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# Formal and Informal Constitutional Amendment in Hungary\*

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## Abstract

In this paper, we give a critical overview of the formal and informal constitutional amendments that have occurred in Hungary since the transition. We argue that even though we face terminological difficulties, informal constitutional amendment is not only possible but is actually present in the Hungarian constitutional order in the form of the constitutional interpretation of the Constitutional Court. In certain cases, this exercise is beneficial for the stability of the rule of law, while in others it may have a detrimental effect on the same. We also claim that it is up to the other powers (political branches of government or the constitutional court/high court itself) to decide whether the informal constitutional amendment by constitutional interpretation is legitimate or not. No one can challenge a constitutional interpretation in any legal way in a constitutional democracy; however, it is up to the political branches or the courts to reject or uphold its result. This latter can occur by applying the new content or consolidating it to the text of the constitution. The phenomenon that we call informal constitutional amendment by constitutional interpretation is not only experienced in countries with a rigid constitution but also in states having a rather short constitution with many vague provisions especially concerning certain principles and fundamental rights.

## Introduction

The Hungarian constitution, called Fundamental Law (FL), entered into force on 1 January 2012. Regarding its amendability, it contains explicit rules on the formal amendment procedure and contains no eternity clauses or otherwise entrenched procedures. The FL can be amended by the two thirds majority of the Parliament (*flexible constitution*), but it cannot be amended by popular vote. These rules concerning the adoption and the formal amendment of the constitution were established in 1949 when Hungary adopted its first written constitution under soviet influence (Constitution). The flexibility of the constitution was acknowledged in 1989, when the Hungarian Parliament voted on the democratic transition and adopted the first of many formal amendments that allowed the Hungarian Republic to become a democratic state in which the rule of law prevails. In this paper, we give a *critical overview* of the formal and informal constitutional amendments that have occurred in Hungary since the transition. We argue that even though we face terminological difficulties, *informal constitutional amendment* is not only possible but is *actually present* in the Hungarian constitutional order in the form of the constitutional interpretation of the Constitutional Court (CC), which in certain cases is *beneficial* for the stability of the rule of law, while in others it may have a *detrimental* effect on that. We also claim that it is *up to the other derivative powers* (political branches of government or the constitutional court/high court itself) *to decide* whether the informal constitutional

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amendment by constitutional interpretation is legitimate or not. No one can challenge a constitutional interpretation in any legal way in a constitutional democracy; however, it is up to the political branches or the courts to reject or uphold its result, this latter by applying it or consolidating it to the text of the constitution. The phenomenon that we call informal constitutional amendment by constitutional interpretation is not only experienced in countries with a rigid constitution<sup>1</sup> but also<sup>2</sup> in states having a rather short constitution with many vague provisions especially concerning certain principles and fundamental rights. Good examples are the transitional constitutions of some CEE states.<sup>3</sup>

As a *preliminary remark* we must be mindful of the *denominations* of the Hungarian constitutions. Throughout the chapter, we will refer to the democratic constitution adopted by a revision of the former 1949 communist constitution in 1989 as “Act XX of 1949 on the Constitution of the Republic of Hungary”, the Constitution.<sup>4</sup> Although the new constitution, the Fundamental Law was adopted in 2011, we will still refer to the case law of the CC based on the Constitution because there is a legal continuity between the constitutional order pre and post FL. The Fourth Amendment to the Fundamental Law in 2013 (Fourth Amendment), however, complicated this approach as it declared that the decisions of the CC prior to 2012 were invalid. The Fourth Amendment has, however, also declared that the legal effect of CC decisions remains in force, and, according to the CC,<sup>5</sup> this means that former jurisprudence, as precedents, can still be used if the wording of the FL is similar or identical to the wording of the Constitution.<sup>6</sup> This is the situation in many cases, therefore, the constitutional order might be or could have been continuous. Therefore, we will start the discussion about formal and informal amendments in Hungary at the democratic transition in 1989.

## **I. Constitutional amendments in Hungary: rules, concepts and practice**

### **1. Rules on formal amendment in Hungary**

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<sup>1</sup> Xenophon Contiades and Alkmene Fotiadou: Models of constitutional change. In Xenophon Contiades (ed.): *Engineering Constitutional Change* Routledge (2016) 440.

<sup>2</sup> Tímea Drinóczi: Does the constitutional review breach the principle of separation of powers? A shifting perspective. In Iulia Motoc, Paulo Pinto de Albuquerque, Krzysztof Wojtyczek (eds.): *New Developments in Constitutional Law: Essays in honour of András Sajó* Eleven International Publishing (2018) 75-96.

<sup>3</sup> See the case of Poland and Hungary in Tímea Drinóczi and Agnieszka Bień-Kacała: Illiberal constitutionalism – the case of Hungary and Poland *German Law Journal* (forthcoming, 2019); Tímea Drinóczi and Agnieszka Bień-Kacała: Illiberal constitutionalism in Hungary and Poland: The case of judicialization of politics. In Agnieszka Bień-Kacała, Lóránt Csink, Tomasz Milej, Maciej Serowaniec (eds.): *Liberal constitutionalism – between individual and collective interests* Wydział Prawa i Administracji/Faculty of Law and Administration, Uniwersytetu Mikołaja Kopernika w Toruniu/ Nicolaus Copernicus University in Toruń (2017) 73-108.

<sup>4</sup> The original name of the constitution was Act XX of 1949 on the Constitution of the People’s Republic of Hungary.

<sup>5</sup> Decision 13/2013. (VI. 17.) CC

<sup>6</sup> Moreover, the FL, according to its own wording, is based on the 1989 Constitution.

Neither the Constitution, nor the Fundamental Law had special, restrictive procedural and/or substantive rules on constitutional amendments.<sup>7</sup> Both the Constitution and the FL<sup>8</sup> (before the Fourth Amendment) contained *similar*<sup>9</sup> rules on formal constitutional amendment: it is the *Parliament* that adopts the Constitution; *supermajority* (two-third)<sup>10</sup> and nothing more is required for the adoption and the amendment of the constitution,<sup>11</sup> the people have no direct role in the process.<sup>12</sup> The *Fourth Amendment* to the FL introduced major changes concerning the *constitutional review* of the constitutional amendments.<sup>13</sup> Even before this amendment, it

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<sup>7</sup> The discussion on the problem of unconstitutional constitutional amendments and eternity clauses is beyond the purposes of this chapter. Yet, see Kemal Gözler: Judicial review of constitutional amendments. A comparative study *EKIN Press, Bursa* (2008), <[www.anayasa.gen.tr/jrca.htm](http://www.anayasa.gen.tr/jrca.htm)> (accessed 30 November 2013); Gary Jeffrey Jacobsohn: An unconstitutional constitution? A comparative perspective *International Journal of Constitutional Law* Vol. 4, No. 3 (July 2006); Aharon Barak: Unconstitutional constitutional amendments *Israel Law Review* Vol. 44, No. 3 (2011); Yaniv Roznai, *Unconstitutional constitutional amendments. The limits of amendment powers Oxford University Press* (2017); Gábor Halmai: Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution? *Constellations* Vol 19, Issue 2 (2012); Silvia Suteu: Eternity clauses in post-conflict and post-authoritarian constitution-making: Promise and limits *Global Constitutionalism* Vol 6, Issue 1 (2017) 63-100.

<sup>8</sup> Certain parts of the discussion that follow are based on a former study of Fruzsina Gárdos-Orosz. See: Fruzsina Gárdos-Orosz: Unamendability as a judicial discovery In Bertil Emrah Oder and Richard Albert (eds): *The Forms of Unamendability* Springer (2018) 231-258.

<sup>9</sup> Not the same, as the FL contains rules that did not appear in the Constitution: Art S (4) The designation of the amendment of the Fundamental Law in its promulgation shall include the title, the serial number of the amendment and the day of promulgation.

<sup>10</sup> Constitution:

Article 19 (2) Exercising its rights deriving from the peoples' sovereignty, the Parliament shall ensure the constitutional order of the society and define the organization, orientation and conditions of governing.

