serial amendments of the Constitution in the interest of current political ideas are worrisome in terms of the democratic rule of law, constitutional stability and consistency, legal predictability, and general civil legitimacy.[131] The Constitutional Court pointed out that these principles are to be maintained during the remaining term of validity of the 1949/1989 Constitution, although there was already a

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[128] *See id.*; Alkotmánybíróság (AB) [Constitutional Court] July 13, 2011, ABH 72/2006. (XII. 15.); Alkotmánybíróság (AB) [Constitutional Court] 2006 ABHEK 819, 861 (English translation available at http://mkab.hu/case-law/translations).

[129] In contrast to the Constitutional Court of Romania, see Valentina Bărbăţeanu, *The Influence of the Constitutional Jurisdictions on the Basic Laws*, 2 LEX ET SCIENTIA INT'L J. 137 (2012).

[130] *See* Alkotmánybíróság határozat (ABH) [Constitutional Court] July 13, 2011, 61/2011. (VII. 13.).

[131] *See id.*

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new constitution promulgated on 25 April 2011, which would take effect on 1 January 2012.[132]

However, it conceded as well that the Constitutional Court was not reviewing the current political aspects, and that the procedures complied with the formal provisions provided by the Constitution and the law, abstaining from nullifying the amendments.

These amendments were essentially maintained under the Fundamental Law. Again under jurisdiction of European law, the question may be raised of whether fundamental principles of the European Union or the Council of Europe, like the rule of law according to Article 2 TEU or Article 3 of the 1949 Statute of the Council of Europe, are threatened by the restriction of the scope of the Constitutional Court review regarding financial provisions. This question lies at the heart of European constitutional discussions.

In Hungary, there is at least still attention paid to minimum criteria such as human dignity. This core value is first mentioned in Article 2 TEU. In addition, the Constitutional Court may at least annul the financial provisions where there is a lack of compliance with procedural rules.[133] Even at the fundamental level of the protection of human dignity, which is the main principle in Article 2 TEU or Article 3 of the 1949 Statute of the Council of Europe, local interpretations may exist. For example, in a preliminary ruling, the ECJ recognized the compatibility with the Treaty when a killing game may be prohibited in Germany on the ground that it violates human dignity according to the interpretation of the national constitution by Germany's Federal Constitutional Court.[134] That interpretation of human dignity is very similar to that of the Constitutional Court of Germany.[135] But this decision was far more than adaptation.[136]

The Hungarian Constitutional Court was still following its developed principles when it reiterated in 2011 that retroactive taxation violates human dignity.[137] The new constitutional requirement that all human rights must be interpreted in accordance with

[132] *See id.*

[133] *See* A Magyar Köztársaság Alkotmánya [Constitution of the Republic of Hungary] art. 37, § 4.

[134] *See* Omega Spielhallen- und Autmatenaufstellungs-gmbH v. Oberbürgermeisterin der Bundesstadt Bonn, CJEU Case C-36/02, 2004 E.C.R. 1-9609.

[135] *See* Catherine Dupré, *Importing German Law: The Interpretation of the Right to Human Dignity by the Hungarian Constitutional Court*, 46 OSTEUROPARECHT 145 (2000).

[136] *See* László Sólyom, *The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary*, 18 INT'L SOC. 133, 145 (2003).

[137] *See* Alkotmánybíróság határozat (ABH) [Constitutional Court] May 3, 2011, 37/2011 (V. 10.) chs. 3–4.

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the National Avowal has given rise to some scholarly concern.[138] The National Avowal is the Preamble of the new Constitution. It contains numerous national, historical, and cultural references, such as to the Holy Crown, Christianity, and the historical constitution. Dupré stated that a new constitutional requirement of interpretation as a constitutional principle would diverge from European standards of human rights.[139] These concerns have not so far materialized. Recently, the Constitutional Court clearly stated that it will interpret the Constitution in accordance with the European heritage of common values.[140] In order to safeguard the continuity of its settled case law, it is to be expected that the Constitutional Court will follow the European standard of its former decisions.[141]

There is no reason, with regard to Article 2 TEU, to initiate a procedure against Hungary either for an action for infringement of the Treaty brought by the Commission under Article 258 TFEU, nor according to an Article 7 by motion of the European Council, nor under Article 8 of the 1949 Statute of the Council of Europe solely because of the limitation of the reviewability of the Constitutional Court of budgetary measures. [142]

As for the Constitutional Court, it did not annul this provision and the European Courts must at least take its decision into account by respecting the national identity of the Member State.[143] Of course, some of these budgetary measures could fall within the scope of the ECJ as well. This is not actually mere theory: The European Commission considers the telecommunication tax illegal because EU rules do not allow sector-specific charges for the purposes of generating additional revenue.[144]

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[138] *See* Catherine Dupré, *Human Dignity: Rhetoric, Protection and Instrumentalisation*, *in* CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW 143, 146 (Gábor Attila Tóth ed., 2012).

[139] *See* Catherine Dupré, *La Dignité Humaine dans la Loi Fondamentale Hongroise de 2012* (*Human Dignity in the Hungarian Fundamental Law of 2012*), 1 REVUE EST EUROPA 89, 95 (2012), http://www.est-europa.univ-pau.fr/images/archives/2012-Hongrie/catherine-dupre.pdf.

[140] Alkotmánybíróság (AB) [Constitutional Court] May 21, 2013, II/648/2013, http://www.mkab.hu/download.php?h=492.

[141] *See infra* note 142.

[142] That is why the discussion as to whether the infringement procedure could concur with the EU Art 7 TEU Mechanism could be disregarded. Article 2 TEU contains no power-conferring provision, and so cannot be used as legal basis for a decision in the framework of an infringement procedure. *See* ALAIN DASHWOOD, MICHAEL DOUGAN, BERRY RODGER, ELEANOR SPAVENTA & DERRICK WYATT, EUROPEAN UNION LAW 99 (2011).

[143] *See* Treaty on European Union, Mar. 3, 2010, 2010 O.J. (C 83) 1, art. 4(2).

[144] *See* Opinion of Advocate General Kokott, Hervis Sport- és Divatkereskedelmi Kft. V. Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Föigazgatósága, CJEU Case C-385/12, (Sept. 5, 2013), http://curia.europa.eu/juris/document/document.jsf?text=&docid=140629&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=716328; CJEU Case HU 2011/4194 TAXU (discriminating special retail tax); CJEU Case HU 2012/2103 (discriminating special telecommunication tax), http://europa.eu/rapid/press-release_IP-12-286_en.htm?locale=en.

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Returning to the wording of the new constitution, the Fundamental Law improved the legal situation by introducing a temporary limit of the reduction of the full scope of control over the constitutionality of the budget and tax legislation and extending the scope of control to procedural provisions. From then on, the Constitutional Court could no longer control legislative acts or sub-legislative legal norms due to violation of the financial provisions of the constitution, as long as state debt exceeds half of the Gross Domestic Product.[145] Constitutionally, however, there is the exception of an ex ante review.[146]

But still, this provision seems to be inconsistent because there is no clear and understandable reason for the limited scope of control and the enumeration of the applicable fundamental rights.[147] It would appear to be only of a procedural nature because via the *ex ante* review the Constitutional Court is still empowered to fully review these matters.

It is an open question how and whether by the constitutional complaint against judicial decisions according to Section 27 ACC[148] there could be a full review as well, because Section 41.2 in conjunction with Section 41.1 ACC[149] exonerates this procedure from the restriction, which was not in fact intended by the constitutional provision of Article 37 subsequent 4 of the Fundamental Law.

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[145] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] § 37(4).

[146] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 24(2).

[147] *See* Catherine Dupré, *Human Dignity: Rhetoric, Protection and Instrumentalisation*, *in* CONSTITUTION FOR A DISUNITED NATION: ON HUNGARY'S 2011 FUNDAMENTAL LAW 143, 160 (Gábor Attila Tóth ed., 2012).

[148] *See* 2011. évi CLI. törvény a Magyarország Alkotmánybírósága (Act CLI of 2011 on the Constitutional Court) § 27. Section 27 of ACC provides:

In accordance with Article 24 (2) d) of the Fundamental Law, persons or organizations affected by judicial decisions contrary to the Fundamental law may submit a constitutional complaint to the Constitutional Court if the decision made regarding the merits of the case or other decision terminating the judicial proceedings

a) violates their rights laid down in the Fundamental Law, and

b) the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her.

