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From the “Rule of Law Revolution” to the Constitutional Counter-Revolution in Hungary

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A The “Hungaricum” of Transition?

After more than 20 years, and after the enactment of the new Hungarian Constitution on April 18, 2011, I try to look at the core of the democratization process and evaluate the role that the constitution and the constitution-making processes played in Hungary. To achieve this aim I would like to discuss A) the characteristics of the Hungarian transition to democracy B) the constitution as the instrument of system change C) the constitutional counter-revolution in 2010-2011, and D) the status of consolidation after twenty years of transition.

The common characteristic of the system-change in Hungary was that the country had to achieve the independent nation-state, a civil society with a private economy, and democratic structure at the same time. In other words the constitutionalization here was part of a transition to both a Western model of democracy and a market economy. This “dual transition” scenario of constitutionalization is significantly different from the scenario of “single transition”, where the only aim

1 This terms of “single” and “dual” transitions are used by Ran Hirsch, Towards Juris-
to achieve was a transition from a quasi-democratic or authoritarian regime to democracy, as happened in the middle of the 1970s in Southern Europe (Greece 1975, Portugal 1976, and Spain 1978), or in South Africa with the making of the interim Constitution in 1993 and the final one in 1996, and even more different from constitutional reforms that have been neither accompanied by nor the result of any apparent fundamental changes in political or economic regimes, like in the case of Israel.

The very first question to be investigated is how the different categorizations of some political scientists fit to the transitions in Hungary. How we can, for instance, put the countries, representing unique solutions of transition into one of the categories (replacement, transformation, transplacement) used by Samuel Huntington studying thirty-five so-called third wave transitions that had occurred or that appeared to be underway by the end of the 1980s. He calls the overthrow replacement, while the two less radical types of transition, between which the line is fuzzy, transformation and transplacement. The problem with this kind of categorization starts when we try to put the different countries, representing unique solutions of transition into one of the categories. Evaluating the East Central European transitions, Huntington for instance puts Hungary into the category of transformation, while the events in Poland and Czechoslovakia are characterized as transplacements. In his book, The Magic Latern, Timothy Garton Ash, keeping alive “the revolution of ’89” as he witnessed in Warsaw, Budapest, Berlin and Prague has coined the term “refolution” for the events of Warsaw and Budapest, because they were in essence reforms from above in response to the pressure for revolution from below, though he uses revolution freely for what happened in Prague, Berlin, and Bucharest. The changes in Hungary and Poland were not triggered by mass demonstrations like in Romania, GDR (German Democratic Republic), and reforms of revolutionary importance interrupted the continuity of the previous regime’s legitimacy without any impact on the continuity of legality.

Ralf Dahrendorf another Western observer, argues that “the changes brought about by the events of 1989 were both extremely rapid and very radical (which is one definition of revolutions), at the end of the day, they led to the delegitimation of the entire ruling class and the replacement of most of its key members, as well as a constitutional transformation with far-reaching consequences.” But the forces that for instance in Poland helped liberate the society, the church and the labor unions were not present in Hungary, so instead of civil society organization only a reformist elite contibuted to the changes. But if we take into account Hannah Arendt’s definition of revolution, we can argue that the events in Hungary were actually revolutionary, in the sense that their aim was to create a constitutio libertatis, an attempt to establish a political space of public freedom in which people, as free and equal citizens, would take their common concerns into their own hands.

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B The Constitution as the Instrument of System Change

The more future oriented issue of transitions is the role of the constitutions in the process of change of system in some post-communist countries, illustrating how constitutions were exclusively political documents before 1989, and how newly established constitutions and institutions, like constitutional courts can serve as both political and legal instruments of change. History shows that while laws change, written constitutions containing fundamental values must remain, contravening the notion that “Higher Law” is not law at all. Basically this doctrine lies at the root of all natural law theories. Such theories continually revive, especially in moments of acute crisis, such as the collapse of both fascism and communism. When the Nazi-Fascist era shook their faith in legislatures, people began to reconsider the judiciary as a check against legislative disregard of principles that had customarily been considered immutable, and sought to realize those principles. As Mauro Cappelletti formulated in his book, this process took place in three stages. The first was the adoption of a written constitution. The second was the “rigid” character accorded to modern constitutions. The final stage was the provision of a means for implementing the guarantees contained in the constitution, separate from the legislative power; this would be made operational by the judiciary - in some systems by a special constitutional court. Through modern constitutionalism, natural law, placed on a historical and realistic footing, has found a new place in legal thought.

The same process occurred in 1989-1990, when the communist system changed in Eastern and Central Europe, including the countries of the former Soviet-Union. In almost all of these countries, new constitutions were enacted and separate constitutional courts were established. Latvia was the only state in post-communist Europe to return to independence while retaining its pre-World War II constitution of 1922. As Eivind Smith states, the different forms of constitution-making that took place in the early 1990s can only be understood as expressions of these countries’ will to rid themselves of the past and enter a new era. In countries such as Estonia, Latvia and Lithuania, the constitution was evidently regarded as an instrument of transformation of their status from having been Soviet republics. In countries with a less painful past, it was rather seen as a symbol of past achievements, as in Norway, or as an expression of how the polity sees itself being governed, shown by the example of Sweden.