(3) Within this sphere of authority, the Parliament shall  
a) adopt the Constitution of the Republic of Hungary.

Article 24 (3) A majority of two-thirds of the votes of the Members of Parliament is required to amend the Constitution and for certain decisions specified therein.

FL:

Article R (1) The Fundamental Law shall be the foundation of the legal system of Hungary.

(2) The Fundamental Law and legal regulations shall be binding on everyone.

(3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution.

Article S (1) A proposal for the adoption of a new Fundamental Law or for the amendment of the Fundamental Law may be submitted by the President of the Republic, the Government, any parliamentary committee or any Member of the National Assembly.

(2) For the adoption of a new Fundamental Law or the amendment of the Fundamental Law, the votes of two-thirds of the Members of the National Assembly shall be required.

(3) The Speaker of the National Assembly shall sign the adopted Fundamental Law or the adopted amendment of the Fundamental Law within five days and shall send it to the President of the Republic. The President of the Republic shall sign the Fundamental Law or the amendment of the Fundamental Law sent to him within five days of receipt and shall order its promulgation in the official gazette.

Article 1 (1) HUNGARY's supreme organ of popular representation shall be the National Assembly.

(2) The National Assembly:

a) shall adopt and amend the Fundamental Law of Hungary.

<sup>11</sup> For a comparative analysis of constitutional amendment rules see: Rosalind Dixon: Constitutional amendment rules: a comparative perspective *Chicago Public Law and Legal Theory Working Paper* No. 347. (2011)

<sup>12</sup> Formal rules however differ. Constitution: Article 28/C (5) National referendum may not be held on the following subjects: c) the provisions of the Constitution on national referenda and popular initiatives. FL: Article 8 No national referendum may be held on: a) any matter aimed at the amendment of the Fundamental Law. See more about under point III.5. below.

<sup>13</sup> FL Article 24 (5) The Constitutional Court may review the Fundamental Law or the amendment of the Fundamental Law only in relation to the procedural requirements laid down in the Fundamental Law for its making and promulgation. Such examination may be initiated by:

a) the President of the Republic in respect of the Fundamental Law or the amendment of the Fundamental Law, if adopted but not yet published;

was generally accepted that if formal procedural rules are not complied with, the formal constitutional amendment is unconstitutional. However, before 2012, no formal constitutional amendment was annulled on this basis. The substantive review was never raised in constitutional practice before 2010.

Due to the flexibility of the constitution, *formal amendments* have never been rare,<sup>14</sup> which has made Hungarian scholarly literature focus on them and has left the informal amendments underexposed. Formal constitutional amendments have always been more spectacular and have triggered *more attention*, especially when they intended to constitutionalize unconstitutional contents *after 2010*.<sup>15</sup> The Hungarian scholarly debate on unconstitutional formal constitutional amendments has been flourishing since then,<sup>16</sup> mainly because the number of amendments to the constitutions has multiplied and the CC claimed not to have the competence for the substantive review of the allegedly unconstitutional constitutional amendments<sup>17</sup>. Thus, in the Hungarian scholarship, the discussion about amendability and unamendability is strictly related to the issue of constitutional review.

## 2. Informal constitutional amendment in Hungary

In our view, *informal constitutional amendments* are delivered through the constitutional interpretation of the CC. Given the centralized (Kelsenien) and strong type constitutional review system<sup>18</sup> in Hungary and its continental legal traditions, the recognition of customary law or conventions as a constitutional amendment should be *excluded*<sup>19</sup> and they *cannot be derived from* any ordinary legislative, executive or any other judicial activity as it would be

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b) the Government, one-fourth of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights within thirty days of promulgation.

(6) The Constitutional Court shall decide on the motion pursuant to Paragraph (5) with priority but within thirty days at the latest. If the Constitutional Court finds that the Fundamental Law or the amendment of the Fundamental Law does not comply with the procedural requirements referred to in Paragraph (5), the Fundamental Law or the amendment of the Fundamental Law:

- a) shall again be debated in the National Assembly in the case laid down in Paragraph (5) a);
- b) shall be annulled by the Constitutional Court in the case laid down in Paragraph (5) b).

Another extra sentences were added to para (3) of Article S by the Fourth Amendment: If the President of the Republic finds that any procedural requirement laid down in the Fundamental Law with respect to adoption of the Fundamental Law or the amendment of the Fundamental Law has not been met, he or she shall request the Constitutional Court to examine the issue. Should the examination by the Constitutional Court not establish the violation of such requirements, the President of the Republic shall immediately sign the Fundamental Law or the amendment of the Fundamental Law, and shall order its promulgation in the official gazette.

<sup>14</sup> Between 23 of October 1989 (the proclamation of the Republic) and the end of 2009 (the last year before the parliamentary term 2010-2014 when the FL was enacted) 25 formal amendments to the Constitution passed in Parliament. See István Kukorelli: Az alkotmánymódosítások alkotmánya – egységes szerkezetben. In: Miklós Kocsis, Judit Zeller (eds.): *A köztársasági alkotmány 20 éve* PAMA (2009) 59-66. 62.

<sup>15</sup> In 2010-2011 (before the FL entered into force) the Constitution was amended 12 times. See the website of the Office of the National Assembly: <http://www-archiv.parlament.hu/fotitkar/alkotmany/modositasok.htm>

<sup>16</sup> See: Nóra Chrowski, Tímea Drinóczi, Judit Zeller: Túl az alkotmányon... Az alkotmányvédelem elméleti és európai kontextusa, továbbá magyar gyakorlata 2010-ben, avagy felülvizsgálható-e az alkotmánymódosító törvény az Alkotmánybíróság által *Közjogi Szemle* 2010/4.; László Sólyom: Normahierarchia az alkotmányban *Közjogi Szemle* 2014/1.; András Bragyova, Fruzsina Gárdos-Orosz: Vannak-e megváltoztathatatlan normák az Alaptörvényben? *Állam és Jogtudomány* 2016/3.

<sup>17</sup> See Decision 12/2013. (V. 24.) CC

<sup>18</sup> See Joel I. Colón-Ríos: A New Typology of Judicial Review of Legislation *Global Constitutionalism* Vol 3 Issue 2 (2014) 143-169.

<sup>19</sup> For a more extended view on informal amendments see Richard Albert: How Unwritten Constitutional Norms Change Written Constitutions *Dublin University Law Journal* Vol 38. (2015) 387; Richard Albert: Constitutional Amendment by Constitutional Desuetude *American Journal of Comparative Law* Vol 62 (2014) 641; Xenophon Contiades (ed.): *Engineering Constitutional Change* Routledge (2016); Dawn Oliver and Carlo Fusaro: *How Constitutions Change. A Comparative Study* Hart Publishing (2011).

contrary to the rules of the constitutions, which do not allocate amending power to these authorities. We thus define informal constitutional amendment as *the product of constitutional adjudication that is capable of modifying the text and the content of the FL*. These informal amendments, however, have not received much attention except for those most important decisions where the CC might have neglected the boundaries of constitutional interpretation. This practice, however, has not been denominated informal constitutional amendment yet but has rather been described by terms like ‘overstepping competences’, ‘acting as constitution-making power’, ‘exercising the power of the constitution-making power’.<sup>20</sup> Probably because of the many difficulties that need to be faced when identifying and theorizing informal constitutional amendments, scholarship has abandoned this topic. In the lack of Hungarian academic views, we *rely on* the theoretical and doctrinal assumptions of foreign literature<sup>21</sup> in order to facilitate the discussion on informal constitutional amendments. As said already, we view the Hungarian practice of informal constitutional amendment *restrictively* and we do not extend our research to constitutional change, which, in our view, covers all changes that could occur in a constitutional order.<sup>22</sup> Thus, *we focus on the changes in the text* of the constitution.<sup>23</sup>

### 3. Practice of constitutional change: the transition process in 1989

From a historical perspective, Hungary seems to present a mixed type of approach to constitutional amendment, which is explained by the peculiarities of its transition. In the course of the transition process each major political decision intending to introduce rule of law and democracy was agreed on by the *multilateral National Round Table*, which did not have any legal power but was legitimized by its participants, the Hungarian Socialist Workers’ Party, the opposition, trade unions and other civic movements. During the transition, the *Parliament* acted as a *rubber stamp*: it adopted each law and amendment, including constitutional amendments in 1989 and 1990. It lasted until the first free elections held in spring 1990, which were based on the newly adopted laws and constitutional rules. The National Round Table may be regarded as an organ functioning as a ‘special *pouvoir constituant*’, as it actually did not create a new basic law in a formal sense but it prepared it from the substantive point of view. The ‘National Round Table’ may also be deemed a *self-created special constituent assembly*<sup>24</sup> whose decisions were formally adopted by Parliament. In 1990, after the first democratic elections, Parliament started to act as a democratic legislature.