[149] *See* 2011. évi CLI. törvény a Magyarország Alkotmánybírósága (Act CLI of 2011 on the Constitutional Court) § 41 (Hung.). Section 41 of ACC provides:

(1) If the Constitutional Court, within the framework of proceedings specified in Sections 24 to 26 declares that any legal regulation in force or any provision thereof is contrary to the Fundamental Law, it shall annul the legal regulation or provision in whole or in part.

(2) Paragraph (1) shall be applied subject to the exceptions and conditions set forth in Article 37 (4) of the Fundamental Law.

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Because of the deep financial crisis, there is a fundamental question of how to balance the protected interests, especially in the first chapter of the Fundamental Law as between the rule of law[150] and the rule of financial stability.[151] As the financial crisis is endangering the European Union, this may be of particular interest. The economic aspect of constitutional law has been not assessed yet.[152] Indeed, the limitation of reviewability could be acceptable, if the period is really temporary.

There are, in fact, strict conditions for reestablishing the public finances because the Parliament is obliged to turn to the state of the art as soon as possible: To begin with, there is a ban on the adoption of central budget acts that would result in the state deficit exceeding half of the Gross Domestic Product.[153] When an excess has occurred, Parliament may only adopt an act on the central budget that provides for a reduction of the state debt in proportion to the Gross Domestic Product.[154] In order to maintain these provisions, an act on the central budget needs the approval of the Budget Council.[155] This institution partly substitutes for the constitutional control by a judiciary body on budgeting. As there is less interest in current politics in responsible management of public finance, this newly-established institution is a watchdog for future generations. The experts involved are all economists, thus a sustainable public finance is guaranteed.

Parliament could deviate from the above-mentioned provisions only for special legal orders, such as a national defense crisis, or if there is a significant and enduring national economic recession.[156] These exceptions are restricted.

In the case of a special legal order, there is a strict regulation that fully maintains the functions of the Constitutional Court.[157] This appears to be a contradiction to the general

[150] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. B(1).

[151] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. N(1).

[152] Some information and evaluation of the Hungarian economic measures can be found in: László Csaba, *Growth, Crisis Management and the EU: The Hungarian Trilemma*, 53 SÜDOSTEUROPA MITTEILUNGEN 116 (2013).

[153] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] § 36(4).

[154] *See id.* at art. 36(5).

[155] *See id.* at art. 44(3).

[156] *See id.* at art. 36(6).

[157] *See id.* at art. 54(2).

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limitation of the scope of the Constitutional Court concerning the financial measures as long as the state debts exceed half of the Gross Domestic Product.[158]

When Parliament disregards Article 36 (6) of the Fundamental Law, there is no approval by the Budget Council of the Budget Act, and the President of State is empowered to dissolve Parliament.[159] Thus, the Constitutional Court has no power to scrutinize these financial duties of Parliament because that would be contradictory to the institution of the Budget Council.[160]

These first concerns were confirmed because, under the Transitory Provisions, even when the budget situation has improved beyond that target, acts passed in this period are not subject to the supervision of the Constitutional Court.[161] This meant that all those provisions promulgated in this period would never have undergone a constitutional review.[162] But in its judgment of 28 December 2012, the Constitutional Court annulled main parts of the Transitory Provision, including Article 27, although it had constitutional connotations.[163]

Regarding the ongoing practice of the Parliament and the Government of changing the rules and amending semi-constitutional provisions like the Transitory Provisions, this judgment stated that Parliament had exceeded its authority when it enacted such delegated constitutional acts as were not of a transitional character. Whereas the Constitutional Court, in line with its consistent practice, did not examine the constitutionality of the content of the Fundamental Law and the Transitional Provisions, it held that, in acting as constitution-maker, the Hungarian Parliament had infringed on "essential procedural requirements." In its reasoning, the Constitutional Court, while

[158] *See* Catherine Dupré, *La Dignité Humaine dans la Loi Fondamentale Hongroise de 2012* (*Human Dignity in the Hungarian Fundamental Law of 2012*), 1 REVUE EST EUROPA 89, 104 (2012), http://www.est-europa.univ-pau.fr/images/archives/2012-Hongrie/catherine-dupre.pdf.

[159] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 3(3)(b).

[160] *See* Alkotmánybíróság (AB) [Constitutional Court] Dec. 28, 2012, AB 45/2012. (XII. 29.), http://www.mkab.hu/letoltesek/en_0045_2012.pdf.

[161] *See* The Act on the Transitional Provisions of the Fundamental Law (2011) art. 27.

[162] The Venice Commission is very critical at this point. *See* European Commission for Democracy through Law (Venice Commission), Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, Opinion No. 665/2012, CDL(2012)037, para. 38 (May 29, 2012), http://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)037-e.; Venice Commission, Remarks of the Hungarian Government on the Draft Opinion on ACT CLI of 2011 on the Constitutional Court of Hungary, Opinion 655/2012, CDL(2012)045, p. 8 (June 19, 2011), http://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)045-e.

[163] *See* Alkotmánybíróság (AB) [Constitutional Court] Dec. 28, 2012, ABH 45/2012. (XII. 29.), http://www.mkab.hu/letoltesek/en_0045_2012.pdf (Hung.).

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seemingly examining the merits of the Transitional Provisions, stated that these had created a kind of hidden "small constitution," which gave rise to misuse by creating a kind of "no-man's land of public law," which circumvented constitutional review.[164]

But in fact, it was the consistent result of the announcement, mentioned above, in its decision in 2011,[165] where the Constitutional Court had already pointed out the limits of the parliament and government in terms of competences and formal requirements.[166] Most importantly, the Constitutional Court was referring to its institutional role within the State organization as the highest organ of constitutional protection, which was finally recognized and affirmed by the Fundamental Law.

Similarly, the European Court of Justice has extended the scope of its review concerning treaty amendments, although its jurisdiction was contested by nine Member States and other European institutions such as the European Commission. The Lisbon Treaty introduced a new mechanism for amending treaties. These self-executing amendment procedures in European Union law create new institutional relationships between the European institutions and the Member States. The Court therefore held that it has to supervise these revision procedures regarding the requirements of the Treaties.[167]

Both decisions are crucial and demonstrate how the Courts play their roles within institutional checks and balances. In Hungary, the controversy between the Constitutional Court and the Parliament as a constitutional power is ongoing. The Fourth Amendment of the Fundamental Law is part of this conflict, which is deeply rooted in the traditional decision-making of the Constitutional Court after the fall of the Iron Curtain and in the attempt of the government to overrule the Constitutional Court. Due to the shortcomings of the provisional 1949/1989 Constitution and the agony of Parliament, the Constitutional Court acted as substitutive constituent power.

Now the majority of Parliament is taking its role as a constitutional power very seriously and is trying to further extend this power. The Venice Commission, however, stated that the consistent pattern of reacting with constitutional amendments to the rulings of the

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[164] *See* Alkotmánybíróság (AB) [Constitutional Court] Dec. 28, 2012, 45/2012. (XII. 29.) *über die partielle Verfassungswidrigkeit des Grundgesetz-Einführungsgesetz*, http://www.mkab.hu/letoltesek/en_0045_2012.pdf (regarding the unconstitutionality and annulment of certain provisions of the Transitional Provisions of the Fundamental Law of Hungary); *see also* Herbert Küpper, *Translation of Decision 45/2012 with Commentary*, 54 JAHRBUCH FÜR OSTRECHT 238–281 (2013).

[165] *See supra* note 132.

[166] *See id.*

[167] *See* Pringle v. Ireland, CJEU Case C-370/12, paras. 30–37 (July 21, 2012), http://curia.europa.eu/juris/liste.jsf?num=C-370/12. Reference the Supreme Court of Ireland for a preliminary ruling.

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Constitutional Court is resulting in an infringement of democratic checks and balances and on the principle of separation of powers.[168] That is why the Government drafted the Fifth Amendment—in order to accommodate the recent critics.

The Hungarian Parliament annulled the earlier decisions of the Constitutional Court made before the enforcement of the Fundamental Law.[169] This amendment states that "Constitutional Court rulings delivered prior to the entry into force of the Fundamental Law are hereby *repealed*. This provision is without prejudice to the legal effect produced by those rulings" (emphasis added).

To understand this new provision, one must look back to the former decisions of the Constitutional Court: Indeed, the exact meaning of the term "repeal" in the context of judicial decisions is not clear.

During the period from 1989 to 2011, the Constitutional Court interpreted itself as the protector of the paradoxical revolution of the rule of law[170] because the laws made by the communists before the revision of 1989 remained in force under the new constitutional order.

In 1992 the Constitutional Court stated, "in the process of achieving the rule of law, beginning with the Constitution and manifesting itself in the peaceful change of system, the Constitutional Court, within its powers, must unconditionally guarantee the conformity of the legislative power with the Constitution."