A better-designed constitution has many advantages, among others it can indeed bring political stability. As a counter-example one can mention the case of Latvia, where a large number of formal amendments to its 1922 constitution could be enacted in a short period of time, due to the procedural ease of adopting amendments in the Parliament. The same concern can be raised about the stability of the Hungarian and the Polish constitution, the latter at least until 1997. A very paradoxical aspect of the whole history of East-Central Europe is, that those two countries, i.e. Hungary and Poland, which were the most developed countries, did not enact a new constitution. Poland did it in 1997. But those coun-

6 Mauro Cappelletti, Judicial Review in the Contemporary World, New York 1971.
8 See Janis Penekis, Amend or Adjust the Constitution, in Smith (ed.) (2003), 82.
tries, where the obstacles of a new democracy were seemingly more present, enacted new constitutions very rapidly, e.g. Russia, Bulgaria, Romania.

A common negative consequence of the frequent amendments to the constitution both in Latvia and Hungary are the temptations to harness constitutional changes to a popular cause and to exploit both for partisan gain, as for instance the ongoing agitations in both countries for a president elected by "all the people", which involves the risk that a "strong hand" will solve the endless problems of today's politics.9

One of the well known examples of the old dilemma of amending or adjusting a constitution, and the rigidity of constitutional amendment procedures is that of Norway, where the constitution dates back to 1814. It is the people's foremost piece of national and political heritage. In some important aspects the wording seems at odds with what is actually going on; therefore one often has to refer to "constitutional customs" some of which seem to stand in direct contradiction to the written constitution.

The way of constitution-making very much depends on the power relations at the time the transition towards democracy starts. The most radical, revolutionary way of transition is the violent overthrow or collapsing of the repressive regime; there is then a clear victory of the new forces over the old order. Democracy can also arrive at the initiative of reformers inside the forces of the past or as a result of joint action by and the negotiated settlement between governing and opposition groups. The different forms of constitution-making that took place in the early 1990s can be understood as expressions of these countries’ will to rid themselves of the past and enter a new era, but through different ways.

By now, after twenty years of the transition the constitutionalization can be deemed as more or less closed in all of the East Central European countries, probably with the exception of Hungary. These processes represent three different types of constitution-making.

1 The earliest, even too early closure with significant legitimation problems happened in Bulgaria and Romania, where the first freely elected parliaments have been elected as a sovereign constituent assembly, like the French one in 1789-1791 and in 1945, or the Weimar Assembly in 1918.

2 In the Czech and the Slovak Republics the democratically elected normal legislature closed the process in 1992 after the collapse of the formal federal state, had contributed very much to the end of the federation.10

3 In Hungary (and Poland) formally the normal, but the illegitimate legislature enacted the comprehensive modifications of the old constitution, but after the peaceful negotiations between the representatives of the authoritarian regimes and their democratic opposition. Similar "post-sovereign"11 or "pacted

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10 Andrew Arato, Dilemmas Arising Out of the Power to Create Constitutions in Eastern Europe, in Michel Rosenfeld (ed.), Constitutionalism, Identity and Difference, Durham 1994.
constitution-making\textsuperscript{12} process happened in Spain in the end of the 70s and in South Africa from the beginning through the middle of the 90s.

Even though in Poland the constitution-making process was closed in 1997 by a final constitution, the constitutional courts have played an important role with their activist interpretation in the not finalized constitution-making process.

In Hungary, concepts of transforming the 1949, Stalin-inspired Rákosi-Constitution into a rule of law document were delineated in 1989 in the National Roundtable Talks by the participants of the Opposition Roundtable (OR), the so-called third side and the representatives of the state-party. Afterwards, the illegitimate Parliament only sealed the comprehensive amendment to the Constitution, which entered into force on the anniversary of the Revolution and which is since then – with smaller-bigger changes – the basic document of the "constitutional revolution". The minutes of the OR and the Tripartite Negotiations\textsuperscript{13} enable us to receive a better idea what the intention of the "founding fathers" were, and then we can examine how these ideas have been implemented and altered.

As the immediate antecedent of the establishment of the OR in March 1989 the concept of the new constitution written by the Hungarian Socialist Worker’s Party (Magyar Szocialista Munkáspárt - MSZMP) had been submitted to the Parliament. Thus, they were afraid that those being in power would create the “new” constitutional framework themselves. During the National Roundtable talks, which started in mid-June, initially the OR tried to prevent this, and considered the adoption of the new constitutional order to be the task of the new Parliament set up after the Parliamentary elections. For example, they did not want to negotiate about creating the institution of the president of the republic at all; instead they recommended that the speaker of the Parliament should be vested temporarily with the powers of the president. Moreover, the participants of the OR had agreed on establishing the Constitutional Court prior to the new Constitution only three days before the negotiations were closed.

Giving up the idea of adopting a new constitution by the democratically elected new Parliament was influenced by various factors. One of them definitely was the fact that the opposition could not be sure that the MSZMP would not win by absolute majority against its rivals who were far less known among the voters. But several signs indicate that they could not exclude, even in case of a relative win, the MSZMP’s ability to form a government. Of course, the MSZMP could not be sure of its success either, thus they were not able to ignore the possibility of the “advance constitution-making”, certainly in exchange of promises to guarantee some of their positions. Such a promise could be on the part of the parties at the end signing the agreement to directly elect the president before the parliamentary elections, which held forth the win of the communist reformer Imre Pozsgay. This was prevented by the success of the referendum initiated by the

\textsuperscript{12} The term is used by Michel Rosenfeld, The Identity of the Constitutional Subject, London 2009.