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<sup>20</sup> See e.g. the dissenting opinions attached to decisions on the powers of the President. Decisions 48/1991. (IX. 26.) CC and 36/1992. (VI. 10.) CC. See in detail under point III.3. below.

<sup>21</sup> Among others, we will strongly rely on the publications of Richard Albert. See footnote 20.

<sup>22</sup> We conceive some essential changes in the jurisprudence of the Constitutional Court as not having reached the level of informal constitutional amendment by judicial interpretation. These are related to the interpretation of the general principles of the Constitution and Fundamental Law. These encompass the understanding of rule of law, especially legal certainty, democracy, sovereignty or the separation of powers; role and status of interpretation rules in the Fundamental Law. For more, see in Tímea Drinóczi: *The European Rule of Law and illiberal legality in illiberal constitutionalism: the case of Hungary*, MTA LWP 2019/16, [https://jog.tk.mta.hu/uploads/files/2019\\_16\\_Drinoczi.pdf](https://jog.tk.mta.hu/uploads/files/2019_16_Drinoczi.pdf) We also do not address the issue of changes triggered by the transposition of the ECHR and the EU accession.

<sup>23</sup> For orientation with „C” and „c”, see the *Global Survey for Constitutional Law Experts on Small-c Constitutions* (Adam Chilton and Mila Versteeg): <http://www.iconnectblog.com/2017/07/global-survey-for-constitutional-law-experts-on-small-c-constitutions/> or Xenophon Contiades (ed.): *Engineering Constitutional Change Routledge* 2016.

<sup>24</sup> A notion borrowed from Elster: for him it means that Parliament begins being a legislature and turns itself into being a constituent assembly. Jon Elster: *Legislatures as Constituent Assemblies* In Richard W. Bauman and Tsvi Kahana (eds.): *The Least Examined Branch. The Role of Legislatures in the Constitutional State* Cambridge University Press (2006) 182.

The transition period (1989/1990 but especially until the first democratic election in May 1990) was thus unique in the Hungarian constitutional history. The joint efforts of the National Round Table and the socialist parliament to agree and codify the text of the 1949 Constitution may be described as a series of *simultaneous informal agreements and formal constitutional amendments*: the text was agreed on by the informal, non-institutionalized National Round Table and was formally adopted by the socialist, non-democratically but formally elected and empowered Parliament.

## **II. Formal amendment power and formal amendments – practice<sup>25</sup> and attitudes**

### **1. Formal amendments in numbers and the 4/5 rule**

#### **1.1. Numbers and proponents in parliamentary terms with 2/3 majority (1994-1998, 2010-2014)**

In 1994 three, in 1995 one and in 1997 two amendments were adopted; the adoption of some of them in 1997 was necessary because at that time it became clear that the constitution-making process, which had begun in 1994, had failed. The *proponents* of the majority of the changes introduced between 1994 and 1998 were competent ministers; MPs proposed only one.<sup>26</sup> Between the formation of the new Government in 2010 and the end of 2011 twelve amendments to the Constitution (among which six were adopted in summer 2010) were made along with the preparation and the adoption of the new FL. After the formation of the new Government in May 2010, the new majority immediately started to amend the Constitution (without any substantial and formal limitation: purely based on its 2/3 majority in Parliament). The unexpectedness, the ways of and methods of preparation, coordination and deliberation was often mentioned in the critics.<sup>27</sup> As for the *proponents* of the modifications of 2010/2011, only three were proposed by the Government (trainee judge and retroactive taxation,<sup>28</sup> legislative powers and Financial Supervisory Authority, taking away the property of local government) and the rest (nine) by often individual MPs.<sup>29</sup>

#### **1.2. The 4/5 rule**

*Between 1994 and 1998* the socialist and liberal coalition managed to win two-thirds majority and started to work on a new constitution.<sup>30</sup> Due to political reasons, it found that an *even larger majority would be necessary* to require consent for the constitution making between the governing and the opposition parties. The Parliament, therefore, adopted a modification of the Constitution by a two-thirds majority to require a four-fifth majority for the adoption of

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<sup>25</sup> For a more comprehensive description and analysis see Tímea Drinóczi: Constitutional politics in contemporary Hungary *Vienna Journal on International Constitutional Law* Issue 1 (2016)

<sup>26</sup> See below in point II.2.1.

<sup>27</sup> See also Kriszta Kovács and Gábor Attila Tóth: Hungary's Constitutional Transformation *European Constitutional Law Review* (2011) 183-203.

<sup>28</sup> See below in point II.2.3.

<sup>29</sup> Drinóczi, n 26, 67, 69.

<sup>30</sup> Adopting a new constitution was at the agenda of each party running in the parliamentary election of 1994; and the preamble of the Constitution also referred to its interim nature.

parliamentary resolution on the basic rules of preparation of a new constitution.<sup>31</sup> In 2010, this rule was removed from the text.<sup>32</sup>

*Scholars opposing* the entire constitution-making process in 2010-2011 that led to the adoption of the FL in 2011, *argue* that a four-fifth majority rule should have been removed from the constitutional text by a four-fifth majority, and because it happened with a two-third majority in 2010, the rule is still valid and that makes the entire 2011 constitution-making process *illegitimate*.<sup>33</sup> Although this argument might be logical, it is clear that this was not the intention of the constitutional amendment.<sup>34</sup> However, the repeal of a four-fifth majority rule in 2010 by constitutional amendment was a clear message that there is no need for any political support or consensus from the opposition.

## 2. Formal amendments of the Constitution

When making the supermajority rule for constitutional amendment a sole criterion, drafters had in mind the political difficulty<sup>35</sup> of achieving this majority. As mentioned before, there was only one governmental period before 2010 when a coalition had 2/3 majority support in the Parliament, between 1994 and 1998. Below we give a more detailed overview of the activity of the parliaments acting as constitution-amending powers and only briefly refer to the other amendments.

### 2.1. Formal amendments in 1994-1998<sup>36</sup>

The 1994-1998 parliamentary majority began the preparation for making a new constitution along with the *practical amendments* of the Constitution. The first amendment in 1994 (Act LXI of 1994) was the result of the implementation of the program of the new government. It touched upon the chapters of the Constitution on local governments, fundamental rights and freedoms and the *right to vote*. The second amending act in 1994 (Act LXXIII of 1994) dealt with the introduction of the *ombudsman* for data-protection and freedom of information; and it also introduced the ombudsman for national and ethnic minorities' rights into the Constitution. The next amendment in the same year (Act LXIII of 1994) – according to its functioning in practice – reduced the number of members of the CC from 15 to 11. In 1997 (Act LIX of 1997) Parliament amended the Constitution in connection with i) the requirement of the 2/3 majority for the decision on the incompatibility of MPs, ii) rules governing the termination of the mandate of the prime minister and ministers, iii) the right to asylum (adapting the wording of the Geneva Refugee Convention of 1951), iv) national plebiscite and popular initiatives, and v) judicial reform.

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<sup>31</sup> Art 24 (5) Constitution A majority of four-fifths of the votes of the Members of Parliament is required to pass the Parliamentary resolution specifying the detailed regulations for the preparation of the new Constitution.

<sup>32</sup> Art 2 (2) of the modification of the Constitution published on 5 July 2010, *Magyar Közlöny* 2010. évi 113. sz. 21770 [Official Gazette 2010, nr.113. p. 21770].