The pre-revision law was transformed by the rule of law. The revolution took place via the institutional transformation into the new order.

It is remarkable that, even regarding the Constitutional Law before the revision of 1989, the Constitutional Court consistently followed its principle of rule of law as it operated with the First Amendment of the 1949 Constitution in 1972.[171] This was part of the process of reestablishing the authority of the law in Hungary because during the communist era the law had no real value.[172]

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[168] *See* European Commission for Democracy through Law (Venice Commission), Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Opinion No. 720/2013, CDL-AD (2013)012, paras. 81, 87 (June 17, 2013), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e.

[169] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 19, amend. IV, para. 2.

[170] *See* Alkotmánybíróság (AB) [Constitutional Court] Mar. 3, 1992, ABH 11/1992. (III. 5.).

[171] *See* Alkotmánybíróság (AB) [Constitutional Court] Feb. 16, 2004, ABH 3/2004. (II. 17.) IV. 1.4; Alkotmánybíróság (AB) [Constitutional Court] Mar. 11, 2008, 32/2008. (III. 12) V. 1.

[172] *See* LÁSZLÓ SÓLYOM, *supra* note 107, at 139.

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It is essential to point out the legal place of the closing and miscellaneous provisions, which mainly implemented transitional provisions.[173] The main purpose of the Fourth Amendment is to insert the transitional provisions into the Constitution after the Constitutional Court repealed them due to procedural provisions. There is now an overall and comprehensive regulation regarding the prior Constitution. All of the constitutional provisions prior to the Fundamental Law are repealed.[174] The intent of the amendment was to establish a new starting point for constitutional history while taking due account of the main principles of legal transition and continuity. In this way, it clarifies the relationship of the Constitutional Court to its legacy.[175]

Indeed, lately the Constitutional Court has reiterated its statement very clearly by quoting a prior decision that it will go on to refer to its settled case law.[176] In this crucial decision, it rejected the idea of assigning its former decisions to the achievements of the Hungarian historical constitution.[177] This would equate the former decisions of the Hungarian Constitutional Court with the historical decisions of the Courts under the monarchy and therefore devaluate their status. Instead it stated that it will still follow the European developments of modern democratic states.

However, all of the decisions made after the Fundamental Law quote older decisions, at least insofar as these older decisions referred to are incorporated in the Hungarian public law.[178] On the other hand, the Parliament recognized the power of the Constitutional Court to control the procedure of the adoption of the Fundamental Law and its amendments by the Fourth Amendment, although it excluded substantive control of constitutional amendments. In the exclusion, Parliament is following settled case law of the

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[173] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 19, amend. IV, para. 2.

[174] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 20(26).

[175] *See* Delpérée, *supra* note 7 .

[176] *See* Alkotmánybíróság (AB) [Constitutional Court] June 17, 2013, ABH 13/2013. (VI. 17.) no. 28 (quoting 22/2012 V. 11) (Hung.).

[177] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. R(3) (formulating this idea). This idea, set out in Venice Commission Opinion 720/2013 on the same day, was followed by the dissenting opinions of judges Imre Juhász and István Balsai, Nr. 202. *See* European Commission for Democracy through Law (Venice Commission), Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Opinion No. 720/2013, CDL-AD (2013)012, para. 99 (June 17, 2013), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e. *See also* Alkotmánybíróság (AB) [Constitutional Court] June 17, 2013, ABH 13/2013. (VI. 17.) (Balsai, J., dissenting) (Juhász, J., dissenting).

[178] *See, e.g.*, Alkotmánybíróság (AB) [Constitutional Court] Dec. 28, 2012, ABH 45/2012. (XII. 29.), http://www.mkab.hu/letoltesek/en_0045_2012.pdf.

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Constitutional Court, in which it has previously stated that there is no review of amendments to the constitution.[179]

There are concerns in the European institutions about other substantive changes to the Constitution by the Fourth Amendment because the Hungarian Parliament was accused of trying to overrule recent decisions of the Constitutional Court. The Venice Commission stated: "A series of provisions of the Fourth Amendment raise issues to the constitutional level as a reaction to earlier decisions of the Constitutional Court."[180]

The rapporteur of the European Parliament considers that the Constitutional Court can no longer "fulfill its role as the supreme body of constitutional protection as the legislature is now entitled to modify the Fundamental Law as it wishes even in the case of constitutional amendments contradicting other constitutional requirements and principles."[181]

The Hungarian Commissioner for Fundamental Rights has initiated a constitutional review of some of the incriminated provisions and the Constitutional Court has recently reviewed their constitutionality.[182] The scope of this review did not cover the provisions regarding the Constitutional Court. But this decision seems to be very crucial, because the Constitutional Court pointed out that the constitutional power has to take account of international and European obligations. This decision was the starting point of the Government's efforts to close the national and international discussions by adopting the Fifth Amendment.[183]

A question of particular interest is whether there is already a European heritage of values, which determine the national constitutional reality and exercise. Due to the variety of the constitutional principles of the Member States, such a heritage may be difficult to define but not to exclude, especially due to further European integration.[184] In fact, the European Union has laid down common constitutional principles for the Union and the Member States which may fall under the jurisdiction of the ECJ. The Constitutional Court has stated

[179] *See* Alkotmánybíróság (AB) [Constitutional Court] 23/1994. (IV. 29.) (ABHek 94, 275).

[180] European Commission for Democracy through Law (Venice Commission), Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Opinion No. 720/2013, CDL-AD (2013)012, para. 144 (June 17, 2013), http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)012-e.

[181] Rui Tavares, MEP, Eur. Parl. Comm. of Civil Liberties, Justice, and Home Affairs, *Draft Report on the Situation of Fundamental Rights: Standards and Practices in Hungary*, 20 (May 2, 2013), *available at* http://www.europarl.europa.eu/committees/en/libe/draft-reports.html#menuzone.

[182] *See* Alkotmánybíróság (AB) [Constitutional Court] May 21, 2013, II/648/2013.

[183] *See* Tibor Navracsics, Min. of Admin. & Justice, Draft T/12015, 5 (Aug. 2013).

[184] *See* Mark Dawson and Elise Muir, *Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law*, 14 GERMAN L.J. 1959 (2013).

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that there are boundaries to the constituent power arising from the international treaties and EU membership. These obligations, together with the fundamental principles and values, compose a coherent system that cannot be left out of consideration during any constitutional examination of the Constitutional Court in the future.

It is to be hoped that the Fifth Amendment, which partly reestablishes rulings of the Constitutional Court, is now at a turning point. During the voting process of the Fifth Amendment, there was a proposal of the opposition in order to avoid the pattern of rejecting Constitutional Courts rulings by amending the constitution, but the majority rejected it.[185] In case the majority continues to overrule the Constitutional Court by constitutionalizing, further investigation is needed to check the rule of law because stability and predictability seem to be affected.

Indeed, Fidesz' former concept of the Nineties with regard to the need for a new constitution would now amount to a blatant power struggle with the Constitutional Court. The supremacy of Parliament alone does not justify overruling judicial decisions by any available means. Although the prior decisions of the Constitutional Court were rendered in an inconsistent constitutional order, the juridical heritage of twenty-one years of the "revolution of the rule of law" should not be endangered.

The simple fact that there is already a fifth amendment after the ratification of the new constitution is not worrying. The Fifth Amendment was more or less a correction of the Fourth Amendment. Altogether four amendments in a row alone are not a sign of decreasing stability of the new constitution. For example, during the fifth legislature of Germany there were twelve constitutional amendments adopted and the French constitution of 1958 had twenty-four modifications altogether.[186]

So far the current establishment of the Fundamental law and the Act on the Constitutional law is not infringing European Law, although it weakens the former powerful status of the Constitutional Court in order to strengthen the role of the Parliament.

III. Relationship to the Government

The relationship to the government is also affected by the above-mentioned rules concerning public finances. In addition, the former Act on the Constitutional Court also assigned the task of posterior constitutional review of other legal means of state administration to the Constitutional Court.[187] Happily, this superfluous competence has

[185]*See generally* Hungarian Parliament's Public Information Center, http://www.parlament.hu.

[186] *See* Galharague, *supra* note 6.

[187] *See* 1989. évi XXXII. törvény a Magyarország Alkotmánybírósága (Act XXXII of 1989 on the Constitutional Court)§ 1(b).

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now been abolished and the ordinary judicial system exercises at least some control of such measures.

The government has to accept the proposal of the Constitutional Court concerning the yearly state budget. Only Parliament itself may make changes to this.