Alliance of Free Democrats (Szabad Demokraták Szövetsége – SZDSZ) and the Federation of Young Democrats (Fiatal Demokraták Szövetsége – Fidesz). As a result of this the president was elected only after the first democratic elections, by the new Parliament. The published minutes prove: the split between the signatories of the agreement and those who initiated the referendum was caused by the fact that one of the parties pursued a consistent plan to change the regime, while on the other side – allegedly – Antall and Pozsgay agreed on an MSZMP and MDF (Hungarian Democratic Forum, Magyar Demokraták Fórum – MDF) pact. Antall was obviously motivated by the fear that the MSZMP could win, and that is why he wanted to have assurance to receive share in power, so they could win even if they actually loose on the first democratic elections. From the point of view of the transition the happy end of this is that the referendum freed the MDF from the pact with the communists, and this made it possible to come to agreement with the SZDSZ, which initiated the referendum.

This shows that both the state-party and the opposition were motivated in not leaving the establishment of the transition’s constitutional framework to a new constitution by the fear that they could loose the democratic elections. Thus the 1989 constitutional amendment inserted new content into the 1949 framework, which can be considered as a rule of law document, even if the Rákosist-Kádárist skeleton lolls out sometimes. Apparently the negotiations-based drafting explains that the old-new constitution principally follows the model of a consensual democracy widely accepted in the continental European systems. The system of government, which assumes the presence of more than two parties in the Parliament and a coalition-governance, at the same time meant that the parties knowingly rejected both the semi- or full presidential regime that was preferred by the MSZMP and is applied in many post-communist countries even today, and also the English Westminster-type of two-party parliamentarism. If compared to the Western European solutions, the decision-making process set up in 1989-90 has another distinctive characteristic that obviously could be explained by the legacy of the forty-year long totalitarian regime: it is not only based on the consensus among the coalition parties, but in some cases it requires the involvement of the opposition, and it significantly strengthens the checks on the governmental powers.

As regards the acts requiring two-third of majority, hence the support of the opposition, in their original forms as “acts with the force of the Constitution” practically called for a two-third quorum in all questions concerning the structure of the government and fundamental rights. The “pact” in 1990 between the biggest governing and opposition party radically reduced the number of the qualified acts. In exchange of this and of the acceptance of the constructive vote of confi-

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14 Surprisingly a contrary approach is reflected in the reasoning of the Decision 3/2004. (II. 17.) on the possibility of interpellation of the Attorney General, where the justices fifteen years after the transition resulting in a practically new Constitution, perceived the Hungarian constitutional development as a continuum starting from 1949. This is supported by the fact that the Court established periods in the following way: its first stage is the Rákosist- Constitution, the Act no. XX of 1949 (marked as Constitution 1 by the Court, even though in this partition only one exists of this), its amendment during Kádár by Act I of 1972 (the marking of the Court for this is Amendment 1), the second stage is the Constitution of the transition, elaborated by the Roundtable talks, the Act no. XXXI. of 1989 (this is called as Amendment 2).
The parties of the OR accepted the MSZMP’s plan to set up the Constitutional Court as an institution counterbalancing the executive, like it is prevalent in the consensual democracies of Europe, even for the temporary period prior to the elections. However, instead of a body for preserving the state-party’s power, the opposition insisted on a Court, which radically limits the Parliament and the government and the decisions of which cannot be overturned by the Parliament – as initially proposed by the MSZMP, and where anyone is entitled to submit a petition to review the constitutionality of a piece of legislation.

The MDF-SZDSZ “pact” signed after the 1990 spring elections is also the result of the decision-making procedure based on consensus, which was also introduced in the Hungarian political culture by the roundtable talks. Actually, the minutes of the roundtable talks tangibly prove that the preparation of the Hungarian transition was carried out in a consensual way and the participants – obviously feeling the absence of their legitimacy – tried to shape the new constitutional system as a consensual democracy. For this reason, they tried to include the utmost checks on the executive power. At the same time, the technical implementation of the next constitutional amendment showed that the political actors treated the task of defining the relationship among the constitutional institutions as part of a political bargaining process, and for the time being they did not aimed at creating final constitutional solutions, what would have meant the adoption of the new Constitution.

This is indicated by the fact that József Antall, who had been arguing in favor of a president who is the head of the executive branch and the commander-in-chief, as a prime minister during the media war in 1991-1992 he requested from the Constitutional Court an opposite interpretation of the Constitution’s provisions on the president’s powers. The Court led by László Sólyom – supplementing the missing provisions of the Constitution – declared that the president in parliamentary systems similar to the Hungarian is not the head of the executive branch, and on the basis of the Constitution and the act on national defense he practically does not have commander-in-chief powers; those are shared by the government and the minister of defense.

While the pact of 1990 represented probably the last institutional sign of a consensus between the governing parties (or at least the bigger party) and their opposition (or at least one of them), the constitutional amendment following from the pact itself also narrowed the checks on the executive. In the coming parliamentary periods it seemed that the governments would have gladly restricted the constitutional institutions of the consensus-based exercise of governmental powers, first of all the Parliament’s means to control the executive. However, they did
not have either the courage or the necessary support to carry out the required constitutional amendments.