<sup>33</sup> This argument [see Miklós Bánkúti, Gábor Halmai, Kim Lane Scheppele: Disabling the Constitution, *Journal of Democracy* Vol 23. (2012) 138.] is, however, does not consider at all the text of Article 24 (5).

<sup>34</sup> This misunderstood conceptualization of this rule is then used by e.g, Andrew Arato: [Arato on Constitution Making in Hungary and the 4/5 Rule](http://www.iconnectblog.com/2011/04/arato-on-constitution-making-in-hungary-and-the-45-rule/), <<http://www.iconnectblog.com/2011/04/arato-on-constitution-making-in-hungary-and-the-45-rule/>> (18.05.2017) and Mark Tushnet: Authoritarian constitutionalism *Harvard Public Law Working Papers* No. 13-47 (2013).

<sup>35</sup> See the mixed electoral system and party structure of Hungary in János Mécs: Hungary In: Márta Dezső, Zoltán Pozsár-Szentmiklósy (eds.): *ACEEEO 25 – Development of Electoral Systems in Central and Eastern Europe since 1991*. Association of European Election Officials (Budapest, 2016).

<sup>36</sup> For a more detailed analysis see Drinóczi, n 26, 67-68.

As for the subject matters of *other constitutional amendments*, the following can be mentioned. The *judicial reform* and that of administration of justice in 1997<sup>37</sup> in Hungary was part of the drafted constitution of 1994-1998,<sup>38</sup> and due to the failure of constitution-making at that time, certain elements of this reform were put into the Constitution by an amendment. Some changes were made for setting the constitutional basis of new laws extending some fundamental rights (e.g. *plebiscite*<sup>39</sup>) and their enforcement (e.g. *ombudsman*<sup>40</sup>). The case of the *right to vote* represented – to a great extent – a *disputable overruling* of a decision delivered by the CC on the constitutional meaning of the right to vote. The amendment inserted into the Constitution the following provision (1994): voters can exercise their right to vote, ‘provided that they are present in the country on the day of the election’. This was a response to the decision 3/1990 (III. 4.) CC in which the CC proclaimed the provision of the Act on right to vote unconstitutional because it provided that voters who are resident in Hungary but who are abroad on the day of election were ‘restricted in exercising the right to vote’. (It was not considered contrary to the Constitution that those citizens who are not resident in Hungary do not have right to vote.) The reasoning of the CC was, briefly, that being abroad could not limit one’s right to vote in our day. The CC, after annulling the referred provision of the Act, stated that a legal loophole arose as the technique and method of exercising the right to vote while abroad was not regulated in any legal source and requested Parliament to adopt the necessary legal rules. By the solution of 2/3 majority of Parliament, the ruling coalition (of socialists and liberals) ignored this constitutional interpretation on the right to vote and restricted this right of those being abroad on the day of election at a constitutional level.

## 2.2. Other formal amendments – in the absence of governing supermajority<sup>41</sup>

The *comprehensive amendment* to the Constitution in 1990, enacted by the freely elected Parliament (Act XL of 1990) had a special significance in the process of the transition. After the elections, it turned out that, due to the numerous institutional safeguards included in the Constitution in 1989 (because none of the participants of the National Roundtable had trust in their fellows), the Government and the parliamentary majority were not able to perform their activities efficiently and there was an imminent risk of constitutional deadlocks. Looking for solution, the governing party<sup>42</sup> and the biggest opposition party<sup>43</sup> started negotiations in order to stabilize the governing system. As a result, Parliament enacted the comprehensive amendment to the Constitution in the summer of 1990. The most important provisions of the amendment were related the constructive (German-type) motion of no confidence against the prime minister; the (neutral) position of the President of the Republic; defining the legislative

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<sup>37</sup> The *judicial reform*, at a constitutional level, introduced appeal courts, the fourth level of courts of justice. Having in mind the principle of the separation of powers, the parliamentary majority decided to take away the administration of the courts from the sphere of competence of the Minister of Justice and transferred it to the authority of a newly founded body, the *National Council of Justice*. This reform also expressed that the *right to legal remedy* can be limited by an Act of Parliament in order to resolve cases within a reasonable time.

<sup>38</sup> Tímea Drinóczi: Constitutional politics, 71-73.

<sup>39</sup> As for the direct exercise of popular power, the amendment to the Constitution that added new rules on plebiscite became indispensable because the related Act had fundamentally been modified.

<sup>40</sup> The amendment was necessary because the Act on data protection and freedom of information (Act LXIII of 1994) had introduced this type of ombudsman, but there had been no rule in the Constitution containing the possibility to elect ombudsman beyond those designated *expressis verbis* in the Constitution.

<sup>41</sup> For more detailed analysis see: István Kukorelli: Magyarországot saját alkotmánya nélkül kormányozni nem lehet. A közjogász almanachja *Méry Ratio* (2014) 15-37.

<sup>42</sup> Magyar Demokrata Fórum (Hungarian Democratic Forum)

<sup>43</sup> Szabad Demokraták Szövetsége (Alliance of Free Democrats)

topics which required relative supermajority (two-thirds of the MPs present at the sitting of Parliament)<sup>44</sup> and the protection and limitation of fundamental rights<sup>45</sup>.

In some cases, formal constitutional amendments in Hungary were necessary to be completed in order to take part in the international enterprise, such as to *join the NATO* or the EU, while in other cases it was necessary to amend the constitution to meet certain EU law or international law requirements.

In the case of the *NATO membership* (1997), a successive amendment was necessary (Act XCI. of 2000) in order to direct the armed forces of the country in accordance with the requirements following from the functioning of the military alliance, which was later followed by four other amendments on the same topic<sup>46</sup> and one additional amendment on the peacekeeping activity of the armed forces<sup>47</sup>.

In the case of the *EU accession* (2003), the Constitution itself was amended (Act LXI. of 2002) prior to the accession. The amendment required an extra procedure for completing the accession, a popular vote on it. According to the modified text of the constitution: Article 79 [Referendum on EU accession] “A peremptory national referendum shall be held concerning the accession of the Republic of Hungary to the European Union under the conditions laid down in the accession treaty. The date of this referendum is 12 April 2003. The question of the referendum shall read as follows: ‘Do you agree that the Republic of Hungary should become a member of the European Union?’.” It was a transitory constitutional norm which lost its effect right after its goal has been achieved. The particularity of this rule is that even though the referendum was not required for the formal constitutional amendment and no amendment could be reached by referendum, this new rule on the peremptory national referendum certainly affected the necessity of the EU related formal amendments. Should the people turned down the integration project, the EU related amendments would not have been needed at all. The amendment also contained other provisions related to the EU accession: on the exercise of constitutional powers jointly with other Members States (independently or by way of the institutions of the EU); on the right vote in order to enfranchise EU citizens with Hungarian residence related to local elections and election of the members of the European Parliament and on the cooperation of the Parliament and the Government in EU related matters. All these provisions were later included in the FL. Later on, another EU-related amendment to the Constitution was enacted, regarding the ratification of the Lisbon Treaty (Act CLXVII. of 2007).

*Other formal amendments* to the Constitution in periods without governing supermajority had different focuses. Some of these (in the period of the first parliamentary term, 1990-1994) were related to additional,<sup>48</sup> symbolic,<sup>49</sup> or technical questions<sup>50</sup> of the transition. Others were related to typical questions of governance: the competence of the Government to structure the system of state organs belonging to the legislative branch,<sup>51</sup> integration of the Police and the Border Control Authority,<sup>52</sup> the allowance of MPs.<sup>53</sup>

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<sup>44</sup> For a detailed analysis, see: Zoltán Pozsár-Szentmiklós: Supermajority in Parliamentary Systems – A Concept of Substantive Legislative Supermajority: Lessons from Hungary. *Acta Juridica Hungarica* Vol 58, Issue 3 (2017) 281-290.

<sup>45</sup> See below in point III.6.

<sup>46</sup> Act XLII. of 2001, Act CIX. of 2003, Act CIV. of 2004, Act XIII. of 2006.

<sup>47</sup> Act XXX. of 2009.