Regarding the procedures of the Constitutional Court, there are a great number that could be initiated by Government such as the *ex ante* and *ex post* review, the interpretation of the Constitution, and the review of compliance with international treaties. There is still a lot of tension because the power of the Government is currently very strong. As already mentioned, due to the current weakness and division of the opposition, the parliamentary lawmaking procedures are controlled by the Government.

IV. Relationship to European Union Lawmaking Institutions

The relationship to European Union lawmaking institutions (European Council, European Parliament, European Commission) is determined by the question of supremacy, whether of the national constitution or of European Union law. The main part of the wording of the new constitution concerning the European Union is mostly identical to that of the 1949/1989 Constitution, which stems from the 2002 accession preparatory period.

The scope for review of constitutional conditions for the European or Hungarian lawmaking institutions in terms of EU-Integration and harmonization is an open question. Meanwhile in Germany, the Federal Constitutional Court has viewed EU-Integration with criticism or, more recently, with the so called "safety net responsibility."[188] In Hungary, in spite of its general judicial activism, the Constitutional Court has been reserved about revealing its opinion.[189]

Prior to the accession of Hungary to the EU, starting in 1998 by declaring a provision concerning the adaptation of European Union Law as a third country unconstitutional, the Constitutional Court was very early in demanding that every exercise of public power such as that of the European institutions must be traced back to the sovereign nation.[190] Indeed, the Constitutional Court assessed the constitutionality of a provision of the Europe Agreement signed in Brussels on 16 December 1991 establishing an association between

[188] *See* SCHLAICH & KORIOTH, *supra* note 63, at para. 358–69.

[189] *See* László Blutman & Norá Chronowski, *Hungarian Constitutional Court: Keeping Aloof from European Union Law*, 3 VIENNA J. ON INT'L CONST. L., 329 (2011).

[190] *See* Alkotmánybíróság (AB) [Constitutional Court] June 1998. 30/1998 (VI.25.), 234.

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the Republic of Hungary and the European Communities and their Member States to prepare the accession of Hungary to the European Communities.[191]

According to this Agreement, the current EU Competition law had to be applied by Hungarian authorities. In the pre-accession period, the Constitutional Court treated the Europe Agreement as a traditional international treaty and stated a constitutional requirement that the Hungarian executive authorities could not directly apply the implementing criteria of European Union Law. Further, the Constitutional Court suspended the effectiveness of such provisions as long as there was no special constitutional authorization. As a result of this decision, the accession clause was implemented in the constitution.

Following the accession of Hungary, European Union law became part of the Hungarian legal system.

1. Primary Law

Before the Fundamental Law, the Constitutional Court could review the amendments of the founding Treaties. The Treaties of the European Union and their amendments after national transformation did, according to the ruling of the Constitutional Court, have a double nature in the Hungarian law order. They do not automatically form part of the Hungarian law because they need appropriate national legislation or a transformation act to have force of law domestically.

On the one hand, the Constitutional Court treated them as international treaties and therefore the promulgating law could, to a certain extent, undergo a constitutional *ex post* review.[192] In case of unconstitutionality, the Constitutional Court could require the government or the lawmaker to take the necessary steps to resolve the conflict. These legal consequences were the results of the Constitutional Court's competences in the procedures either of examination of conflicts with international treaties or the *ex post* review and the constitutional mandate of harmonization of international law and domestic law, which are derived from the Constitution.

According to the 1949/1989 Constitution, the Constitutional Court stated that the *ex post* review should be exercised in a universal manner including any type of legal rule. Thus laws promulgating international treaties were not intended to be excluded from constitutional

[191] *See* European Agreement between the Republic of Hungary and the Other Part of the European Community, Hung.-Eur. Un. Member States, Dec. 16, 1991, *available at* http://www.1000ev.hu/index.php?a=3¶m=9059.

[192] *See* Alkotmánybíróság (AB) [Constitutional Court]. 143/2010, VII. 14 (scrutinizing the Lisbon Treaty).

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control.[193] Although the Fundamental Law changed the rules and abolished the *actio popularis*, it is to be expected that the Constitutional Court will continue to apply this rule. It is a general requirement of the Constitution for the Constitutional Court to complete its tasks concerning constitutional case law. Article 24.1 of the Fundamental Law states, "The Constitutional Court shall be the principal organ for the protection of the Fundamental Law."[194]

The ACC has implemented the settled case law concerning the constitutional *ex post* review of international treaties in Section 42.2 ACC as a special case, when there is a conflict between the promulgated law and higher ranking law like constitutional provisions. The legal effects of the decisions are different according to the level of the scrutinized national law: If it is higher ranking than the promulgated law, the competent lawmaker is called on to resolve the conflict.[195] If it is lower ranking, the Constitutional Court has the power to nullify it.[196] Concerning the examination of conflicts with international treaties, the wording of Section 42.2 ACC is to be seen in comparison to Section 42.1 ACC.[197] In any case, the control of the promulgating laws does not affect the international obligations of Hungary.

According to the first judgment of the Constitutional Court in 1998, the principles of democracy, rule of law, and the national sovereignty are decisive measures during the constitutional review. Twelve years later, after its first decision concerning European Union law, the Constitutional Court had the possibility to interpret the accession clause in its decision concerning the Lisbon Treaty. There it held that the enforcement of the European Union law via Section 2/A of 1949/1989 Constitution, now Article E subsection 2 of Fundamental Law, could not erode the fundamental principles of the national sovereignty of the state democracy and rule of law, Section 2 (1) and (2) of 1949/1989 Constitution,

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[193] *See* Alkotmánybíróság (AB) [Constitutional Court] 4/1997 (II.22.) (Bragyova, dissenting, favoring an ex-ante review). *See* András Bragyova, *No New(s), Good New(s)?*, *in* CONSTITUTION FOR A DISUNITED NATION 336, 346 (Gábor A. Toth, ed. 2012).

[194] A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 24.1.

[195] *See* 1989. XXXII § 42.2 (Act XXXII of 1989 on the Constitutional Court) (Hung.).

[196] *See* 1989. XXXII § 42.1 (Act XXXII of 1989 on the Constitutional Court) (Hung.).

[197] The English translation delivered to the Venice Commission may be somewhat misleading. Actually the correct wording of section 42.2 should be:

If the Constitutional Court declares that such a legal regulation is contrary to an international treaty, with which the legal regulation promulgating the international treaty, according to the Fundamental Law, shall not be in conflict, it shall—in consideration of the circumstances and setting a time limit—invite the Government or the lawmaker to take the necessary measure to resolve the conflict within the time limit set.

There seems to be an unintentional mistake because the legal consequences of the competences of examination of conflicts with International Treaties and the ex-post review are confounded.

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now Article B.[198] Therefore, there is a core of national state authority, which has to be maintained and protected by the Constitutional Court. Although these principles are implemented in the TEU (Articles 2 and 4.2 TEU), the Constitutional Court may claim a precedence of its domestic interpretation in case of different interpretation according to Hungarian law.

It can be stated that the Constitutional Court is a safeguard to constitutional consistency with EU primary law.[199] Whether or not the Parliament, as an amending power, has an unlimited power to transfer competences to the EU by constitutional amendments is, of course, another matter.[200]

2. Secondary Law

On the other hand, after the accession of Hungary in 2004, secondary European Union Law forms part of domestic law. The constitutional European clauses concerning power conferral are addressing further developments of the European Union. Primarily, they are guidelines for the public authorities.

In Germany, the Fundamental Law proclaims peaceful collaboration and integration into Europe as a state objective, calling on the federal state to enforce some fundamental principles within the European Union. It is an active mandate, mentioning the "everlasting constitutional order," which includes concepts such as federalism, rule of law, and democracy, as well as the principle of subsidiarity.[201]

In Hungary there is also a state objective; in order to enhance liberty, prosperity, and security of the European nations, the Hungarian state is heading for European integration.[202] As there are no additional measures, the mandate is more general.

The Hungarian state authorities are not obliged to enforce fundamental principles within the European Union, but there is a constitutional expectation of every Hungarian state authority to enhance European integration.

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[198] *See* Alkotmánybíróság (AB) [Constitutional Court]. 143/2010, VII. 14. *Cf.* András Bragyova, *No New(s), Good New(s)?*, *in* CONSTITUTION FOR A DISUNITED NATION 336, 346 (Gábor A. Toth, ed. 2012); Nóra Chronowski, Tímea Drinóczi & Ildikó Ernst Hungary, INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS 259, 265, 266 (Dinah Shelton ed., 2011).

