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An Illiberal Constitutional System in the Middle of Europe

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Keywords

Rule of law, transition, fundamental rights, constitution, constitution-making, democracy

A Introduction

Two years ago I already reported in this Yearbook the transformation the Hungarian constitutional order is undergoing since 2010, characterizing this illiberal turn as a counter-revolution.[1] Alas, it appears that this assessment of the Hungarian constitutional process has been borne out by the harsh criticisms that the Council of Europe and the European Union put forth on this issue.

This rechange of the constitutional order should not be a surprise to those, who followed the rhetoric of the central-right governing party, FIDESZ, and its leader, Viktor Orbán, before and after the election. Orbán characterized the results of the elections as a "revolution of the ballot boxes". His intention with this revolution was to eliminate any kind of checks and balances, and even the parliamentary rotation of governing parties. In a September 2009 speech he predicted that there was "a real chance that politics in Hungary will no longer be defined by a dualist power space [...]. Instead, a large governing party will emerge in the center of the political stage [that] will be able to formulate national policy, not through constant debates but through a natural representation of

1 See Gábor Halmai, From the 'Rule of Law Revolution' to the Constitutional Counter-Revolution, Benedek, Benoît-Rohmer, Karl, Nowak (eds.), European Yearbook of Human Rights 2012, Vienna 2012, 367-384.

interests." Orbán's vision for a new constitutional order - one in which his political party occupies the center stage of Hungarian political life and puts an end to debates over values - has now been entrenched in a new constitution, enacted in April 2011.

The Hungarian situation was at the same time also a test that will reveal whether and in how far the civilized world and especially the European institutions will be able to enforce European values in those countries that are members of the value-based communities of the European Union and the Council of Europe. Not by any standard do the results of this test qualify as a success. The Hungarian government's minor concessions were not primarily due to the resolve of European institutions or the grit of its value enforcement mechanisms, but stemmed rather from the compelling imperatives of Hungary's economic situation.

Despite all these external efforts the situation of the checks and balances as well as fundamentum rights has even worsened since the new constitution was enacted.

B Amendments to the Fundamental Law: Further Restrictions

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

On 11 March 2013 the Hungarian Parliament added the Fourth Amendment[2] to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The Fourth Amendment also added new restrictions on the Constitutional Court, inserted provisions that limit the application of constitutional rights and raises questions about whether concessions that Hungary made to European bodies last year in order to comply with European law are themselves now unconstitutional. These moves reopened serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaties of the European Union and under the European Convention on Human Rights.

2 See the 'official' English text of the amendment provided by the government, Council of Europe, Venice Commission, CDL-REF(2013)014-e, Fourth Amendment to the Fundamental Law of Hungary and Technical Note, http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF%282013%29014-e.

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

The government has said that this fifteen-page comprehensive amendment to the still-new constitution was necessary because of previous decisions by the Hungarian Constitutional Court, in particular a ruling issued at the very end of 2012. This decision held that those parts of the Transitional Provisions of the Fundamental Law that are not transitional in nature could not be deemed part of the constitution, and were therefore invalid.[3] Some elements of the Transitional Provisions were previously reviewed and criticized by the Venice Commission.[4] In his letter to Thorbjørn Jagland, Secretary General of the Council of Europe, dated 7 March 2013, Tibor Navracsis, the Hungarian Minister of Public Administration and Justice argued that the main aim of the Fourth Amendment was to formally incorporate into the text of the Fundamental Law itself the provisions that were annulled for formal procedural reasons.[5] He argued that the amendment is therefore, "to a great extent, merely a technical amendment to the Fundamental Law, and most of its provisions do not differ from the former text of the Transitional Provisions or they are directly linked thereto. Accordingly, the significance and novelty of this Proposal should not be overestimated". József Szájer, the FIDESZ member of the European Parliament who served as the official representative of the Hungarian government at the hearing before the Commission on Security and Cooperation in Europe (U.S. Helsinki Commission) on 19 March 2013 went even further, claiming that the amendment was "basically a copy-paste exercise of a purely technical nature" done at the request of the Court itself.[6]

These statements are misleading. In its decision of 28 December 2012, the Constitutional Court did not review the substance of the Transitional Provisions,[7]

3 Decision 45/2012. (XII. 29.)

4 See Opinion 664/2012 on the Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and Legal Status of Churches, Denominations and Religious Communities.

5 See the letter of Mr. Tibor Navracsics, Minister of Public Administration and Justice to Mr. Thorbjørn Jagland, Secretary General of the Council of Europe on March 7, 2013. Retrieved from the Hungarian Government's website on December 23, 2013 http://www.kormany.hu/download/c/ee/c0000/Letter%20from%20DPM%20Navracsics%2007-03-2013.pdf.

6 Szájer's testimony can be found at Commission on Security and Cooperation in Europe, The Trajectory of Democracy – Why Hungary Matters, 19 March 2013, http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord_id=539&ContentType=H,B&ContentRecordType=H&CFID=22872555&CFTOKEN=58422914. Last visited on March 25, 2014.