The Hungarian “constitution-making” of 1989 was criticized by many authors. The American law professor, Bruce A. Ackerman states in his book published in 1992 that the constitutional guarantees of a liberal rule of law state can be established only if a new constitution is adopted, and the possibility to adopt a new basic law fades as the time passes. According to him, there would have been a possibility, and indeed a need, for the adoption of a new constitution in Hungary at the beginning of the political transition, which would have solved the legitimacy deficit of the “system change”, similar to what was done with respect to the German Basic Law (Grundgesetz) of 1949. In an interview given a decade later he not only repeats this opinion, but talks about the disadvantages too:

Hungary did not grab the opportunity to pass a constitution. The roundtable of 1989 did not adopt a new constitution. The Constitutional Court by elaborating on fundamental principles in its decision, tried to substitute the new constitution. But it is to be feared that this had been finished when the mandate of László Sólyom expired. Because the appearance of the constitutionalism is not supported by a modern, new constitutional text, but it is based on the interpretation of the current Constitutional Court, the Hungarian constitutional achievements are too fragile and uncertain.

After more than twenty years the question remains whether the consolidated constitutional regime in Hungary, which seemed to work, until about 2010, really needed another constitution, or as Ackerman argues, the window of opportunity was already closed, when the “Ester-Constitution” was enacted in April 2011.

C The Constitutional Counter-Revolution

The center-right government of FIDESZ, the Alliance of Young Democrats, with its tiny Christian democratic coalition partner received more than two-third of the mandates in the 2010 Parliamentary elections. With this overwhelming majority they were able to enact a new Constitution without the votes of the weak opposition parties. But this constitutionalist exercise aimed at an illiberal constitutional sort.

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16 “A magyar alkotmányos vívmányok túlságosan sérülékenyek”. ["The Hungarian Constitutional Achievements Are Fragile"] Gábor Halmai’s interview with Bruce A. Ackerman. Fundamentum, 2003/2, 52.
This new constitution, entitled the Fundamental Law of Hungary was passed by the Parliament on 18 April 2011. The Fundamental Law, which enters into force on 1 January 2012, supersedes the previous constitution (hereinafter: 1989 constitution), which, in keeping with the requirements of democratic constitutionalism during the 1989-90 regime change, comprehensively amended the first written Constitution of Hungary (Act XX of 1949). The drafting of the Fundamental Law took place without following any of the elementary political, professional, scientific and social debates. These requirements stem from the applicable constitutional norms and those rules of the House of Parliament that one would expect to be met in a debate concerning a document that will define the life of the country over the long term. The debate — effectively — took place with the sole and exclusive participation of representatives of the governing political parties. In its opinion approved at its plenary session of 17-18 June 2011, the Council of Europe’s Venice Commission also expressed its concerns related to the document, which was drawn up in a process that excluded the political opposition and professional and other civil organisations. The document — according to the declaration set forth in article B) — seeks to maintain that Hungary is an independent, democratic state governed by the rule of law, and furthermore — according to article E) — that Hungary contributes to the creation of European unity; however, in many respects it does not comply with standards of democratic constitutionalism and the basic principles set forth in article 2 of the Treaty on the European Union [hereinafter: TEU].

This article addresses some of those flaws in its content in relation to which the suspicion arises that they may permit exceptions to the European requirements of democracy, constitutionalism and the protection of fundamental rights, and, thus, that in the course of their application they could conflict with Hungary’s international obligations.

1 The Fundamental Law on the Identity of the Political Community

An important criterion for a democratic constitution is that everybody living under it can regard it as his or her own. The Fundamental Law breaches this requirement on multiple counts.

Its lengthy preamble, entitled National Avowal, defines the subjects of the constitution not as the totality of people living under the Hungarian laws, but as the Hungarian ethnic nation: “We, the members of the Hungarian Nation [...] hereby proclaim the following.” A few paragraphs down, the Hungarian nation returns as “our nation torn apart in the storms of the last century”. The Fundamental Law defines it as a community, the binding fabric of which is “intellectual and spiritual”: not political, but cultural. There is no place in this community for the nationalities living within the territory of the Hungarian state. At the same time, there is a place in it for the Hungarians living beyond our borders.

The elevation of the “single Hungarian nation” to the status of constitutional subject suggests that the scope of the Fundamental Law somehow extends to the whole of historical, pre-Trianon Hungary, and certainly to those places where

Hungarians are still living today. This suggestion is not without its constitutional consequences: the Fundamental Law makes the right to vote accessible to those members of the “united Hungarian nation” who live outside the territory of Hungary. It gives a say in who should make up the Hungarian legislature to people who are not subject to the laws of Hungary.

It characterises the nation referred to as the subject of the constitution as a Christian community, narrowing even further the range of people who can recognise themselves as belonging to it. “We recognise the role of Christianity in preserving nationhood”, it declares, not as a statement of historical fact, but also with respect to the present. And it expects everyone who wishes to identify with the constitution to also identify with its opening entreaty: “God bless the Hungarians.”