[199] *Cf.* Chronowski, Drinóczi & Ernst, *supra* note 198, at 270.

[200] Judge András Bragyova seems to be worried. *See* András Bragyova, *No New(s), Good New(s)?*, *in* CONSTITUTION FOR A DISUNITED NATION 336, 346 (Gábor A. Toth ed. 2012).

[201] A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 23.I.

[202] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. E.2.

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Contrary to the German Federal Constitutional Court, the national guaranteed fundamental rights are not mentioned *expressis verbis* as standards for the European Union law.[203] Nor is there any explicit measure—such as everlasting constitutional orders—in the new constitution, which could guarantee these rights as the foundation of the national state.

In fact, the Constitutional Court, apart from examining the law promulgating a treaty, has never until now controlled European Union secondary law. There was a lot of criticism of the Constitutional Court's application of the European Clause.[204]

Concerning fundamental rights, Article XXVIII subsection 4 of the Fundamental Law may be a basis on which to deliver a constitutional barrier to the effectiveness of European acts in the Hungarian law system:

> No one shall be held guilty of or be punished for an act which at the time when it was committed did not constitute a criminal offence under Hungarian law or, within the scope specified by an international treaty or a legal act of the European Union, under the law of another State.

This provision was introduced after the judgment of the Constitutional Court on 11 March 2008 because, according to the current constitutional provisions, only an act specified in an Act of Parliament or in other constitutional acts as a punishable conduct can be regarded as a criminal offense.[205] Now, according to the amendment of the 1949/1989 Constitution in 2008, the right to liberty could be restricted by acts of Hungarian domestic law and of the European Union as well. This regulation is transferred into the Fundamental Law with some remarkable modifications. Previously, its application was restricted to the creation of the areas of freedom, security, and law. Now, it is extended to international treaties and all acts of the European Union.

Article XXVIII subsection 4 states especially the right to protection from retroactive criminal law. Given that all the acts of the European Union are now bundled under Article XXVIII, the general constitutional rules of limitation clauses for fundamental rights are applicable

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[203] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case no. 2 BvR 197/83, 73, 339 (Oct. 22, 1986).

[204] *See* Bragyova, *supra* note 200, at 336, 348; MÀRTA DEZSÖ AND ATTILA VINCZE, MAGYAR ALKOTMÁNYOSSÁG AZ EURÓPAI INTEGRÁCIÓBAN 210–37 (2012).

[205] *See* Alkotmánybíróság (AB) [Constitutional Court] Mar. 11, 2008. 32/2008, III.12., http://makab.hu/case-law/translations.

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for them as well. We could therefore reach the general conclusion that acts of the European Union could not erode the core of the fundamental rights. In general, this means that the Constitutional Court could intrinsically scrutinize European Union acts in terms of respecting the core of fundamental rights.

Indeed, the Fundamental Law may open a new perspective for the Constitutional Court.

According to the National Avowal, Hungary has strong ties to Europe; it declares that Hungary forms a part of the Christian Europe and has defended European values.[206] Hungary would like to contribute with its cultural heritage to the diversity of a united Europe. Meanwhile, although the Venice Commission welcomes universal elements,[207] there are critical voices stating that there remains a strong reference to national virtues.[208] Similarly, some lawyers opine that by omitting the word "separately" in the European clause of the Fundamental Law, any further "federalization" is excluded.[209]

The European Clause clearly depends on the constitutional order of joint exercise of competences with other Member States.[210] The Hungarian fundamental concept of power conferral better addresses the international level of Member States' collaboration and the community of Member States. In fact, Hungary is following the French Republic, where the principle of national sovereignty is essential.

Nevertheless, the new article seems to be a further development of the original inherent concept of the European clause.[211] In Germany the constitutional limits to the transfer of powers to the EU level have been developed by the German Constitutional Court. But as Peter Sommermann recently stated there is still enough space for European integration within the framework of the German constitution.[212] Concerning the state of play in Hungary, further investigation is needed.[213] Whereas the EU itself needs the democratic

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[206] Second sentence: " . . . and made our country a part of Christian Europe." Fourth sentence: " . . . our people have fought in defense of Europe . . . and . . . have enriched Europe´s common values."

[207] *See* EUR. CONSULT. ASS. (Venice Comm'n), *supra* note 21, at para. 33.

[208] *See* Bragyova, *supra* note 200, at 349.

[209] *See* Halmai *et. al, supra* note 6, at 486.

[210] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. E.2.

[211] The analysis of the European policy of the current government states a concept which is rather pragmatic and utilitarian than sentimental or nationalistic. *See* András Hettyei, *Die Europa-Politik der Orbán Regierung*, 53 SÜDOSTEUROPA MITTEILUNGEN 116–53 (2013).

[212] *See* KARL-PETER SOMMERMANN, INTEGRATIONSGRENZEN DES GRUNDGESETZES UND EUROPÄISCHER VERFASSUNGSVERBUND: BRAUCHEN WIR EINE NEUE VERFASSUNG? 708 (2013).

[213] *See* DEZSÖ & DEZSÖ, *supra* note 204.

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legitimization of the Member States and their citizens, the European institutions have no end in themselves; they are organs serving the sovereign Member States and their citizens because their competences and powers are borrowed from them. Indeed, the European Union is different from any other international organization as it is a union of citizens and member states.

How to best reconcile conflicts between the Constitution and European Union law in addressing the questions of Hungary's integration into the European Union is a task for the Hungarian Constitutional Court. In a multilevel cooperation between the European and national institutions, an engagement of the Constitutional Courts is also needed.

Due to the constitutional complaint and the protection of the fundamental rights, the scope of the Constitutional Court should, at least theoretically, be extended to secondary acts of the European Union. The new provision, which clarifies the validity and the effectiveness of the European Union law within the Hungarian law system, must particularly be respected.[214] The yardstick for the application of secondary law is now explicitly the European clause, Article E (2) of the Fundamental Law.[215]

The Member States are maintaining their sovereignty, which is not partly conferred but only voluntarily restrained in order to exercise joint power. There could be only singular competences of the nation states exercised by the institutions of the European Union. This point of view tends to emphasize the character of the European Union as an international organization. It seems similar to the French concept of national sovereignty, but, in contrast to the French constitutional court (*Conseil Constitutionnel*), the Hungarian Constitutional Court did not take the opportunity during the review of the Lisbon Treaty to demand any constitutional amendments because the Hungarian Constitutional Court had not yet really applied the European clause.[216] But now, as the highest organ of constitutional protection, it is called to take a closer look into the constitutional aspects of European integration. The Venice Commission states, "notwithstanding the strong emphasis put on the national element and the role of the Hungarian nation, there has been an effort to find a balance, in the Preamble, between the national and universal elements."[217] The constitution acknowledges Europe as a constitutional element and defines the relationship between the Hungarian and European community. It is the task of the Constitutional Court to bring these two components into an optimized relationship.

[214] "The law of European Union may stipulate generally binding rules of conduct subject to the conditions set out in subsequent 2." A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. E.3.

[215] *See* Bragyova, supra note 204, at 354.

[216] *See* DEZSÖ & DEZSÖ, *supra* note 204, at 233–238.

[217] *See* Bragyova, *supra* note 200, at 349.

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It could be concluded that the Hungarian constitution has strong ties to Europe and a clear concept of a close collaboration with the Member States. The active involvement of Hungarian institutions in European integration is possible and depends on the commitment of all—the Constitutional Court included.

V. Relationship to the European Court of Justice

Concerning the relationship to the ECJ, the legal discussion turns very quickly to the question of the supremacy of law—but there are different aspects. The two courts may share their competences on the same subject matter and they may each have exclusive competences due to the subject matter. They may share a common interest in enhancing the rule of law and unity, while applying different principles, thereby contributing to cultural diversity. A good example of the shared decision competence is the recent decision-making of both courts on the same subject matter concerning the retirement of judges.

1. Legal Consequences of Decisions

On 16 July 2012, the Hungarian Constitutional Court had already decided to repeal, with retroactive effect, part of the Hungarian legislation already criticized by the European Commission.[218] Later, on 6 November 2012, the European Court (First Chamber)[219] ruled as well, because the European Commission initiated an infringement procedure against Hungary. Although one part of the legislation had already become moot as a result of the judgment of the Hungarian Constitutional Court, the European Court of Justice stated a need to adjudicate. It recalled its settled case law.