7 See the English translation of the Transitional Provisions to the Fundamental Law,

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

In fact, the ruling on the Transitional Provisions made it possible for the Constitutional Court to review the substance of some of the cardinal laws that said the same thing as the corresponding parts of the Transitional Provisions.[8] Most of the provisions struck down by the Constitutional Court when it reviewed the Transitional Provisions were also embedded in cardinal laws that the Parliament had passed earlier, and with these provisions now "demoted" from constitutional status by the Court's ruling, the Court then undertook to review the almost identical provisions in the cardinal laws. Among these reviewed and annulled laws was one on voter registration, which the Court found unconstitutional on substantive grounds because it constituted an unnecessary barrier to voting.[9]

At the time that the Fourth Amendment was submitted to the Parliament, a decision on the constitutionality of the cardinal law on the status of churches was expected and the Court did in fact issue its ruling on 26 February 2013[10] declaring unconstitutional parts of the law regulating the parliamentary registration of churches. These provisions had been first enacted as a law in 12 July 2011, were struck down by the Constitutional Court on procedural grounds in December 2011,[11] and then reinserted into the Transitional Provisions one week after

http://lapa.princeton.edu/hosteddocs/hungary/The%20Act%20on%20the%20Transitional%20Provisions%20of%20the%20Fundamental%20Law.pdf.

8 This may be slightly confusing because identical legal content often appears in multiple places in the Hungarian legal order. In a number of instances, the government would first pass a cardinal (two-thirds) law regulating a particular matter. Then, if the Constitutional Court declared that statutory provision was unconstitutional or if a particular provision was submitted to the Constitutional Court for review and the government might anticipate that the Court would strike it down, the government would then amend the constitution to take such provisions from the cardinal act and insert them into the constitution directly, either through the Transitional Provisions (before December 2012) or through the Fourth Amendment (after the Constitutional Court declared that permanent constitutional amendments made through the Transitional Provisions unconstitutional). In cases where the cardinal law was not declared unconstitutional before parts were added to the constitution, the cardinal law and the constitution duplicated each other. Therefore, when the Constitutional Court declared the permanent amendments made through the Transitional Acts unconstitutional, there often remained cardinal laws with identical content, which the Court would then review. In its decision on the Transitional Provisions, the Court declared that it had the *theoretical* power to review constitutional amendments on substantive grounds, but it had not used that power by the time the Fourth Amendment removed it. Therefore, when the Constitutional Court declared legal provisions unconstitutional on substantive grounds, it always did so in the context of reviewing a statute and not a constitutional amendment.

9 Decision 1/2013. (I. 5.)

10 Decision 6/2013. (III. 1.)

11 Decision 164/2011. (XII. 20.)

the Constitutional Court struck down the law. This section of the Transitional Provisions was then struck by the Court again in December 2012 because the provisions failed to guarantee procedural fairness in the parliamentary process through which churches were certified. Within a week, the annulled provisions were again added to a constitutional amendment, the Fourth Amendment, and this time it was insulated from Constitutional Court review by the section of the Fourth Amendment that prohibits the Court from substantively evaluating constitutional amendments.

The fact that the government was defeated in the church registration case shows that, even though the FIDESZ government by that time had elected seven of the 15 judges with the votes of their own parliamentary bloc, these judges were still not in a reliable majority within the Court.[12] That may have provided a reason for the government to want to limit the Court's influence even further.

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

Finally there is a set of amendments related to the power of the Constitutional Court itself, as a direct reaction to recent unwelcome decisions of the judges. Section (5) of Article 24 of the amended Fundamental Law bans the Constitutional Court from reviewing constitutional amendments for substantive conflicts with constitutional principles, and allows only review for conformity with the procedural requirements with respect to an amendment's adoption and promulgation.

In his letter to Thorbjørn Jagland, Secretary General of the Council of Europe, Tibor Navracsis, Minister of Public Administration and Justice explained:

> "The Proposal contains that constitutionality of the Fundamental Law itself and any amendments thereto may be examined by the Constitutional Court from a procedural point of view, in order to check their compliance with procedural law requirements regulated in the Fundamental Law. This is a new competence for the Constitutional Court, because under the Fundamental Law so far it had no legal possibility at all for any review of the

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

amendments to the Fundamental Law. The provision is in accordance with the case-law of Constitutional Court based on the former Constitution under which, for the last time in decision 61/2011, the Constitutional Court explicitly reinforced that it had no power to review in merits the amendments to the Constitution. Neither did the decision of 45/2012 on the Transitional Provisions overrule this former practice."