<sup>48</sup> Act XXIX. of 1990 on organizational issues related to governance, Act LIV. of 1990 on the status of MPs, Act LXIII. of 1990 on local governments, Act CVII. of 1990 on armed forces.

<sup>49</sup> Act XLIV. of 1990 on the Coat of Arms of the Republic of Hungary.

<sup>50</sup> Act LVIII. of 1991.

<sup>51</sup> Act LIV. of 2006

<sup>52</sup> Act LXXXVIII. of 2007.

<sup>53</sup> Act LXIV. of 2009.

### 2.3. Amendments of 2010-2011<sup>54</sup>

Only some of the amendments adopted between the summer of 2010 and the end of 2011 “survived” the adoption of the FL and appear in the new text. Examples are the rules concerning the CC and its members, allowing a *trainee judge*, who is not yet appointed as a judge by the President of the Republic to act as a judge,<sup>55</sup> the clear and systematic *enumeration of laws and the decree issuing powers of autonomous administrative organs* (without, however, mentioning them), and the ‘legal status’ of the Prosecutor General. *Nomination of CC judges* was modified by shifting from parity to proportional representation in the nominating committee in the Parliament. The reason was that the parity system made nominations impossible or degraded them to simple political bargaining. During the course of preparation for the new constitutional rules on and roles of the CC (constitutional complaint), the number of judges was increased from 11 to 15 and the President of the CC was made to be elected by Parliament’s two-thirds majority, departing from prior regulation providing for an election by the members of the CC.<sup>56</sup> The ‘*legal status*’ of the *Prosecutor General* was modified by changing the rules of the election from simple to two-thirds majority and it ceased the possibility of MPs to present interpellations to the Prosecutor General.<sup>57</sup> This is a constitutionalisation of a related CC decision<sup>58</sup> whereas the former intends to make the election more difficult. Besides, in the case of an unsuccessful election, the current Prosecutor General retains the position so long as a new candidate is validly elected.

Other amendments *have not been incorporated into the FL* (only the most important ones are mentioned here), so they were in the constitutional system only briefly but they *served their political purpose* (restriction of passive right to vote, retroactive taxation, the withdrawal of already acquired rights, property of local government) or gave a clear *evidence of the hasty amendment process* (number of the MPs). Knowing at that time that the FL changes the name of the Supreme Court to *Curia* (Kúria) and establishes new competences of ordinary courts, a constitutional amendment stipulated (2011) that the new President of the Supreme Court (later Curia) shall be elected by 31 Dec 2011.<sup>59</sup> This meant that the mandate of the then President should come to an end before six years (the period to which he was elected). This amendment resulted in a *CC decision*<sup>60</sup> and an *ECtHR ruling*,<sup>61</sup> and still can be found in the FL.

### 3. Formal constitutional amendments of the FL<sup>62</sup>

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<sup>54</sup> Tímea Drinóczi: Constitutional politics, 69-71.

<sup>55</sup> Amendment in July 2010

<sup>56</sup> Act LXI of 2011. This amendment was the one that – without even mentioning it in the explanatory memorandum of the draft – repealed the 4/5 rule (see above in point II.1.2.).

<sup>57</sup> Act CXIII of 2010

<sup>58</sup> Decision 3/2004. (II. 17.) CC

<sup>59</sup> Act CLIX of 2011 on the amendment to the Constitution.

<sup>60</sup> Cynically, it was the government, whose two-third parliamentary majority voted for the amendments of the Constitution and the Act on organization and administration of courts of 2011, that initiated an *ex post* review before the CC (in 2012) asking whether this rule (requiring five years of service – leading to the termination of the mandate of the former President of the Supreme Court) was constitutional or not. See decision 13/2013 (VI. 17.) CC that rejected this part of the petition.

<sup>61</sup> Case of *Baka v. Hungary* (Application no. 20261/12) Judgment of 23 June 2016.

<sup>62</sup> For a more detailed analysis, see: Tímea Drinóczi: Constitutional politics, 75-88; Tímea Drinóczi: Special legal orders; challenges and solutions. *Osteuropa Recht* 2016/4. 434-435, Tímea Drinóczi: Central and Eastern European constitutional formulas: the abuse and observance of constitutions in times of emergency, [https://www.researchgate.net/publication/335762469\\_Central\\_and\\_Eastern\\_European\\_constitutional\\_formulas\\_the\\_abuse\\_and\\_observance\\_of\\_constitutions\\_in\\_times\\_of\\_emergency](https://www.researchgate.net/publication/335762469_Central_and_Eastern_European_constitutional_formulas_the_abuse_and_observance_of_constitutions_in_times_of_emergency)

By 1 January 2012 both the FL and the Transitory Provisions came into force and were subjected to both formal and informal amendments. The Transitory Provisions were meant to be parts of the constitution; it was viewed as another document having constitutional status according to the intention of constitution-making political power. Some scholars and the ombudsman were of different opinion, and the ombudsman challenged its constitutionality. The CC shared their concern and did not consider the Transitory Provisions as part of the constitution and did not attribute constitutional status to this document, thus it was able to annul some of its provisions. Controversies around the Transitory Provisions led to the First Amendment, the decision of the CC (along with other rulings) on the partial annulment of the Transitory Provisions (decision 45/2012 (XII. 29.) CC, see later in point II.3.1.) led to the Fourth Amendment, the controversies and debates,<sup>63</sup> which resulted on the Fifth Amendment.

### **3.1. The first three amendments – 18 June 2012; 9 November 2012; 21 December 2012<sup>64</sup>**

Due to the inadequate definition of the status of the Transitional provisions at the end of the FL and due to the fact that some of its provisions were of non-transitory character, opinions were formulated that the Transitory Provisions should be reviewed by the CC. The *ombudsman* shared this opinion as well<sup>65</sup> and on 13 March 2012 he brought the Transitory Provisions to the CC asking *ex post review*. The ombudsman asked the CC to examine if these provisions are in conformity with the rule of law and the legal certainty principle of the FL. According to him, the Transitory Provisions may cause serious interpretation problems and jeopardize the unity and operability of the legal system; moreover, its uncertain legal status may conflict with the rule of law as the Transitory Provisions declare themselves to be the part of the FL and it is not the FL that declares this relationship.<sup>66</sup> He pointed out that the reason of this declaration was to avoid constitutional review.<sup>67</sup> As a reaction, the Government proposed the *first amendment to the Fundamental Law* on 17 April 2012 which was adopted by the Parliament on 4 June 2012.<sup>68</sup> The new point 5 of the Final Provisions of the FL reads as follows: ‘5. The transitional provisions related to this FL adopted according to point 3 (31 December 2011) are part of the Fundamental Law.’ By this amendment, it was declared *expressis verbis* that the Transitory Provisions are to be treated as part of the constitution; and therefore the request for its constitutional review could not be admissible. After the change of the legal context, the CC asked the ombudsman if he upholds the request. He did so,<sup>69</sup> and on 28 December 2012 the

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<sup>63</sup> See below in point II.3.2.

<sup>64</sup> For a more detailed analysis see Tímea Drinóczi: Constitutional politics, 79-81.

<sup>65</sup> Under the new regime, *ex post review* is not an *actio popularis* anymore. See Art. 24 (2) e) FL. A natural person drew the attention of the ombudsman to the unconstitutional feature of the Transitory provisions. Case nr.: AJB-2302/2012.

<sup>66</sup> This opinion could not be supported once one has carefully read point 3. of the Final Provisions of the Fundamental Law, which declares that Transitory provisions shall be enacted in a separate document, according to the procedure of enacting the FL.

<sup>67</sup> Based on the recently reinforced case law of the CC, constitutional norms cannot be reviewed. In decision 61/2011. (adopted on 12 July 2011) the CC refused the constitutional review of constitutional amendments inserting the new Article 70/I (2) and the limitation of its own competences. See also point III.8.

<sup>68</sup> First amendment of the Fundamental Law of Hungary [Magyarország Alaptörvényének első módosítása (2012. június 18.), Magyar Közlöny 2012. évi 73. sz. 11856 p.; Hungarian Gazette 2012. Issue 73. p. 11856].