2 Intervention into the Right to Privacy

The Fundamental Law breaks with a distinguishing feature of constitutions of rule-of-law states, namely, that they comprise the methods of exercising public authority and the limitations on such authority on the one hand and the guarantees of the enforcement of fundamental rights on the other. Instead of this, the text brings several elements of private life under its regulatory purview in a manner that is not doctrinally neutral, but is based on a Christian-conservative ideology. With this, it prescribes for the members of the community a life model based on the normative preferences that fit in with this ideology in the form of their obligations towards the community. These values, which are not doctrinally neutral, feature as high up as the Fundamental Law’s preamble entitled National Avowal:

“We recognise the role of Christianity in preserving nationhood.”
“We hold that individual freedom can only be complete in cooperation with others.”
“We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love.”
“Our Fundamental Law […] expresses the nation’s will and the form in which we want to live.”

With particular regard to the fact that according to article R) the provisions of the Fundamental Law must also be interpreted in keeping with the National Avowal, and that according to article I, paragraph (3) fundamental rights may be restricted in the interest of protecting a constitutional value, this provision could serve as the basis for a restriction of fundamental rights.

Certain provisions of the Fundamental Law pertaining to fundamental rights intervene in questions of marriage and the family, the prohibition on same-sex marriage, and the protection of embryonic and foetal life, prescribing ideologically-based normative value preferences in private relationships.

According to article L) of the Fundamental Law:

“(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation’s survival.

(2) Hungary shall encourage the commitment to have children.

(3) The protection of families shall be regulated by a cardinal Act.”
The Fundamental Law’s conception of marriage – which, incidentally, follows the definition serving as the basis for the Constitutional Court’s Decision 154/2009 (XII. 17.) ÂB on the constitutionality of registered domestic partnerships – corresponds roughly to the Catholic natural-law interpretation of marriage, which regards faithfulness, procreation and the unbreakable sanctity of the relationship between spouses as the most important elements of marriage. This constitutional regulation, founded on natural-law principles, protects those of the people’s interests that not everyone attributes to themselves, and with which they do not necessarily wish to identify themselves and, thus, it breaches their autonomy. When defining marriage and evaluating the role of the family a modern, living constitution – especially a new Fundamental Law – should accommodate the changes to society that increase the range of choices available to the individual. This should have required the Fundamental Law to regulate the institution of marriage and family together with the fundamental rights guaranteeing the self-determination of the individual and the principle of equality.

With the constitutional ban on same-sex marriage the constitution-maker has ruled out the future ability of the Hungarian legislature, following the worldwide tendency, to make the institution of marriage available to same-sex couples. In keeping with this, article XV of the Fundamental Law does not mention discrimination based on sexual orientation and gender identity in its list of prohibited forms of discrimination. This means that the Hungarian constitution-maker does not prohibit the state from supporting or negatively discriminating against a way of life—based on sexual orientation alone. This solution runs counter not only to the European Union’s Charter of Fundamental Rights and the case law of the European Court of Justice (for the latest example see judgement C-147/08 in the case of Jürgen Römer v. Freie und Hansestadt Hamburg), but also to the provisions of Hungary’s still effective Act CXXV of 2003 on the Promotion of Equal Treatment and Equal Opportunities.

All of these provisions breach the autonomy of individuals who do not accept the normative life models defined on the basis of the Fundamental Law’s ideological values - as the preamble words it: “the form in which we want to live” - and they are capable of ostracising them from the political community.

3 Weakening of the Protection of Fundamental Rights

The decline in the level of protection for fundamental rights is significantly influenced not only by the substantive provisions of the Fundamental Law pertaining to fundamental rights, but also by the weakening of institutional and procedural guarantees that would otherwise be capable of upholding those rights that remain under the Fundamental Law. The most important of these is a change to the review power of the Constitutional Court, making it far less capable than before of performing its tasks related to the protection of fundamental rights. Added to this is the change in the composition of the Constitutional Court, taking place prior to the entry into force of the Fundamental Law, which will further impede it in fulfilling its function as protector of fundamental rights.

The considerable restriction on ex-post control has caused great controversy in Hungary and abroad, because the withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been
restricted based on the object of the legal norms to be reviewed. The constitutional court judges can only review these laws from the perspective of those rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship), that they typically cannot breach. The restriction remains in effect for as long as state debt exceeds half of what is referred to in the Hungarian text as “entire domestic product”; the content of which is uncertain. Therefore, in the case of laws that are not reviewable by the court the requirement that the constitution be a fundamental law, and that it be binding on everyone, is not fulfilled. This also clearly represents a breach of the guarantees, set out in Title 2 of the TFEU, relating to respect for human dignity, freedom, equality and the respecting of human rights – including the rights of persons belonging to a minority.

With regard to the Constitutional Court’s powers of ex-post control, the effectiveness of the protection of fundamental rights is reduced not only by the limitation of their objective scope, but also by a radical restriction of the range of persons that may initiate a Constitutional Court review. This is due to the abolition of one of the peculiarities of the Hungarian regime change: the institution of the actio popularis, according to which a petition claiming ex post norm control may be submitted by anybody, regardless of their personal involvement or injury. Over the past two decades or more this unique institution has provided not only private individuals, but also non-governmental organizations and advocacy groups with the opportunity to contest in the Constitutional Court, for the public good, those legal provisions that they regard as unconstitutional. It could of course be argued that this institution has never existed in any other democratic state, but it has nevertheless undoubtedly contributed substantially to ensuring the level of protection of fundamental rights that has been achieved and which now diminishing.