Unfortunately none of these arguments are correct. A great number of petitions reached the Constitutional Court concerning the November 2010 constitutional amendments that sought to curtail the Court's powers in fiscal and budget matters.[13] The restriction of the Court's jurisdiction was instituted in retaliation for a decision that the Court made, declaring unconstitutional a 98 % retroactive tax on "exit bonuses"[14] given to state employees in the preceding five years. In their decision 61/2011 (VII. 13), the justices of the Constitutional Court refused to perform a review of the substance of these amendments. At the same time, however – and this was the first time in the Court's judicial practice – they undertook an investigation, despite the lack of explicit competence to do so, into the constitutional validity of these amendments by examining the procedure that led to their adoption, even though the justices did not find the petition well-grounded in this regard. The three dissenting justices, however, believed that an examination of the substance of the amendments was also necessary, and two of them would have nullified the impugned constitutional amendments, which they deemed – albeit to differing degrees – unconstitutional on substantive grounds.

The Court's majority reasoning was to a significant degree based on a conservative thesis that since the Hungarian Constitution did not contain any immutable provisions, the Constitutional Court did not have a standard against which to assess the substance of the constitutional amendments. In the world, only a minority of constitutions contain explicit "eternal clauses," however. As we have seen, the most famous is undoubtedly the German *Grundgesetz*'s Article 79 (3), but even this provision lacks an explicit jurisdictional rule that would authorize the Federal Constitutional Court to protect the immutable constitutional provisions during the process through which constitutional amendments are enacted. It was the justices of the Court in Karlsruhe who endowed themselves with this power by construing the *Grundgesetz* accordingly. The same was true of most judicial bodies which – acting as guardians of their respective constitutions and in the process of reviewing constitutional amendments – derived this jurisdiction for themselves even without an "eternal clause". The most prominent example is the Indian Supreme Court's doctrine on the "basic structure" of the Constitution, which the Court has used as a basis for conducting a review of constitutional amendments even without an "eternal clause" and without express constitutional authorization to do so.

In the last days of 2011, the Hungarian Parliament enacted the so called Act on the Transitional Provisions to the Fundamental Law, which the government claimed had constitutional status. These Transitional Provisions supplemented the new constitution even before it went into effect. At the very end of 2012, the Constitutional Court in its decision 45/2012 (XII. 29) ruled that those parts of the

13 Act CXIX of 2010.

14 Exit bonuses were sums of money paid to state employees upon leaving their jobs. Everyone from schoolteachers to high-level civil servants received these payments.

Transitional Provisions of the Fundamental Law that were not transitional in nature could not be deemed part of the constitution, and were therefore invalid. This decision did not review the substantive constitutionality of the Transitional Provisions, since the petition of the ombudsman asked for an exclusively formal review and therefore the substantive question was not referred to the Court. But the majority of the justices this time emphasized in the reasoning that it is the constitutional responsibility of the Court to protect the unity of the constitution, and to ensure that the text of the constitution can be clearly identified. The justices added that an amendment of the constitution cannot create an irresolvable inconsistency in the text of the constitution. Therefore they argued: "In certain cases, the Constitutional Court can examine the continuous realization of the substantial constitutional requirements, guarantees and values of the democratic state governed by rule of law, and their incorporation into the constitution." In this decision, therefore, the Court concluded that it had the theoretical power to review constitutional amendments for their substantive constitutionality.

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

The most alarming change concerning the Constitutional Court annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution, old decisions/new constitution, new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. Otherwise, where the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection with European human rights law. Without those cases as touchstones, the government has undermined legal security when it comes to the protection of constitutional rights in Hungary.

C Reactions by the Venice Commission and the European Parliament

1 Opinion of the Venice Commission on the Fourth Amendment

Upon the request of the Secretary General of the Council of Europe, Thorbjørn Jagland, and the Minister for Foreign Affairs of Hungary, János Martonyi, the Venice Commission at its plenary session on 14-15 June adopted opinion 720/2013 on the Fourth Amendment to the Fundamental Law of Hungary.[15] According to the Commission's opinion the main concerns relate to the role of the Constitutional Court and to the ordinary judiciary. In the field of human rights in general, several issues are regulated in a manner disregarding earlier decisions by the Constitutional Court. The Commission assesses these constitutional amendments problematic not only because constitutional control is blocked in a systematic way, but also in substance because these provisions contradict principles of the Fundamental Law and European standards. In particular: the provisions on the communist past attribute responsibility in general terms, without any individual assessment; the absence of precise criteria for the recognition of churches and of an effective legal remedy against the decision not to recognise; the limitations on advertising have a disproportionate effect on opposition parties; and the provisions on the dignity of communities are too vague and the specific protection of the "dignity of the Hungarian nation" creates the risk that freedom of speech in Hungary could, in the future, be curtailed in order to protect Hungarian institutions and office holders.