Regarding the decision-making of the ECJ and the Hungarian Constitutional Court, one must first take a short glance at the effect of the Constitutional Court's verdict. It is in general *ex nunc*,[220] although there are certain exceptions. In the same subject matter, the competent national authorities had already, on the basis of those provisions, adopted individual administrative measures designed to end the employment relationships of the judges concerned. Although the Constitutional Court decided to deviate from the general *ex nunc* effect and repeal the contested provision retroactively according to Section 45.4 ACC, it seems that this decision only affected decisions of the ordinary courts which were contested via the constitutional complaint.[221]

[218] *See* Alkotmánybíróság (AB) [Constitutional Court] 33/2012, VII. 17, *available at* http://mkab.hu/case-law/translations.

[219] *See* Comm'n v. Hungary, CJEU Case C-286/12, para. 1 (Nov. 6, 2012), http://curia.europa.eu/juris/documents.jsf?num=C-286/12.

[220] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 45.1.

[221] *See* Alkotmánybíróság (AB) [Constitutional Court] 33/2012, VII. 17.

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After the experiences of uncertainty and lack of clarity regarding the former constitutional complaint, the new ACC actually created an additional power for the Constitutional Court to extend the retroactive effect of its ruling on all judicial decisions, based on the annulled legal regulation,[222] whether they are contested by constitutional complaint or not. There is no reason why the Constitutional Court could not have applied this new competence in this case. In fact, the new ACC gave the Constitutional Court a broader and clearer competence than the older ACC in terms of legal consequences of it actions.[223] The retroactive extension of annulment effects should not be exercised in general because they affect legal certainty, and the system should function as an incentive to submit complaints against normative acts.[224] But especially in very important cases, like the employment relationships of the judges, and when there is an ongoing procedure at the European level, it is of special national interest to regulate the stability of a judicial system by extending the legal consequences of the decision.

The fear[225] that the effect of the constitutional complaint would be restricted did not come true. The Venice Commission pointed out in 2010 that it is in favor of the full constitutional complaint, not only because it provides for comprehensive protection of constitutional rights, but also because of the subsidiary nature of the relief it provides to that provided by the ECHR and the desirability of settling human rights issues on the national level.[226] This institution could therefore be seen as a strong instrument to enforce fundamental rights.

Nevertheless, as a result, the European Court of Justice ruled well when it stated, "since the repeal of those provisions did not directly affect the validity of those individual measures by which the employment relationships of the persons concerned were brought to an end, those persons are not automatically reinstated."[227]

In fact, its decision was a good amendment to the decision of the Hungarian Constitutional Court, creating stability in the judicial system of a state and filling a gap, although not

[222] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 45.5.

[223] Section 43.4 of the former Act on the Constitutional Court was legally very uncertain. *See* SPULLER, *supra* note 16, at 193–198.

[224] *See* EUR. CONSULT. ASS., *Opinion on Act CLI of 2011 on the Constitutional Court of Hungary Adopted by the Venice Commission*, 91st Sess., DOC. NO. CDL-AD (2012)009 (2012).

[225] Some lawyers stated in their Opinion on the Fundamental Law of Hungary. Gábor Halmai *et. al*, *supra* note 5, at 478.

[226] *See* EUR. CONSULT. ASS. *Study on Individual Access to Constitutional Justice*, 85th Sess., DOC. NO. CDL-AD (2010)039rev (2010).

[227] Comm'n v. Hungary, CJEU Case C-286/12, para. 46 (Nov. 6, 2012), http://curia.europa.eu/juris/documents.jsf?num=C-286/12.

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necessarily one left over by the Constitutional Court. After the set of "crisis tax,"[228] the EU Commission has already prepared a reasoned opinion in order to start an infringement procedure against Hungary. The European Court of Justice will have the task of filling the gap concerning budgetary measures.

2. Conflict Between National Law Below the Constitution and European Union Law

As previously mentioned, according to settled case law, European Union law is part of the Hungarian law system. If there is a conflict between national and European Union law, the Constitutional Court has no competence to review this, because it is not treated as a constitutional issue.

The Court held in 2006 that:

> [T]hese treaties—being primary sources of the law—and the Directive—being a secondary source of the law –are as community law part of the internal law, since Hungary has been a Member State of the European Union since 1 May 2004. With regard to the competence of the Constitutional Court, community law is not considered international law as specified in Article 7 para. (1) of the Constitution.[229]

Thus, the Constitutional Court excluded the review of compliance of Hungarian provisions with European Union law. The task is exclusively assigned to the ordinary courts and the European Court of Justice.

3. References for Preliminary Rulings

The Constitutional Court has not yet brought a question of interpretation of the Treaties or of European Union acts under Article 267 TFEU before the European Court of Justice. This settled case law is to be reconsidered. This provision stipulates, that national courts may request the European Court of Justice to give a preliminary ruling.

The Constitutional Court is a national court for the purposes of this article. The Court is established by law and permanent with compulsory jurisdiction. It applies rules of law and is independent.

[228] *See supra* D. II. Relationship to Parliament.

[229] Alkotmánybíróság (AB) [Constitutional Court]. 72/2006, XII. 15.

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Regarding the requirement that the procedure must be *inter partes*, the European Court of Justice has already noted that this is not an absolute criterion.[230] Because of the origin of the constitutional complaints stemming from legal disputes of the drift in the nature of the Constitutional Court towards ordinary judiciary as previous stated,[231] this criterion is no longer an obstacle.

The recent amendments of the Constitution are strengthening the judicial procedural characteristics of constitutional review. According to the new Article 24(7) of the Fundamental Law, the Constitutional Court is now obliged to give the defendant an opportunity to reply: They may present their oral observations at a public hearing.[232]

There are already examples to reconsider settled case law: The Italian Constitutional Court had turned from settled case law and initiated a preliminary ruling. The European Court of Justice did not question its nature as a Court according to 267 TFEU.[233] Therefore, there is also an open path for the Hungarian Constitutional Court.

4. Interpretation of Constitutional Principles

The European Court of Justice recently confirmed the supremacy of European Union Law. It ruled that a decision of a constitutional court of a Member State (Slovakia) cannot take away the national court's discretion to refer requests to the European Court of Justice to give preliminary rulings regarding interpretation of European Union law. This ruling have to be taken into account even after the Constitutional Court has annulled the decision of the national court.[234]

The European Court of Justice empowers the national court to overrule decisions of constitutional courts and procedural provisions, if these are creating barriers for a request for a preliminary ruling. It did not examine whether there is in fact a constitutional provision of Slovakia, which binds the court. Nevertheless, the ECJ held that even if there were a constitutional provision, these rules cannot undermine the unity and effectiveness of European case law. This case shows that there is an objective need for the constitutional courts to use the preliminary ruling in order to avoid different decisions on various levels.

[230] *See* De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort, CJEU Case C-17/00, 2001 ECR I-9445, para. 14 (preliminary ruling from the Collège juridictionnel de la Région de Bruxelles-Capitale, Belgium).

[231] *See supra* D. I. Relationship to Ordinary Judiciary

[232] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 24.7.

[233] *See* Presidente del Consiglio dei minstri v. Regione Sardegna, ECJU Case C-169/08, 2009 E.C.R. I-10821 (preliminary ruling from the Corte constitutionale, Italy).

[234] *See* ECJ Case C-416/10 Krizan et al. v. Slovenská inšpekcia životného prostredia, ECJU Case C-416/10, (Jan. 15, 2013).

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However, the Hungarian Constitutional Court, in its recent decision, announced its intention to, in order to ensure uniform application of fundamental rights, apply European values to its interpretation of the constitution.[235] This new shift is remarkable, because the Constitutional Court has still now denied any competence to review conformity of national law with European Union law. Therefore, under certain circumstances, European primary law may be either—as already pointed out—subject matter, or even the yardstick, of the Constitutional Court's proceedings.

Due to the extension of Union jurisdiction to the constitutions of Member States, there is a need for a more cooperative interpretation of European Union and domestic law by the ECJ and the Constitutional Courts of the Member States. This is especially the case in similar wordings of indeterminate legal concepts like the rule of law or human dignity. There should be enough space for developments in both directions. The original version of the "homogeneity clause" of Article 2 TEU was inserted into the EU Treaty by virtue of the Treaty of Amsterdam as a result of the accession negotiations.

5. Conclusions

Meanwhile, given that, according to newly introduced Article 19(5) of the Fundamental Law, the prior rulings of the Constitutional Court are repealed, the Constitutional Court could take the opportunity to divert from its practice and start to employ the preliminary ruling in order to enhance collaboration with the ECJ.

The recent discussion about the Fundamental Law and its amendments shows that a State's determination of its own constitutional structure is the core of its sovereignty. In the current situation it is necessary to find a balance between where the Member State has its independent sovereignty and where it has taken over obligations by the Treaties. Therefore, both the Constitutional Courts and the ECJ are appealed to in respect of their complementary tasks by way of cooperative jurisdiction and interpretation of constitutional principles.