<sup>69</sup> The ombudsman claimed that the provision stating that the Transitory provisions are part of the Fundamental Law should not be interpreted on its own but with regard to the entire Fundamental Law; Transitory provisions cannot overrule the provisions of the Fundamental Law; neither can they make exceptions from the application of its regulations. Should the Transitory provisions be able to make exceptions from the Fundamental Law, the ‘standard’ itself would be infringed. Such a situation would question the constitutional status of the Fundamental Law.

Court, in its decision 45/2012. (XII. 29.) The CC annulled the non-transitory type provisions of the Transitory Provisions with retroactive effect (to the date of the adoption).

The first amendment to the FL contained *other rules* as well: not only the status and remuneration of the President of the Republic has to be regulated in a cardinal Act but also that of the former President of the Republic.<sup>70</sup> Article 30 of the Transitory Provisions was withdrawn<sup>71</sup> in order to be in harmony with EU law,<sup>72</sup> and as a result, at that time, it was no longer possible to merge the National Bank and the Financial Supervisory Authority, so the possible violation of the independence of the President of the National Bank at constitutional level ceased.

The *second amendment*<sup>73</sup> was submitted by MPs to Parliament on 18 September 2012 and adopted on 29 October 2012. The new provision in Article 23(3)-(5) of the Transitory Provisions requires the *prior registration of voters*.<sup>74</sup> Thus, for exercising the right to vote one needs to register before the next general elections. The idea of prior registration – that is a completely new legal institution in Hungary and seems to be entirely unnecessary as there is a county-wide register of permanent addresses of inhabitants and elections have been organized smoothly based on this registry – appeared first when the Electoral Procedure Act was submitted. After having given a second thought to the proposed new rule, and having considered the critical views about the introduction of the registration, it seemed to be more secure for the political decision-makers (the two-third parliamentary majority) to put the ‘prior registration’ or ‘sign-up’ to the Transitory Provisions of Fundamental Law. Some provisions of the Electoral Procedure Act were sent for ex ante constitutional review to the CC by the President of the Republic, and including those on prior registration, were annulled by the CC on 7 January 2013.<sup>75</sup>

The *third amendment* to the Fundamental Law<sup>76</sup> was submitted by the Government to Parliament on 7 December 2012 and adopted on 17 December 2012. It created another subject matter that shall be regulated by cardinal Acts.<sup>77</sup> The reason of the modification is the ‘newly discovered’ need for the protection of the *nation’s common heritage* [Article P)(1)], which leads to extending the scope of cardinal acts.<sup>78</sup>

### **3.2. The fourth amendment to the Fundamental Law (11 March 2013)<sup>79</sup>**

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<sup>70</sup>‘This provision guarantees the stability of the resigned president Pál Schmitt’s payment.’ See: Gábor Attila Tóth (ed.): Constitution for a Disunited Nation *CEU Press* (2012) footnote 1, at p. 449.

<sup>71</sup> It contained the possibility of merging the Hungarian National Bank and the Financial Supervisory Authority in which situation the President of the National Bank would be only a vice-president of the new organ.

<sup>72</sup> See the infringement proceeding: IP/12/24.

<sup>73</sup> Second amendment of the Fundamental Law of Hungary [Magyarország Alaptörvényének második módosítása (2012. november 9.), Magyar Közlöny 2012. 149. sz. 25018. Hungarian Gazette (9<sup>th</sup> of November 2012), Issue 149. p. 25018].

<sup>74</sup> See Tímea Drinóczi: Dialogic interaction and legislation on parliamentary election in Hungary 2010-2014 *Osteuropa Recht* Issue 4. (2014)

<sup>75</sup> The CC delivered the decision in January 2013 [Decision 1/2013 (I. 7.) CC]. Note that by the decision of the Court on 28 December 2012 (on Transitory provisions), it also annulled the rules introduced to the Transitory provisions by the second amendment.

<sup>76</sup> Third amendment of the Fundamental Law of Hungary (21 December 2012) [Magyarország Alaptörvényének harmadik módosítása (2012. december 21.), Magyar Közlöny 2012. 177. sz. 29770; Hungarian Gazette (21<sup>th</sup> of December, 2012), Issue 177. p. 29770.]

<sup>77</sup> Art. P) is to be supplemented with the rule that acquisition of property rights over agricultural land, forests and their use as well as rules on production management and agricultural plant of the integrated agriculture should be regulated in cardinal Act.

<sup>78</sup> Reasoning of the bill.

<sup>79</sup> Tímea Drinóczi: Constitutional politics, 81-88.

Provisions of the 4<sup>th</sup> amendment, which were triggered by the decisions of the CC that had not pleased the governing political majority, including decision 45/2012 (XII. 29.) CC, can be classified into three groups. The provisions which *overruled the CC rulings* cover the definition of family, which is formulated in the text very restrictively,<sup>80</sup> rules on political advertisements in the commercial media,<sup>81</sup> the criminalization of homelessness,<sup>82</sup> and questions about the establishment of a church. These rules on advertisement and church establishment were also modified by the fifth amendment. Another group of provisions relates to the *transposition of both the annulled and not-annulled rules of the Transitory Provisions*.<sup>83</sup> The explanatory memorandum of the fourth amendment argues that the original intention of the constitution-making power was to give constitutional status to the Transitory Provisions and that it can freely decide to split the corpus of the constitution into two parts. Besides, the fourth amendment also contained *new provisions*, which were not related to the Transitory Provisions.

One can add that the Transitory Provisions consisted of three main parts: i) a political manifesto-part (called ‘The transition from the communist dictatorship to democracy’), ii) a group of genuine Transitory Provisions and iii) several substantial provisions. The *first part* makes the Hungarian Socialist Party liable for the sins of the communist dictatorship as the legal successor of the Hungarian Socialist Workers’ Party; it makes it possible to withdraw already acquired social rights, namely it creates a constitutional basis for the reduction of pensions and other payments to leaders of the communist dictatorship determined by Act (Article 1). It makes the period of statutory limitation recommence for crimes related to communist dictatorship and not been prosecuted due to political reasons (Article 2). This Article 2 contradicts the decision of the CC delivered in 1992 on the same topic.<sup>84</sup> Against this background, the FL itself contains the following provision, serving as a base in its preamble:

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<sup>80</sup> Decision 43/2012 (XII. 20.) CC. See the analysis and critique of this decision in Bojnár Katinka: Az Alkotmánybíróság határozata a család fogalmáról [The decision of the Constitutional Court on the concept of family] *JEMA* 2013/1. 19-27. See provisions of the FL: Art L (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.’ This approach excludes those in a partnership who take care of and raise each other’s children, different sex-couples without a child and many other forms of long-standing emotional and economic cohabitation, which are based on mutual care and fall within wider, more dynamic sociological notion of family from the state’s objective positive obligation to provide constitutional protection.

<sup>81</sup> Decision 1/2013 (I. 7.) CC annulled the provision that stipulated that in the campaign period, political advertisements may only be published in the public media. The violation of Article 10 of the ECHR is also argued on a proper ground. See Zoltán Pozsár-Szentmiklós: Media access for political parties as a safeguard of free elections. Hungarian experiences. European context. *Electoral Expert* 2017/2.

<sup>82</sup> Decision 38/2012 (XI. 4.) CC annulled the provision of the Petty Offence Act that criminalised the status of homelessness because it was held to be in violation of human dignity. The Court also annulled the provision of the Act on Local Governments making it possible for local governments to create criminal acts so as to criminalise the status of homelessness. The new provision in the FL states that an Act or decree of local government may outlaw the use of certain public space for habitation in order to preserve public order, public safety, public health and cultural values. On the other hand, the Fundamental Law does not oblige the state to combat against homelessness: it uses phrases like ‘shall strive to provide’ or ‘shall contribute to creating’ ‘the conditions for housing’. See Article XXII of the FL.

<sup>83</sup> Decision 45/2012 (XII. 29.) CC annulled these provisions. See later in point III.8.