The Commission states that the Fourth Amendment seriously affects the role of the Constitutional Court of Hungary in a number of ways:

- A series of provisions of the Fourth Amendment raise issues to the constitutional level as a reaction to earlier decisions of the Constitutional Court. Reacting to Constitutional Court decisions by 'constitutionalizing' provisions declared unconstitutional is a systematic approach, which was applied already to the old Constitution, then to the Transitional Provisions and now to the Fundamental Law itself. It threatens to deprive the Constitutional Court of its main function as the guardian of constitutionality and as a control organ in the democratic system of checks and balances.
- The removal of the possibility to base itself on its earlier case-law unnecessarily interrupts the continuity of the Court's case-law on a body of principles, which transcend the Constitution itself and directly relate to the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law.
- Instead of removing the limitations on the competence of the Constitutional Court to review potentially unconstitutional legislation, which has a budgetary incidence, the Fourth Amendment perpetuates this system which shields potentially unconstitutional laws from constitutional review even when budgetary problems have subsided.

15 See Venice Commission, 14-15 June 2013, Opinion 720/2013 on the Fourth Amendment to the Fundamental Law of Hungary, http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD(2013)012-e.

The opinion comes to the conclusion that the Fourth Amendment perpetuates the problematic position of the President of the National Judicial Office, seriously undermines the possibilities of constitutional review in Hungary and endangers the constitutional system of checks and balances. Together with the *en bloc* use of cardinal laws to perpetuate choices made by the present majority, the Fourth Amendment, the Commission argues, "is the result of an instrumental view of the Constitution as a political means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics".

2 The Tavares Report of the European Parlimant

Upon the request of the European Parliament, also its Committee on Civil Liberties, Justice and Home Affairs (LIBE) prepared a report on the Hungarian constitutional situation, including the impacts of the Fourth Amendment to the Fundamental Law of Hungary.[16] The report is named after Rui Tavares, the Portuguese MEP who was the rapporteur on this detailed study of the Hungarian constitutional developments since 2010. On 3 July 2013 the report passed with a surprisingly lopsided vote: 370 in favour, 248 against and 82 abstentions. In a Parliament with a slight majority of the right, this tally gave the lie to the Hungarian government's claim that the report was merely a conspiracy of the left.[17]

With its acceptance of the Tavares Report, the European Parliament has created a new framework for enforcing the principles of Article 2 of the Treaty of the European Union, which proclaims that the Union is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". The report calls on the European Commission to institutionalize a new system of

16 European Parliament, Tavares Report, 3 July 2013, http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN.

17 With about 50 of the 754 MEPs absent, the total number of yes votes was still larger than the total number of MEPs of all of the left parties combined. In short, even if all MEPs had been present, the left alone still couldn't account for all of those votes. And since the 82 abstentions had the effect of allowing the report to go forward, they should be read as soft 'yeses' rather than undecided or negative votes. Most of the abstentions no doubt came from FIDESZ's own party in the European Parliament, the European People's Party (EPP). Many EPP members signaled ahead of time that they could not back Orbán but also would not vote overtly against the position of their party, which officially supported him without whipping the votes. FIDESZ had been counting on party discipline to save it. But then it became clear that FIDESZ was terribly isolated within the EPP. The tally on the final report was not a roll-call vote, so we do not know for sure just who voted for it in the end. But the roll-call votes on the proposed amendments to the bill revealed that many members of the European People's Party (EPP) and the even-more-conservative group of European Conservatives and Reformists (ERC) voted to keep the report from being diluted at crucial junctures. Each attempt to weaken the report was rejected openly by 18-22 EPP votes and by 8-12 ERC votes. We can guess that the MEPs who rejected the hostile changes must have voted in favor of the report in the end, along with even more of their colleagues who could vote anonymously at that point. See Kim Lane Scheppele, *In Praise of the Tavares Report,* Hungarian Spectrum (3 July 2013), http://hungarianspectrum.wordpress.com/2013/07/03/kim-lane-scheppele-in-praise-of-the-tavares-report.

monitoring and assessment in place. The most important four elements of ways of actions are these:

- An "Article 2 Alarm Agenda" which requires the European Commission in all of its dealings with Hungary to raise only Article 2 issues until such time as Hungary comes into compliance with the report. This Alarm Agenda effectively blocks all other dealings between the Commission and Hungary until Hungary addresses the issues raised in the report.
- A "Trilogue" (a three-way communication) in which the Commission, the European Council and the European Parliament will each delegate members to a new committee that will engage in a close review of all activities of the Hungarian government relevant to the report. This committee is charged with assessing the progress that Hungary is making in complying with the list of specific objections that the report identifies. The Trilogue sets up a system of intrusive monitoring, much more intrusive than the Excessive Deficit Procedure (EDP) from which Hungary just escaped. Under the EDP, European bodies only looked at the budget's bottom line to determine whether Hungary's deficit was within acceptable bounds. Under the Trilogue, the committee can examine anything that is on the long list of particulars that the report identifies as within its scope.
- A "Copenhagen Commission" or high-level expert body through which a panel of distinguished and independent experts will be assigned the power to review continued compliance with the Copenhagen criteria used for admission to the EU on the part of any member state. The idea behind this body, elaborated by Jan-Werner Müller, in a report of the Transatlantic Academy research project on the future of the liberal democracy, in which I had also the privilege to take part, is that non-political experts should be given the task of judging whether member states are still acting on the basis of the values of Article 2.[18]
- And in the background, there is still Article 7 of the Treaty of the European Union. Article 7, which identifies a procedure through which an EU member state can be deprived of its vote in the European Council and therefore would lose representation in the decision-making processes of the EU, is considered the "nuclear option" – unusable because extreme. But the Tavares Report holds out the possibility of invoking Article 7 if the Hungarian government does not comply with the monitoring program and reform its ways.