VI. Relationship to the European Court of Human Rights

The Constitutional Court is scrutinizing the conformity of Hungarian law with the European Convention on Human Rights. Under the 1949/1989 Constitution by judgment of 20 December 2011, it annulled provisions found contrary to the European Convention on Human Rights concerning criminal proceedings.[236] In this, the Constitutional Court followed the decision-making and the authoritative ruling of the European Court of Human Rights.

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[235] *See* Alkotmánybíróság (AB) [Constitutional Court] May 21, 2013, II/648/2013.

[236] *See* Alkotmánybíróság (AB) [Constitutional Court] 166/2011, XII.20. para. III.1.

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Recently, by judgment issued on 18 December 2012, the Constitutional Court confirmed its settled case law under the new established order.[237]

As mentioned earlier, prior to the Fundamental Law there was not a secure way for everyone to be effectively remedied. Although the Constitutional Court declared the statute to be unconstitutional because it permitted the dismissal of public servants without cause, there was, due to former limitations under the 1949/1989 Constitution, no real possibility to reinstate or compensate previously dismissed servants.[238] The European Court of Human Rights rightly decided that Article 6(1) of the Convention had been violated and ordered the Hungarian government to pay the applicant money as compensation for non-pecuniary damages.[239]

Still, after the introduction of the full-fledged constitutional complaint concerning budgetary measures, there may be an increase in cases pending before the European Court for Human Rights, which should be actually relieved by the introduction of the fully-fledged constitutional complaint.

The gap may be partly filled due to the competence for the review of compliance with international treaties. The standing list of petitioners is still broad and has already come into practice—the President of the Curia, one quarter of the members of Parliament, judges, or the Commissioner for Fundamental Rights.[240] The Constitutional Court may exercise this power *ex officio* during ongoing procedures. There may be a small opening via the constitutional complaint against judicial decisions as well.

Cases without full Constitutional Court review are inevitable. The gap concerning the budgetary measures should be balanced by a strong control of the review of achieving financial stability.

The relationship to the European Courts seems to be complementary. Due to permanent tensions between the Constitutional Court and the governing parliamentary groups, the Constitutional Court may search for allies.

Applicants had pursued successful constitutional complaints challenging the 2011 Church Act, culminating in decision no. 6/2013. (III. 1.) of the Constitutional Court. The

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[237] *See* Alkotmánybíróság (AB) [Constitutional Court] 43/2012, XII. 20. Para. 66–68 (concerning discrimination of non-marriage relationships).

[238] *See* Alkotmánybíróság (AB) [Constitutional Court]. 8/2011, II. 18. para. 6.

[239] *See* K.M.C. v. Hungary, ECHR App. No. 19554/11, para. 46 (July 10, 2012).

[240] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. 32.2.

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Constitutional Court ordered the retroactive annulment of provisions of the 2011 Church Act, in which the applicant communities regained the formal status of churches.

But nevertheless some churches brought the case to the European Court of Human Rights. The Government submitted several pleas for the applications to be declared inadmissible, mainly because the Constitutional Court had already made a decision and annulled the original form of the impugned legislation with retrospective effect. But the European Court of Human Rights admitted the applications because, only by regaining the formal status as a church, the grievance has not been entirely redressed. With regard to the ability of churches to receive donations and subsidies in order to carry out any societal functions, the churches did not get any compensation.[241]

As already pointed out, the constitutional court may be reluctant to exercise its competence to remedy entirely the applicants' grievance.[242] By that means it opens the way for the European Court of Human Rights to intervene.

E. Outlook

Due to the actio popularis and the limited constitutional complaint, the Constitutional Court played a more important role as an institutional guarantor of the separation of power and of the public constitutional order than as a safeguard of individually-exercised fundamental rights under the 1949/1989 Constitution. There is a high number of pending applications before the European Court of Human Rights.[243] The question remains as to whether these will decrease as the populace comes to accept the institution of constitutional complaints.

With the exception of the limitation of the scope of the Court's jurisdiction with regard to budgetary measures, the recent developments are changing the Court's competence without breaking the Hungarian constitutional tradition. The ACC, especially, is establishing and developing rules referring to the former rulings of the Court.

[241] *See* Magyar Keresztény Mennonita Egyház v. Hungary, ECHR Appl. Nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12, para. 53 (Apr. 8, 2014) http://hudoc.echr.coe.int/.

[242] *See supra* D. V. 1. Legal Consequences.

[243] In Austria, a country with almost the same size with a constitutional complaint, there were 359 pending cases, but in Hungary there were 3192. *Cf.* http://www.echr.coe.int/Documents/CP_Austria_ENG.pdf (last visited July 02, 2014); http://www.echr.coe.int/Documents/CP_Hungary_ENG.pdf (last visited July, 02, 2014).

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In the past, in general, the Constitutional Court was following settled case law concerning European Union law and international treaties.[244] The Fourth Amendment of the Fundamental Law, which set aside the prior decisions of the Constitutional Court, is an appeal to the Constitutional Court to reconsider its settled case law. But the Fundamental Law and the ACC are not understandable without taking the former decisions of the Constitutional Court into account. Therefore, the Constitutional Court has to analyze each former decision to decide whether it still fits into the new constitution. Continuity of law as a part of the rule of law is thus possible, though the whole corpus of public law in Hungary has to undergo a second step of transformation after the fall of the Iron Curtain.

During the twenty years following the fall of the Iron Curtain, Parliament could not take over its originated constituent power and was very often exercising its derived constituent power by initiative of the Constitutional Court. As previously mentioned, the change of the system was ongoing and the Constitutional Court as a substitutive constituent power was very actively involved in the process.[245]

But the constitutional checks on the powers of Parliament were excessive, as they led the Constitutional Court to work as a negative co-legislative lawmaking and constitution-supplementing power.[246] The 1949/1989 Constitution was a framework rather than a consistent constitutional order, within which the Hungarian Constitutional Court had a broader discretion than many other national Constitutional Courts.[247] The Constitutional Court was referred to too quickly in political discussions, because there were no limitations on the access to constitutional review. This concept created a number of conflicts and there was a real problem of separation of power, because the Constitutional Court did not have the same political responsibility as the parliament and government. Alternatively, the ordinary courts did not really concern themselves with the application of the Constitution, which would have mitigated some problems of the promulgated laws.

Due to the weakness of the opposition, the Constitutional Court found itself in 2010 in the position of being the main counterpart of the governing and constituent parties' coalition. This was no longer an amicable relationship, which led to the limitation of the scope of

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[244] *E.g.* Alkotmánybíróság (AB) [Constitutional Court] Mar. 31, 2005. 7/2005, III. 31; Alkotmánybíróság (AB) [Constitutional Court] July 14, 2010. 143/2010, VII. 14 (concerning the Lisbon Treaty).

[245] *Cf.* András Sájo, *A "láthatatlan alkotmány" apróbetűi: A magyar Alkotmánybíróság első ezerkétszáz napja*, 35 ÁLLAM ÉS JOGTUDOMÁNY 42 (1993).

[246] *Cf.* Chronowski, Drinóczi & Petrétei, *supra* note 104, at 313; Gábor Halmai, *Interview with Bruce Ackermann*, FUNDAMENTUM 51 (2003); Valentina Bărbăţeanu, *The Influence of the Constitutional Jurisdictions on the Basic Laws*, XIX-2 LEX ET SCIENTIA INTERNATIONAL JOURNAL 137 (2012).

[247] *Cf.* Gábor Halmai, *Interview with Bruce Ackermann*, FUNDAMENTUM 51 (2003); Nóra Chronowski,Tímea Drinóczi and József Petrétei, *Multidimensional Protection of Universal Human Rights in Hungary*, *in* THE UNIVERSALISM OF HUMAN RIGHTS 371, 382 (Rainer Arnold, ed. 2013).

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review-ability concerning budgetary measures and to the permanent argument concerning the constituent power between the two institutions.

In 1997 the Constitutional Court pointed out that the Constitutional Court is competent to declare a provision invalid due to formal deficiencies in order to optimize procedural constitutional guarantees.[248] The Constitutional Court derives new competences concerning the formal control of the establishment of constitutional amendments from this decision and from the new constitutional measures.[249] With this concept it opposed the current constituent power of Parliament, which acknowledged this position in the Fourth Amendment.