<sup>84</sup> Decision 11/1992 (III. 5) CC (available in English at [http://www.mkab.hu/letoltesek/en\\_0011\\_1992.pdf](http://www.mkab.hu/letoltesek/en_0011_1992.pdf).) In 1991 the new democratically elected governing coalition submitted to Parliament a piece of legislation with retroactive effects in criminal matters. The draft intended to amend the Criminal Code to revive the period of statutory limitation. The new limitation period would have run from 2 May 1990 and would apply to offences of treason, manslaughter and infliction of bodily harm resulting in death committed in the period from 21 December 1944 to the date of the legislation. In this ruling the Court defined its theory of the constitutional meaning of transition, the concept of the ‘*revolution under the rule of law*’ and set down basic principles of constitutional criminal law by stating that the constitutional guarantees of criminal law could neither be relativized nor be balanced against some other constitutional right or duty since they already were the result of balancing, i.e., the risk of unsuccessful prosecution of the socialist era was borne by the state.

‘We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships.’ The political manifesto part of the Transitory Provisions was transposed, with a slightly changed content, into the text of the FL to its ‘Foundation’ part.

The *second group of provisions* of the Transitory Provisions contain genuine Transitory Provisions connected to the entering into force of the FL (e.g., when a provision of the FL is to be applied for the first time, or which provision of the Constitution is to be applied until a determined period of time<sup>85</sup>).

*Examples of substantive rules* introduced by the original text<sup>86</sup> of the Transitory Provisions are, *inter alia*, the following. The first made it possible for Parliament to merge the National Bank and the Financial Supervisory Authority. With this act the President of the National Bank would be only a vice-president of the new organ; this could have meant a threat to the independence of the Central Bank. This provision of the Transitory provision was repealed by the first amendment and a substantially same rule (it is the task of the national bank to supervise the financial system) appeared in the fifth amendment.<sup>87</sup>

The second substantive rule declared which mandate ceased (ombudsman for data protection and freedom of information) and which did not (‘other ombudsmans’ and President of the Budget Council). There is no explanation whatsoever of the selection criteria: who remains until and who has to leave before his/her original mandate ends. The FL itself, when regulating the end of the mandate, does not refer to the Transitory Provisions in this respect. The FL still contains this rule. One can note that the European Court of Justice also examined the early termination of the mandate of the ombudsman for data protection.<sup>88</sup>

The third substantive rule made Article 37(4) of the FL<sup>89</sup> applicable – even when the state debts do not exceed half of the GDP – in connection with those statutes published when the state debts exceeded half of the GDP. This is an exception rule from the main rule that should have been the termination of the restriction of the competence of the CC in reviewing financial laws from the moment that the state debts do not exceed half of the GDP.

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<sup>85</sup> Here we are talking about that Constitution which was adopted in 1949, substantially reformed in 1989 and 1990 and on which the constitution-making power establishes itself and about which the Fundamental Law in its preamble says the following: ‘We do not recognize the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid’; ‘We date the restoration of our country’s self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected body of popular representation was formed. We shall consider this date to be the beginning of our country’s new democracy and constitutional order’. It is worth to note here that the Republic was proclaimed on 23 October 1989 along with the first major modification of the Constitution (Act XXXI of 1989).

<sup>86</sup> As mentioned in point II.3.1., it was amended by Art 2 of the First Amendment (18 June 2012 and the Second Amendment to the Fundamental Law of Hungary (9 November 2012).

<sup>87</sup> Article 41 and 42 of the FL. The FL mentions only that the rules for the body supervising the system of financial mediation shall be defined by a cardinal Act. [Magyarország Alaptörvényének Ötödik módosítása, Fifth amendment to the Fundamental Law of Hungary (2013. szeptember 26.), Magyar Közlöny 2013. 158. sz. 67822; Hungarian Gazette 2013. Issue 158. p. 67822]. The draft of the fifth amendment had a first (14 June 2013) and a second (30 August 2013) version, that withdrew the first one.

<sup>88</sup> C-288/12 Commission v Hungary, available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0288&from=EN>>

<sup>89</sup> 37 (4) As long as state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence set out in Article 24 (2) b-e), only review the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding Acts due to violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship. The Constitutional Court shall have the unrestricted right to annul the related Acts for non-compliance with the Fundamental Law’s procedural requirements for the drafting and publication of such legislation.

The fourth substantive rule, in order to guarantee the right to obtain justice in reasonable time and until the workload of the judicial system is balanced, the Transitory Provisions made it possible for the President of the National Judicial Office to assign a court outside the general territorial jurisdiction determined by law to proceed in any case; the prosecutor general or the competent prosecutor also could make an accusation in a court outside the general territorial jurisdiction determined by law. This latter rule is again a response to a CC ruling<sup>90</sup> that declared the same rule<sup>91</sup> in the Criminal Procedure Act unconstitutional in 2011.<sup>92</sup> One can note that the FL recognizes the right to due process, including the right to obtain justice in reasonable time in Article XXVIII but (before the 4<sup>th</sup> amendment) it had provision on neither the National Judicial Office nor its President. Thus, the Transitory Provisions are themselves reactions to the CC ruling, *supplementing and making* some constituent elements of the right to *due process relative*. The Fourth Amendment changed the wording of the prerogative of the President of the National Judicial Office: it makes no reference to a time condition ('until the balance workload of the judicial system is settled'), making this rule a non-temporary one. Act CXXXI of 2013 on modification of some Acts related to the 4<sup>th</sup> amendment of the Fundamental Law, however, withdrew Chapter V of the Act on organisation and administration of courts (appointment of proceeding court in the interest of the assessment of cases within reasonable time) effective as of 1 August 2013. In addition, the fifth amendment of the FL repealed the related constitutional provision effective as of 1 October 2013.

The fifth substantive rule of the Transitory Provisions authorized Parliament to identify the recognised churches and determine the criteria for recognition of denominations as churches, such as operation for a certain period of time, a certain number of members, historical traditions and social support. This is a supplementation of the rule on freedom of religion and separation of the Church and state in Article VII of the Fundamental Law. This rule was also changed by the Fifth Amendment.

The sixth substantive rule, devolves the payment obligation of the state due to a decision of the CC, the Court of Justice of the European Union or any other court to taxpayers, provided that there is no separated or available money in the state budget. This is also a supplement, it relates to Article XXX of the FL on proportionate contribution to satisfying community needs.<sup>93</sup>

The Transitory Provisions also contained rules on the general retirement of judges that was not transposed into the FL by the 4<sup>th</sup> amendment. The provisions of the related Act were annulled by the CC<sup>94</sup> because it found that this age limitation is contrary to the principle of the independence of the judiciary and constituent elements thereof. Furthermore, the European Court of Justice (First Chamber) on 6 November 2012 in Case C-286/12 declared that Hungary had failed to fulfil its obligations under Articles 2 and 6(1) of Council Directive 2000/78/EC of

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<sup>90</sup> Decision 166/2011. (XII. 20.) CC. See Tímea Drinóczi: Influence of human rights standards? Hungarian style on dialogic interaction In Jerzy Jaskiernia, ed., *Wpływ standardów międzynarodowych narozwóydemokracjiiochronęprawczłowieka. Tom 3.* Wydawnictwo Sejmowe, Warszawa (2013) pp. 430-440.; Bence Mészáros: The decision of the Hungarian Constitutional Court on the rules of criminal procedure in high priority cases *Vienna Journal on International Constitutional Law* (2013)

<sup>91</sup> There was one exception: it did not concern all cases but only 'cases of high importance'.

<sup>92</sup> Later the Court found that that it was contrary to international obligations (and to the case law of the Strasbourg Court as well as of the Hungarian Constitutional Court) and did not fulfil the requirements of impartiality and due process and related rights and principles that followed from the Constitution. The fact that the President of the National Judicial Office may appoint the proceeding court constitutes a neglect of the related opinion of the Venice Commission. See Decision 36/2013. (XII. 5. CC) and Opinion 663/2012 on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organization and administration of courts of Hungary adopted by the Venice Commission at its 90<sup>th</sup> Plenary Session (Venice, 16-17 March 2012)

<sup>93</sup> It also defines constitutional complaint (Art 22) which should have been put either in the Fundamental Law or (rather) the Act on Constitutional Court.