But perhaps the most important part of the report is the list of what these various monitoring bodies can examine. Here is the summarized list of items taken from para. 72 of the report that the Hungarian government must address, and, where the Parliament urges the Hungarian authorities to implement as swiftly as possible all the measures the European Commission as the guardian of the treaties deems necessary in order to fully comply with EU law, fully comply with the decisions of the Hungarian Constitutional Court and implement as swiftly as possible the following recommendations, in line with the recommendations of

18 See at Seyla Benhabib, David Cameron, Anna Dolidze, Gábor Halmai, Günther Hellmann, Kateryna Pishchikova, Richard Youngs, The Democratic Disconnect. Citizenship and Accountablility in the Transatlantic Community, Transatlantic Academy, March, 2013, http://www.transatlanticacademy.org/publications/safeguarding-democracy-inside-eu-brussels-and-future-liberal-order.

the Venice Commission, the Council of Europe and other international bodies for the protection of the rule of law and fundamental rights, with a view to fully complying with the rule of law and its key requirements on the constitutional setting, the system of checks and balances and the independence of the judiciary, as well as on strong safeguards for fundamental rights, including freedom of expression, the media and religion or belief, protection of minorities, action to combat discrimination, and the right to property:

On the Fundamental Law:

- to fully restore the supremacy of the Fundamental Law by removing from it those provisions previously declared unconstitutional by the Constitutional Court;
- to reduce the recurrent use of cardinal laws in order to leave policy areas such as family, social, fiscal and budget matters to ordinary legislation and majorities;
- to implement the recommendations of the Venice Commission and, in particular, to revise the list of policy areas requiring a qualified majority with a view to ensuring meaningful future elections;
- to secure a lively parliamentary system which also respects opposition forces by allowing a reasonable time for a genuine debate between the majority and the opposition and for participation by the wider public in the legislative procedure;
- to ensure the widest possible participation by all parliamentary parties in the constitutional process, even though the relevant special majority is held by the governing coalition alone.

On checks and balances:

- to fully restore the prerogatives of the Constitutional Court as the supreme body of constitutional protection, and thus the primacy of the Fundamental Law, by removing from its text the limitations on the Constitutional Court's power to review the constitutionality of any changes to the Fundamental Law, as well as the abolition of two decades of constitutional case law; to restore the right of the Constitutional Court to review all legislation without exception, with a view to counterbalancing parliamentary and executive actions and ensuring full judicial review; such a judicial and constitutional review may be exerted in different ways in different Member States, depending on the specificities of each national constitutional history, but once established, a Constitutional Court – like the Hungarian one, which after the fall of the communist regime has rapidly built a reputation among Supreme Courts in Europe – should not be subject to measures aimed at reducing its competences and thus undermining the rule of law;
- to restore the possibility for the judicial system to refer to the case law issued before the entry into force of the Fundamental Law, in particular in the field of fundamental rights;
- to strive for consensus when electing the members of the Constitutional Court, with meaningful involvement of the opposition, and to ensure that the members of the court are free from political influence;
- to restore the prerogatives of the parliament in the budgetary field and thus secure the full democratic legitimacy of budgetary decisions by removing the restriction of parliamentary powers by the non-parliamentary Budget Council;

- to provide clarifications on how the Hungarian authorities intend to remedy the premature termination of the term of office of senior officials with a view to securing the institutional independence of the data protection authority;

On the independence of the judiciary:

- to fully guarantee the independence of the judiciary by ensuring that the principles of irremovability and guaranteed term of office of judges, the rules governing the structure and composition of the governing bodies of the judiciary and the safeguards on the independence of the Constitutional Court are enshrined in the Fundamental Law;
- to promptly and correctly implement the abovementioned decisions of the Court of Justice of the European Union of 6 November 2012 and of the Hungarian Constitutional Court, by enabling the dismissed judges who so wish to be reinstated in their previous positions, including those presiding judges whose original executive posts are no longer vacant;
- to establish objective selection criteria, or to mandate the National Judicial Council to establish such criteria, with a view to ensuring that the rules on the transfer of cases respect the right to a fair trial and the principle of a lawful judge;
- to implement the remaining recommendations laid down in the Venice Commission's Opinion No CDL-AD(2012)020 on the cardinal acts on the judiciary that were amended following the adoption of Opinion CDL-AD(2012)001;[19]
- to invite the Venice Commission and the OSCE/ODIHR to carry out a joint analysis of the comprehensively changed legal and institutional framework of the elections and to invite the ODIHR for a Needs Assessment Mission and a long and short term election observation.
- to ensure balanced representation within the National Election Committee.