The Fourth Amendment was endangering the rule of law by once again overruling the Constitutional Court. With the "paradoxical revolution of the rule of law," one of the main achievements of the Constitutional Court was the affirmation of the rule of law in an effort to guarantee predictability and stability despite political influences. Combined with the exception of the regrettable gap of constitutional checks, the constitutional system was seriously adversely affected. The Fifth Amendment allayed some of these concerns. It is hoped that the drafters of the constitution appreciated the important distinction between the *pouvoir constituant* (constituent power) and the *pouvoir constitués* (constituted power).[250] Once the nation has enacted the constitution, this constitution should stay unified according to the postamble. The process of constitutionalizing has to come to end, because as Lembcke and Boulanger stated, when politics start to constitutionalize its own rules of play, it mixes the constituted power with the constituent power. By perpetuating the privilege of interpretation of constitutional questions, the majority may inadvertently gain the "result of dissolving the bonds between nation and constituent power."[251]

It could then be possible to state that the overall changes affecting the Constitutional Court could create a more consistent and balanced order. The recent rulings of the Constitutional Court have shown its capacity and willingness to counterbalance the rulings of a majority coalition.[252] The President of Hungary and the Commissioner for Fundamental Rights are exercising their petition rights in order to maintain a constitutional balance.

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[248] *See* Alkotmánybíróság (AB) [Constitutional Court] 29/1997, IV. 29.

[249] *See* Alkotmánybíróság (AB) [Constitutional Court] 45/2012, XII.29.

[250] "Dans chaque partie, la constitution n'est pas l'ouvrage du pouvoir constitué, mais du pouvoir constituant" ("At any way constitution is not the work of the constituted power but of the constituent power.") EMMANUEL JOSEPH SIEYÈS, QU'EST-CE QUE LE TIERS ÉTAT? 84 (1788).

[251] Lembcke & Boulanger, *supra* note 16, at 294.

[252] *See* Alkotmánybíróság (AB) [Constitutional Court] Feb. 26, 2013. 6/2013, III. 1 (concerning "the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities").

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While the control of Parliament and the government is more limited, the control over the ordinary judiciary is extended. This shift towards the judiciary does not change the character of the Constitutional Court as a court *sui generis* and a singular institution of law. But it can no longer be regarded as a constitutional organ *sui generis* because it is more integrated into the constitutional order of the Fundamental Law. Indeed, it could be regarded as the highest constitutional organ of the judiciary.

The constituent majority of the Parliament is now competing for the leading position in the Hungarian state and constitutional order against the Constitutional Court. This domestic conflict is felt at the European level. How long this conflict will stay in the remit of national competences is a delicate question.

In matters of the organization of a state there is a clearer understanding of the role of the Constitutional Court. The status of the Constitutional Court among the other state organs is better balanced, although there is no constitutional control concerning the way back to a balanced, transparent, and sustainable budget management.[253] The budgetary Council may be an adequate—perhaps innovative—substitution. As Hungary is a unitary state, there may be still a need for a real counterbalance to the majority. The Constitutional Court, in connection with the European institutions, may play a further role in that game.

The several guarantees in the constitution[254] and the definition as the highest organ of constitutional protection are strengthening the role of the Constitutional Court. Concerning the gap of a full-fledged constitutional complaint in the 1949/1989 Constitution, the Court itself already stated in 1997, "The incorporation of other jurisdictions into the Constitution—as it is usual in case of a newly-established constitutional court—is a guarantee and desirable."[255]

We can wonder what might be the task under the new constitution declaring a new era.[256] As previously mentioned, the Constitutional Court is an important transmission belt between the old and the new constitution.[257] After the fall of the Iron Curtain, the

[253] *See* A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION OF THE REPUBLIC OF HUNGARY] art. N.1.

[254] The Venice Commission seems not to notice this fact. EUR. CONSULT. ASS., *Opinion on the Concept Paper on the Establishment and Functioning of a Constitutional Assembly of Ukraine*, 86th Sess., DOC. NO. CDL-AD (2012)002, para. 92 (2011).

[255] Alkotmánybíróság (AB) [Constitutional Court] 4/1997, I. 22.

[256] The president of the Constitutional Court is pleading for the Anglo-American way of interpretation the "historical constitution" and the "preamble" as well. The latter was criticized by the Venice Commission. *See* EUR. CONSULT. ASS. (Venice Comm'n), *supra* note 21.

[257] *Cf.* Lembcke & Boulanger, *supra* note 16, at 299.

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transformation has been at least formally finished; the task of achieving the coherence of the national legal system on both the national and the European level and of creation a better relationship to the rulings of the European Courts (ECJ and ECtHR) has emerged.[258] The Constitutional Court's jurisdiction to review judicial decisions and conformity with international treaties may be more exercised by means of the constitutional complaints or by references for preliminary rulings in order to enhance constitutional stability.

The introduction of a fully-fledged constitutional complaint will give some new inputs into the relationship between the Constitutional Court and the ECJ. Previously, due to the abstract nature of the proceedings and the nature of the Constitutional Court, there were doubts as to whether the Constitutional Court could itself initiate preliminary rulings of the ECJ.[259] From its involvement in judicial proceedings and by the recent amendment of the constitution, there is a new opportunity giving questions raised in cases pending before the Constitutional Court access to preliminary rulings of the ECJ.

It no longer seems to be impossible that the Constitutional Court could claim the right to scrutinize the constitutional implications of secondary law in order to protect fundamental rights. If the Constitutional Court were to realize that the European Union legislator had exceeded its constitutional authorization to act, or had acted *ultra vires*, and that there were fundamental rights violated, the Constitutional Court might declare the unconstitutionality of the act which applied the European Union law.

Due to the problems of legitimacy of the European Union and the tendency of the European Commission to regulate the implementation and enforcement of European Union law by very complex legal mechanisms, which are less and less comprehensible to the ordinary citizen,[260] there is a need for effective national sovereign states and regions. The German Federal Constitutional Court is constantly trying to find a balance between the two poles of European integration and national sovereignty.[261]

[258] *See* FLORÁ FAZEKAS, A MAGYAR ALKOTMÁNYBÍRÓSÁG VISZONYA A KÖZÖSSÉGI JOG ELSŐBBSÉGÉHEZ EGYES TAGÁLLAMI ALKOTMÁNYBÍRÓSÁGI FELFOGÁSOK TÜKRÉBEN (Nov. 30, 2009) (unpublished PhD dissertation), www.doktori.hu/index.php?menuid=193&vid=3941 (last visited Dec. 20, 2012).

[259] *See* Blutman & Chronowski, *supra* note 189, at 336; *see* LÁSZLÓ KECKÉS, EU-JOG ÉS JOGHARMONIZÁCIÓ 931–32 (2009).

[260] The European Commissions recently started the Revision of the EU legal framework on environmental inspections. Ideas of creating its own public agency with executive powers to monitor the implementation and enforcement of Environmental law by the Member States are strongly supported. Eur. Comm'n, Environment, http://ec.europa.eu/environment/legal/law/inspections.htm.

[261] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court), Case No. 2 BvR 2134, 2159/92, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, part B 2 c5 (1993) (Ger.).

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But the protection of fundamental rights within a system of government based on the rule of law is crucial. The Council of Europe started the debate concerning the mechanism to better support protection of fundamental rights and the rule of law in the Member States and in the institutional system of the European Union. The Council therefore calls on the Commission to take forward the debate on a possible need for and shape of a collaborative and systematic method to tackle these issues.[262]

> This process of engagement with Member States, civil society and dialogue with citizens around these themes could be very fruitful. Very clearly, the questions at the heart of this debate need to be carefully considered and any agreed initiative should be crafted sensitively and in a way that is respectful of the different legal traditions of member states and of the division of competencies between the Union and Member States.[263]

The Constitutional Court could play an important role in the European integration of Hungary, especially with regard to the application of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. Concerning the ECJ's permanent statement of the supremacy of European Union law, how creative any future collaboration with the ECJ will be would depend on the Hungarian Constitutional Court's own commitment and involvement.

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[262] *See* COUNCIL OF THE EUR. UNION, COUNCIL CONCLUSIONS ON FUNDAMENTAL RIGHTS AND RULE OF LAW AND ON THE COMMISSION 2012 REPORT ON THE APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, LUXEMBOURG (June 6–7, 2013), www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf.

[263] Coreper, *Council Conclusions on Fundamental Rights and Rule of Law and on the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European* Union, para. 21 (Council of the Eur. Union, draft paper no. 10168/13, May 29, 2013) (containing the reasoning of the Council conclusions), register.consilium.europa.eu/pdf/en/13/st10/st10168.en13.pdf.

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