Abstract ex-post norm control, under point e) paragraph (2) of Section 24 of the Fundamental Law, may in future only be initiated by the government, a quarter of the votes of members of parliament, or the Commissioner for Fundamental Rights. Given the balance of power in the current parliament, this makes any such petitions highly unlikely, since the government and the ombudsperson appointed by it are hardly about to make use of this opportunity, while a quarter of MPs’ votes would assume a coalition between the two democratic opposition parties and the radical right-wing party, which supports the government.

The cardinal Act on the Constitutional Court, passed in October 2011 decided on the fate of the several hundred petitions that are already lying in the court’s intray, submitted in the form of an actio popularis by private individuals entitled to do so prior to the entry into force of the Fundamental Law, but who will be subsequently divested of this right. It applies the ad malam partem retroactive effect, so willingly applied by the present government in other cases, also came into play here with the result that the Constitutional Court does not pass judgement on previously submitted petitions.

Private individuals or organisations may only turn to the Constitutional Court in future if they themselves are the victims of a concrete breach of law and this has already been established in a civil-administration or a final court decision. In this case, the legal remedy offered by the Constitutional Court will naturally only affect them. In other words, the extension of opportunities to submit constitutional complaints is no substitute whatsoever for the widely available right of private individuals and organisations to file petitions.
There is no doubt that the widely available opportunity to submit complaints could be beneficial to the judging of cases involving fundamental rights, and this has been the case in Germany, Spain and the Czech Republic. A prerequisite for this, however, is a Constitutional Court that is committed to fundamental rights and is independent from the government. The present government, on the other hand, has done all it can to prevent this since taking office in May 2010. This process began with the alteration of the system for nominating constitutional court judges, giving the governing parties the exclusive opportunity to nominate and subsequently replace judges. The Fundamental Law, in a further weakening of the guarantees of independence, increased the number of Constitutional Court judges from eleven to fifteen, which makes it possible to select five more new judges, after the two judges selected in May 2010, with their appointments lasting for a term of twelve years rather than the previous nine; in other words, for three parliamentary cycles. In future the president of the constitutional court, who has until now been elected for a term of three years by the judges, will be selected by Parliament for the duration of his/her time in office. These changes could not wait until the entry into force of the Fundamental Law on 1 January 2012; rather, the president and the new members were selected at the end of July based on an amendment to the existing constitution, passed on 6 July 2011.19

4 The Constitutional Entrenchment of Political Preferences

At the time of the Hungarian regime change, the constitution makers have preserved the amendment rule of the original 1949 constitution used to produce a substantively new constitution. Whatever the original reason, this rule requiring only two thirds of the absolute majority of parliament to make any and all changes to the constitution has been long considered insufficient for a protection of fundamental rights, adequate constitutional review and of the stability of the basic structure of the constitution. Observers including the author of this article considered this deficiency the main one requiring the making of a new constitution.20 The FIDESZ government, in its initial plans, proposed a new amendment rule that would require 2/3 votes in two parliamentary sessions with an election in between to approve constitutional amendments. Unlike its Spanish prototype, not distinguishing between fundamental revision and minor changes, this rule promised to entrench to too high a degree a constitution that was not produced with sufficient consensus. It was because of such legitimation problems the government backed away from the idea of replacing the purely parliamentary amendment rule. But it chose to compensate for this failure by lifting a large number of ordinary policy issues into the realm of entrenched laws, thereby removing the power of future parliaments to alter policy choices made by the present one.

The new Fundamental Law regulates some issues which would have to be decided by the governing majority, while it assigns others to laws requiring a two-third majority. This makes it possible for the current government enjoying a two-third majority support to write in stone its views on economic and social policy. A subsequent government possessing only a simple majority will not be able to

alter these even if it receives a clear mandate from the electorate to do so. In addition, the prescriptions of the Fundamental Law render fiscal policy especially rigid since significant shares of state revenues and expenditures will be impossible to modify in the absence of pertaining two-third statutes. This hinders good governance since it will make it more difficult for subsequent governments to respond to changes in the economy. This can make efficient crisis management impossible. These risks are present irrespective of the fact whether in writing two-third statutes the governing majority will exercise self-restraint (contrary to past experience). The very possibility created by the Fundamental Law to regulate such issues of economic and social policies by means of two-third statutes is incompatible with parliamentarism and the principle of the temporal division of powers.

As regards pensions, the Fundamental Law itself excludes the possibility that a subsequent governing majority create a funded pension scheme based on capital investment. Europe and the Western world in general will face serious demographic challenges in the coming decades. One possible response of public policy to this challenge is the partial transformation of the pay-as-you-go pension system to a funded pension scheme based on capital investment. Such a decision is to be preceded by a comprehensive social debate and assessment of the pros and cons of different public policy solutions. It is not compatible with the functions of the constitution that the current governing majority excludes the application of one of the available public policy solutions in the Fundamental Law without having been empowered by the electorate to do so. In addition, Section 40 of the Fundamental Law assigns the basic rules of the pension system to a cardinal act, which, as mentioned above, requires a two-third majority. It is impossible to know today to what extent this statute will regulate the pension system. In any case, the Fundamental Law makes it possible that the retirement age and other conditions of eligibility as well as the basis for calculating pensions will be modifiable only by a two-third majority. This prevents subsequent governments winning popular support at free elections to put in practice its own views of pension policy.