On the media and pluralism:

- to fulfil the commitment to further discuss cooperation activities at expert level on the more long-term perspective of the freedom of the media, building on the most important remaining recommendations of the 2012 legal expertise of the Council of Europe;
- to ensure timely and close involvement of all relevant stakeholders, including media professionals, opposition parties and civil society, in any further review of this legislation, which regulates such a fundamental aspect of the functioning of a democratic society, and in the process of implementation;
- to observe the positive obligation arising from European Court of Human Rights jurisprudence under Article 10 ECHR to protect freedom of expression as one of the preconditions for a functioning democracy;
- to respect, guarantee, protect and promote the fundamental right to freedom of expression and information, as well as media freedom and pluralism, and to refrain from developing or supporting mechanisms that threaten media freedom and journalistic and editorial independence;
- to make sure that objective, legally binding procedures and mechanisms are in place for the selection and appointment of heads of public media, man-

19 CDL-AD(2012)020-e, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012) http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)020-e.

agement boards, media councils and regulatory bodies, in line with the principles of independence, integrity, experience and professionalism, representation of the entire political and social spectrum, legal certainty and continuity;
- to provide legal guarantees regarding full protection of the confidentiality-of-sources principle and to strictly apply related European Court of Human Rights case law;
- to ensure that rules relating to political information throughout the audiovisual media sector guarantee fair access to different political competitors, opinions and viewpoints, in particular on the occasion of elections and referendums, allowing citizens to form their own opinions without undue influence from one dominant opinion-forming power;

On respect for fundamental rights, including the rights of persons belonging to minorities:

- to take, and continue with, positive actions and effective measures to ensure that the fundamental rights of all persons, including persons belonging to minorities and homeless persons, are respected and to ensure their implementation by all competent public authorities; when reviewing the definition of 'family', to take into account the legislative trend in Europe to broaden the scope of the definition of family and the negative impact of a restricted definition of family on the fundamental rights of those who will be excluded by the new and more restrictive definition;
- to take a new approach, finally assuming its responsibilities towards homeless – and therefore vulnerable – people, as set out in the international treaties on human rights to which Hungary is a signatory, such as the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, and thus to promote fundamental rights rather than violating them by including in its Fundamental Law provisions that criminalise homeless people;
- calls on the Hungarian Government to do all in its power to strengthen the mechanism for social dialogue and comprehensive consultation and to guarantee the rights associated with this;
- calls on the Hungarian Government to increase its efforts to integrate the Roma and to lay down targeted measures to ensure their protection. Racist threats directed at the Roma must be unequivocally and resolutely repelled;

On freedom of religion or belief and recognition of churches:

- to establish clear, neutral and impartial requirements and institutional procedures for the recognition of religious organizations as churches, which respect the duty of the State to remain neutral and impartial in its relations with the various religions and beliefs and to provide effective means of redress in cases of non-recognition or lack of a decision, in line with the constitutional requirements set out in the abovementioned Decision 6/2013 of the Constitutional Court.

One more item was added to this list by amendment from Rui Tavares during the Parliamentary debate:

- "to cooperate with the European institutions in order to ensure that the provisions of the new National Security Law comply with the fundamental principles of the separation of powers, the independence of the judiciary, respect

for private and family life and the right to an effective remedy."[20]

This list identifies the things that the Hungarian government must change, and the mechanisms identified above are the key ones through which compliance will be monitored and assessed.

3 The Reactions of the Hungarian Government

The first reaction of the Hungarian government was not a sign of willingness to comply with the recommendations of the report, rather a harsh rejection. Two days after the European Parliament adopted the report at its plenary session, the Hungarian Parliament adopted Resolution 69/2013 on "the equal treatment due to Hungary". The document is written in first person plural as an anti-European manifesto on behalf of all Hungarians: "We, Hungarians, do not want a Europe any longer where freedom is limited and not widened. We do not want a Europe any longer where the Greater abuses his power, where national sovereignty is violated and where the Smaller has to respect the Greater. We have had enough of dictatorship after 40 years behind the iron curtain." The resolution argues that the European Parliament exceeded its jurisdiction by passing the report, and creating institutions that violate Hungary's sovereignty as guaranteed in the Treaty on the European Union. The text also points out that behind this abuse of power there are business interests, which were violated by the Hungarian government by reducing the costs of energy paid by families, which could undermine the interest of many European companies which for years have gained extra profits from their monopoly in Hungary. As a conclusion, the Parliament call on the Hungarian government "not to cede to the pressure of the European Union, not to let the nation's rights guaranteed in the fundamental treaty be violated, and to continue the politics of easing life for Hungarian families".[21] These words very much reflect the Orbán-government's view of 'national freedom', the liberty of the state (or the nation) to determine its own laws: "This is why we are writing our own constitution. [...] And we don't want any unconsolidated help from strangers who are keen to guide us. [...] Hungary must turn on its own axis."[22]