Section L) of the Fundamental Law specifies that the regulation of family welfare support is also to be subject to two-third statutory regulation. Without knowing the text of the planned statute it is impossible to decide to what extent the governing majority intends to regulate this issue in the pertaining two-third statute. It is clear, however, that the pertaining prescriptions of the Fundamental Law creates the possibility that every detailed issue of the family welfare support will only be modifiable subsequently by a two-third majority. It is to be part of the ruling majority’s social policy at any given time to settle questions such as the child’s age limit until which motherhood support is paid, the eligibility conditions and amount of this support, or the eligibility of different family types for different kinds of support. Thus, in a parliamentary democracy there is no justification for writing in stone the views of the current government coalition in such a manner.

Section 40 of the Fundamental Law states that basic rules of taxation are to be determined by a fundamental statute, that is, one requiring a two-third majority. This prescription makes it possible that the currently ruling government coalition to set its own views in a two-third statute on tax policies, especially as regards the linear, flat tax and the exceptionally high tax benefits for families. This could easily make it impossible that a subsequent government gaining power
because of its promise to introduce progressive taxation realize its public policies based on the mandate received from voters.

In addition to the long-term fixing of preferences concerning economic and social policies, the governing parties can implement their very own personal preferences, too, in the appointment and replacement of the leaders of independent institutions. Parliament chose as president of the State Audit Office for 12 years and a head of the National Media and Telecommunications Authority for 9 years former MPs of the bigger governing party. The chief prosecutor appointed for 9 years is a former parliamentary candidate of the bigger governing party. Without any additional reason, the coming into force of the Fundamental Law makes it in itself possible that the governing parties nominate only their own candidates for the new positions of Constitutional Court judges, a new president of the Constitutional Court, the head of the ordinary judiciary, as well as new ombudspersons for six, nine and twelve years, respectively. Following the adoption of the Fundamental Law, a statute prohibits the president of the National Council of Justice, who, at the same time, is also the president of Hungary’s Supreme Court, to appoint judges until the Fundamental Law comes into force. Clearly, the aim of this moratorium is that the head of the Curia, to be chosen for nine years on the basis of new Fundamental Law, should appoint the heads of the most important courts. This will result in the long-term entrenchment of personal preferences. This can undermine the adequate operation of independent institutions.

In a related development, the Fundamental Law gives the Budget Council the right to veto the state budget statute. Two of the three members of the Council were appointed by the ruling government coalition until at least 2019. At the same time, the Fundamental Law fails to define unequivocally what is covered by the Council’s right to veto. In addition, it does not contain guarantees to exclude the abuse of the powers of this body. Such guarantees would be all the more required as the drafting of the budget is the competence and responsibility of the governing majority at any given time. This prerogative cannot be limited by a body which seems to be independent, but consists of appointees of an earlier government. This raises the possibility that in addition to – or even instead of – considerations regarding the sustainability of budgetary policies the Budgetary Council may be guided by preferences of public policy when exercising its veto right.

**D Can the 20 Years Old Hungarian Constitutional Democracy Be Deemed As Consolidated?**

One of the most important questions is, what role the making of the constitutions in 1989-1990 and in 2011 played in consolidating the democracy in Hungary and whether the extreme polarisation that exist in this country, more than twenty years after the transition, is the result of the lack of political culture. As it is certain that the criteria of the consolidated democracy are not only the democratic institutions, that were introduced by the early constitutional amendments, but also the absence of political actors aiming to overthrow these democratic institutions, and that the democratic decisions are generally accepted by the public opinion.
One has to differentiate between the two levels of the democratic consolidation process, namely the procedural/structural as well as the more substantive one.

1. The prime question in need of an answer regarding the first, i.e. the institutional level is: How the structures that ensure horizontal accountability, constitutionalism, and the rule of law got strengthened? Did the institution building established by a new constitutional order lead to a state governed by rule of law? And, besides the political institutions, have strong civil society and an institutionalised economic society been created in order for democracies to consolidate?

2. The question concerning the second level, which relates to the normative commitment to democracy on a behavioral and attitudinal level is: whether a broad and deep legitimation has been achieved? In other words, whether all significant political actors, at both the elite and mass levels, are convinced that the democratic regime is the right and appropriate one for the society, better than any other realistic alternative they can imagine?

The recent growth of populism by both the center and the far right, the different movements for geopolitical destabilisation in Europe and the high nostalgia in the country for the old communist regime as well as the easy dismantling of many institutional guaranties of the rule of law after the 2010 Parliamentary elections before and in the new Constitution by the populist center right government enjoying two-third majority of the mandates reveal the lack of the extended nature of the consolidation process, the emergence of a democratic political culture. The institution building of 1989-1990 did not seem to go hand in hand with behavioral development, the entrenchment and deepening of democratic attitudes, both by the elites and by the masses.

My conclusion is that even if Hungary was consolidated on the procedural level, full consolidation on the substantive level leaves to be desired mainly because the political culture in the country is not strong enough. At the same time, although some positive examples of certain aspects of consolidation are present in the other countries of the region, they are hardly ever making an influence cross border.