Due to international pressure the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the Council of Europe and the European Parliament. The changes leave

20 Plenary debate on situation in Hungary, 2 July 2013, European Parliament, Strasbourg. https://www.youtube.com/watch?v=vdyhGk5-Zmk

21 On the very day the resolution of the Hungarian Parliament was announced, Hannes Swoboda (Austria), the leader of the S&D Group at the European Parliament said that the resolution was an 'insult to the European Parliament' and demonstrated that Hungary's Prime Minister Viktor Orban does not yet understand the values of the EU in a press release. See Hungarian Parliament rejects Tavares report, Agence Europe, Brussels, 5 July 2013.

22 For the original, Hungarian-language text of Orbán's speech, entitled Nem leszünk gyarmat! [We won't be a colony anymore!] See, the webpage of the Prime Minister. 27 December 2013, http://www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat. The English-language translation of excerpts from Orbán's speech was made available by officials, see Financial Times, Brussels Blog (16 March 2012), http://blogs.ft.com/brusselsblog/2012/03/the-eu-soviet-barroso-takes-on-hungarys-orban/?catid=147&SID=google#axzz1qDsigFt C.

in place provisions that undermine the rule of law and weaken human rights protection. The Hungarian parliament, with a majority of its members from the governing party, adopted the Fifth Amendment on 16 September 2013.[23] Hungary's reasoning states that the amendment aims to "finish the constitutional debates at international forum". A statement from the Prime Minister's Office said: "The government wants to do away with those [...] problems which have served as an excuse for attacks on Hungary." Here are the major elements of the amendment:

- Regarding political campaigns on radio and television, commercial media broadcasters are able to air political ads, but they must operate similar to public media channels – i.e., distribution of air time for political ads should not be discriminatory and should be provided free of charge. But since commercial media cannot be obliged to air such ads, it is unlikely that commercial outlets would agree to run campaign ads without charge.
- Regarding recognition of religious communities (in line with the relevant cardinal law), the amendment emphasizes that all communities are entitled to operate freely, but those who seek further cooperation with the state (the so-called 'established churches') must still be voted upon by Parliament to receive that status. This means that the amendment does not address discrimination against churches the government has not recognized. Parliament, instead of an independent body, confers recognition, which is necessary for a church to apply for government subsidies.
- The provision that enabled the government to levy taxes to settle unforeseen financial expenses occurring after a court ruling against the country – such as the European Court of Justice – was also removed, but the reasoning adds that the government is always free to levy new taxes, and this amendment will cost Hungarian taxpayers at least 6 billion Forints in the next 5 years.
- The amendment creates a chance for the merger of the central bank (MNB) and the financial watchdog institution (PSZÁF).
- Although the amendment elevates some provisions of a self-governing supervisory body, the National Judicial Council, to the level of the constitution, and slightly strengthens the Council's powers, it still leaves key tasks of administering the courts with the National Judicial Office.
- One positive amendment removed the power of the president of the National Judicial Office to transfer cases between courts – a change already made on the statutory level, but since the head of the Office is already able to appoint new judges loyal to the government all over the country, the transfer power is no longer necessary to find politically reliable judges.

23 Both foreign and Hungarian Human Rights NGOs criticized the amendment. According to Human Rights Watch the "amendments show the government is not serious about fixing human rights and rule of law problems in the constitution." See Hungary: Constitutional Change Falls Short. Europe Should Act on its Rule of Law Concerns, 18 September 2013, http://www.hrw.org/news/2013/09/17/hungary-constitutional-change-falls-short The joint criticism of three Hungarian NGOs: Ötödik Alaptörvény-módosítás: nem akarásnak nyögés a vége [Fifth Amendment to the Fundamental Law: Unwillingness Results in Moan], http://helsinki.hu/otodik-alaptorveny-modositas-nem-akarasnak-nyoges-a-vege.

D Conclusions

The “pacted” or “post-sovereign” constitution-making in Hungary was designed as a two-step process, the first step being an interim constitution prepared by the National Round Table Talks and enacted by the not democratically elected pre-transitional parliament, followed by a final one sometimes after the first democratic elections. But the country has failed to make a final constitutionalist constitution, even though in the second, center left dominated freely elected parliament the governing coalition of the socialist MSZP and the liberal SZDSZ alone had constitution-making powers. Unlike South Africa’s interim constitution, or the Polish Little Constitution, the 1989 Hungarian text had no rules or procedures for the final constitution-making, except an amendment rule giving this power to 2/3 of a mono-cameral parliament, a rule very much at the merci of an electoral rule that turned out to be highly disproportional.