Despite the introduction of rule of law and its institutions in the country in 1989 there is still no consensus on constitutional values among the political actors, some actors do not even fully respect these values, and there is no full respect within the society, either.21 How to explain that after two decades of the transition in a post-totalitarian country the constitution, the parliament and the constitutional court, especially by deciding the most important issues of the transitional justice (lustration, retroactive justice, compensation, access to the files of the former secret police) could not achieve full consolidation of democratic values among the members of society.

The main reasons for this lack of full democratic consolidation are as follows:

1. There was no real parliamentary democracy in Hungary, only elements of a representative system existed before WWII governor Horthy’s regime, with

21 That time opposition leader Viktor Orbán in a speech delivered on 10 November 2009 said the following about the Constitution of the 1989: “There is nothing in the old Constitution to be respected.” The Spring 2010 Parliamentary elections, which lifted him in the position of the Prime Minister he called a “polling booth revolution”, which ended the 20 years of confused transition.
From the “Rule of Law Revolution” to the Constitutional Counter-Revolution in Hungary

strong nationalism and anti-Semitism, and without any kind of human rights culture. During the 1920s and 1930s, when Hungary had a far-right government that flirted seriously with fascism, Miklós Horthy governed not only as admiral without a sea, but also as a regent without a king. Horthy relied for some of his authority on his public reverence for the Holy Crown, with which he associated himself whenever possible. He also organized a major national celebration for the Crown in 1937 and took full propaganda advantage of touring the country with the Crown in an open train. While he himself could not claim the title of king, he appeared nonetheless in the place of a king governing the country with a toxic mix of nationalism, xenophobia and disrespect for basic legality and constitutionalism.

2 The lack of the consensus about democratic values at the time of the transition. The split of the anti-communist coalition partners after the disappearance of the danger of Communist restoration in the countries of the region demonstrate that Anti-communism does not necessarily mean commitments to democratic values and human rights. In the 1998-2002 legislative period the central right government of FIDESZ used the far-right-wing opposition party, MIEP, the Hungarian Justice and Life Party to frustrate the ability of the opposition to carry out its constitutional tasks.

After the 2006 Parliamentary elections Hungary witnessed the even more spectacular rise of extremist right-wing parties. While an undertow of right-wing extremism operated throughout the 1990s, this new extremism has gained a great deal of public political traction in the last five years. A new political party, Jobbik, won 17 % of the vote in the European parliamentary election in 2009 and 15 % of the vote in the parliamentary elections in April 2010, campaigning on a platform of Euroskepticism, anti-cosmopolitanism, and Hungarian nationalism. Operating with its own paramilitary group, the Hungarian Guard, that has been officially banned using militant democratic tactics (but which the party reports is operating anyway), Jobbik has promised to provide police protection to fearful Hungarians who are afraid of “political crime, Gypsy crime and economic crime”.22 Political crime refers to the self-dealing of politicians, which Jobbik has relentlessly exposed (sometimes accurately, other times with breathtaking disregard of evidence). The party has campaigned against all other parties which Jobbik portrays as being corrupt. They therefore play off the widespread sense in Hungary that all politicians are in the political game only for themselves. (This of course may be most true of Jobbik itself, whose origins date to the time when some politicians on the far-right side of the political spectrum were not supported for key political posts that they wanted both at home and abroad.)

3 Economic crime taps anger about the current economic crisis. Many Hungarians are in dire straits at the moment because their foreign-currency-denominated debt suddenly ballooned as the value of the national currency fell relative to other currencies in the recent economic crisis. With many home mortgages denominated in Euros and Swiss francs while salaries were paid in forints, Hungarians suddenly found themselves in deep trouble when the bottom fell out of the national economy. Jobbik tells such people that they have been robbed by foreign interests.

4 The unsolved problems of dealing with the communist past weakened the process of reconciliation in the new democracies. The lack of retributive justice against perpetrators of grave human rights violations and decommunisation through a strong vetting procedure and the lack of restitution of the confiscated properties, as well as the kind of Marshall-plan and an economically and politically independent bourgeoisie with the hope for a speedy economic growth and better living standard, could also contribute to the disappointments.

5 The sound of the losers of the transition could easily cause populism, nationalism, anti-Semitism, anti-secularism, anti-Europeanism, and help to the political actors using these feelings.

All of the listed reasons indicate that like in other post-communist countries the regime's trajectory also in Hungary has been largely circumscribed by historical legacies. Contrary to early optimistic expectations, democracy has not become “the only game in town”. The first 20 years have not produced a Fukuyama-style “end of history” in none of the countries of our region, but rather a return to historically rooted differences. On the other hand this does not mean that outcomes were predetermined or that there was no room for maneuvering. The early successes of the Hungarian transition caused an optimistic “possibilism”, but after two decades we have to realize that we cannot escape our past, and need to learn a more historically grounded realism about the prospects of liberal democracy.

The question for the future of a fragile democracy, like the Hungarian, whether its democracy will fall back into authoritarian systems, or at best into an illiberal democracy, similar to that of the Latin-Americans or the one in Putin’s Russia, or alternatively it can be consolidated. The European Union can help in this consolidation, since according to Article 2 of the TEU the Union is based on common values, like democracy, rule of law, and fundamental rights. But as John Stuart Mill has argued, democracy must come from within, it should not be imposed from outside. This means that to protect the values of democracy Hungary needs a constitution-making majority, supported by the Hungarian people.

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