The unique characteristic of the 1989 Hungarian constitution was that a non-legitimate interim document together with the activist interpretation by the powerful Constitutional Court provided all the institutional elements of constitutionalism: checks and balances and guaranteed fundamental rights. Still this situation needed a second closing step: a final, fully legitimate new constitution, which has been failed. Therefore the most important lesson to learn for countries transitioning nowadays to democracy, like the ones of the Arab Spring is that if they choose the post-sovereign model of constitution-making, they have to close the process with a final constitution, because the window of opportunity will be closed after some years of the transition.

In 2010, FIDESZ with a vote of 52 % attained over two thirds of the parliamentary seats. It used the power to enact a new constitution, without any consensus or negotiation, but not with the intention to entrench constitutionalism, but ruther to constitutionally entrench its political preferences by weakening checks and balances of its power, and guarantees of rights. FIDESZ called its constitutional imposition a revolution, the revolution of the voting booth, though the voters were not told during the elections that they were voting for comprehensive constitutional change. But due to the lack of the serious commitment of citizens to the values of constitutionalism, in the April 2014 FIDESZ has won the elections, and with 44, 5 % of the party-list votes secured a two-thirds majority for another four years. The far-right Jobbik party, another enemy of liberal democracy has received another 20,5 % of the party-list votes. These numbers show to me that the owerwhelming majority of the voters is not concerned about the backsliding of constitutionalism.

This sliding constitutionalism in Hungary after the 2010 elections, and especially after the new Fundamental Law came into force constitutes a new, hybrid type of regime. What happened is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way, liberal democracy is functioning. This constitutionalist exercise aimed at a non-liberal constitutional system,[24] and indeed Hungary became an illiberal democracy. In

24 In an interview on Hungarian public radio on 5 July 2013 Prime Minister Viktor Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal constitution. He said: “In Europe the trend is for every constitution to be liberal, this is not one. Liberal constitutions are based on the freedom of the individual and subdue welfare and the interest

this illiberal democracy the institutions of a constitutional state (Constitutional Court, ombudsman, judicial or media councils) still exist, but their control power is strongly limited. Also, as in many illiberal democracies fundamental rights are listed in the new Fundamental Law, but the institutional guarantees of these rights are endangered through the lack of independent judiciary, and Constitutional Court.

As in full-fledged constitutional democracies, also in Hungary formally competitive elections with competing parties were held in April, 2014, but the more disproportional election system, the elimination of the second round, the introduction of the gerrymandering, the unique system of' winner compensation', the voting rights of non-resident new Hungarian citizens in the neighboring countries, as well as restrictive campaign rules and "biased media coverage" disadvantaged opposition parties, and provided an "undue advantage" for the governing Fidesz party [25].

In this respects the hybridity of Hungarian constitutionalism differs from the "managed democracy" of Putin's Russia, where failing competing parties and candidates, the results of parliamentary and presidential elections can not be deeemed as uncertain.

Besides these more means-based, institution-focused elements of an ordinary liberal constitutional democracy in Hungary, also the end-based sociopolitical elements of the term, namely the cultural patterns as reflected both in general and in specific behavior are lacking. In other words, in Hungary there never has been, and there still is no strong normative commitment to democracy on a behavioral and attitudinal level: therefore a broad and deep legitimation of constitutional democracy hasn't been achieved. This means that the significant political actors, at both the elite and mass levels, are not convinced that the liberal democratic regime is the right and appropriate one for the society, better than any other realistic alternative they can imagine.

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of the community to this goal. When we created the constitution, we posed questions to the people. The first question was the following: what would you like; should the constitution regulate the rights of the individual and create other rules in accordance with this principle or should it create a balance between the rights and duties of the individual. According to my recollection more than 80 % of the people responded by saying that they wanted to live in a world, where freedom existed, but where welfare and the interest of the community could not be neglected and that these need to be balanced in the constitution. I received an order and mandate for this. For this reason the Hungarian constitution is a constitution of balance, and not a side-leaning constitution, which is the fashion in Europe, as there are plenty of problems there." See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán (5 July 2013). Kossuth Rádió. See the website of the government, http://www.kormany.hu/hu/miniszterelnokseg/miniszt erelnok/beszedek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio.

25 "A number of amendments negatively affected the election process, including important checks and balances…The absence of political advertisements on nationwide commercial television, and a significant amount of government advertisements, undermined the unimpeded and equal access of contestants to the media," – international election monitors of the Organization for Security and Cooperation in Europe (OSCE) said in its report". See Statement of Preliminary Findings and Conclusions, International Election Observation Mission, Hungary – Parliamentery Elections, 6 April 2014.

Although the change of the liberal democratic political and constitutional system in Hungary to an illiberal one shows a lot of unique national characteristics, this kind of deviation can happen in other liberal democracies as well. And even though the external challenges, especially from the side of the Council of Europe and the European Union can be instrumental to enforce the compliance of a member state with joint European values, the reestablishment of the liberal democracy in Hungary can only be a consequence of actions taken by internal actors both on the institutional and the behavioral level. This means, in the first instance Hungary needs a constitution-making majority, supported by the Hungarian people willing and able to protect the values of liberal constitutional democracy.