<sup>94</sup> Decision 33/2012 (VII. 17.) CC

27 November 2000 establishing a general framework for equal treatment in employment and occupation.<sup>95</sup>

As mentioned above, the fourth amendment to the FL also contained *new provisions* that belong to neither the group of overruled court rulings, nor the ex-Transitory Provisions. They relate to higher education, the competences of the CC, partly connected to the possibility of formal review of constitutional amendments, the fate of the earlier case law of the CC, the status and the President of the National Judicial Office, Parliamentary Guard, order and disciplinary powers of the Speaker of the Parliament, also the regulatory level of the rules on operation of the Parliament.

### 3.3. The fifth and the sixth amendment<sup>96</sup>

The government submitted the first version of the *fifth amendment* on 14 June 2013, and its second version on 30 August 2013 to the Parliament. The attached explanatory memorandum specifies that this amendment, leaving intact the original intention of the constitution-making power contains *rules reflecting opinions* of the CC, the Commission of the European Union as well as the Venice Commission. Examples of these rules are the withdrawal of the court assignment power, special taxes, the modification of provisions on political campaign, religious communities, and a 30 days-deadline rule related to a process of the CC, adding guarantee rules on administration of courts. The supervisory task of the national bank over the financial sector is not a response at all, but the new appearance of an original intention. The fifth amendment<sup>97</sup> entered into force on 1 October 2013 and resulted in the second consolidation of the Fundamental Law. Because of the 5<sup>th</sup> amendment, there are constitutional rules, such as special taxation and assignment prerogative of the President of the National Judicial Office that formed the part of the FL between 1 April 2013 and 1 October 2013. If we consider the Transitory Provisions as constitution, then these rules formed part of the constitution of Hungary between 1 January 2012 and 1 October 2013.

The sixth amendment (14 June 2016) introduced a new “special legal order” into the Hungarian constitutional order. The text in Article 51/A on the “*state of terrorist threat*” seems to be in line with the internal logic of the regulation of special legal order of the FL: it is fixed in time, certain derogations of fundamental rights are not allowed, the FL and the operation of the CC cannot be suspended, two-third parliamentary majority have to make decisions and adopt the governing laws.<sup>98</sup> It vaguely defines what a “state of terrorist threat” means,<sup>99</sup> which organ<sup>100</sup> on what conditions can introduce, extend and terminate this situation,<sup>101</sup> what other organs

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<sup>95</sup> There are other minor transposed rules that are not constitutionally relevant; the necessity of their constitutional regulation may be questioned, though. Here, registration (right to vote) can also be mentioned: it was part of the Transitory provisions, but was omitted from the 4<sup>th</sup> amendment.

<sup>96</sup> Tímea Drinóczi: Constitutional politics, 92. (description of this amendment); Drinóczi: Special legal orders, 434-435. (critical assessment on this new emergency situation and power)

<sup>97</sup> The amendment corrects grammar mistakes (verb in singular instead of the correct plural form) and false internal references [reference to point g) instead of point f)]; thus it corrects errors that were not realized until the first submission of draft of the fifth amendment (June 2013).

<sup>98</sup> The FL uses the term ‘special legal order’ because the usually employed term of ‘emergency’ has another meaning in the Hungarian constitutional order. The Hungarian regulation in this regard is one of the most detailed ones in Europe. See Drinóczi: Special legal orders, 423-428. See Art 50 on ‘state of emergency’ which is only one of the emergency situations. See more about these situations in Tímea Drinóczi – Lóránt Csink– István Sabjanics: Hungarian constitutional law and interpretations of security. In Agnieszka Bień-Kacała, Jiří Jirásek, L’ubor Cibulka, Tímea Drinóczi (eds.): *Security in V4 constitutions and political practices* Wydawnictwo Naukowe Uniwersytetu Mikołaja Kopernika, Toruń (2016) 177-199.

<sup>99</sup> It covers: the significant and direct threat of a terrorist attack or terrorist attack.

<sup>100</sup> Parliament at the initiative of the Government.

<sup>101</sup> If there is a significant and direct threat of a terrorist attack or terrorist attack.

participate in decision-making during this emergency,<sup>102</sup> and what special competencies are allocated to different state organs.<sup>103</sup>

### **3.4 The seventh amendment to the Fundamental Law**

On June 20, 2018, the National Assembly representatives from the Fidesz-KDNP governing alliance and the opposition party Jobbik adopted the seventh amendment to the Fundamental Law. The first point of the amendment says that alien people cannot be settled in Hungary. This provision was born in reflection to the Hungarian migration policy. The Government majority tried to adopt a similar amendment to the FL in 2017 but, in the absence of a two thirds supermajority, the attempt failed. Another provision of the seventh amendment is about the protection of Hungary's constitutional identity. The protection of this identity and that of Christian culture is the obligation of all state institutions – says the FL. This provision recalls previous attempts to formulate and strengthen national identity, no matter what that means. Although the Constitutional Court in its decision 22/2016 (XII. 5.) gave a very broad definition of the constitutional identity, it has not become clear what duties shall follow this provision in the future. According to the Fundamental Law, the exercise of the freedom of expression and assembly cannot entail the invasion of the private and family lives of others or the trespass of their homes. This provision is also a consequence of a former debate and a CC decision about the restriction of the freedom of assembly. The claim was that the former legislation and constitutional environment does not strictly require a balanced regulation and, therefore, its modification has become necessary in order to protect privacy.

The seventh amendment introduced the separate high administrative court into the Hungarian legal system by declaring that the courts consist of regular and administrative courts. The regular courts make decisions with regard to criminal cases, legal disputes related to civil law and other matters determined by law. The Curia is the supreme organ of the regular court organization. Administrative courts make decisions with regard to legal disputes related to public administration and other matters determined by law. The Administrative Supreme Court is the supreme organ of the administrative courts.

The seventh amendment also declared that living in public spaces is prohibited. The provisions of the seventh amendment were all sensitive issues of public, legal and political debate, serious concerns were raised against these legislative ideas referring human rights matters and separation of power problems. The Government's two thirds majority has led to partisan decisions in these questions, which means the victory of the government's illiberal stance in these questions.

## **4. Other players in the formal constitutional amendment**

There may be many players in the formal constitutional amendment, but in Hungary, due to legal restrictions, neither the *other branches of government* (judiciary), nor the *citizens* (civil society, NGOs, lobbyists,<sup>104</sup> scholars and academia<sup>105</sup>) are entitled to directly participate. Indirect influence is not excluded, of course. The fourth amendment was surrounded by heavy

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<sup>102</sup> President of the Republic, standing committees of the parliament.

<sup>103</sup> Government can introduce special measures, which may be contrary to existing laws for the period of the state of terrorist threat but remains in effect only for a definite period of time. Hungarian Defence Forces may be applied in the territory of Hungary if the use of the police and the national security services proves insufficient.

<sup>104</sup> There is no legal framework for lobby activity in place in Hungary.

<sup>105</sup> The involvement of scholars in the constitution making and amending processes is contingent upon the actual political will. We have no available data proving the involvement of scholars in formal amendment, but as for the constitution making efforts, they could always participate

discussion by *scholars*,<sup>106</sup> *international and supranational organizations* (Parliamentary Assembly of the Council of Europe,<sup>107</sup> Venice Commission and the European Commission,<sup>108</sup> the European Parliament<sup>109</sup>) and *non-governmental organizations*,<sup>110</sup> which may have got the Government itself to request a detailed opinion of scholars representing international academic life.<sup>111</sup> All of these findings may have had an effect on the content on the Fifth Amendment. Transnational courts may be assumed to trigger formal constitutional amendments, or at least can be considered as starting points for the possible future changes. It is, however, not the case with Hungary. The *European Court of Human Rights* in several decisions measured the relationship between the provisions of the Hungarian constitutional order and the ECHR. Among other things, we must emphasize the cases examining the early ending of the mandate of the president of the Supreme Court of Hungary<sup>112</sup> (a case originating from the Transitional provisions to the Fundamental Law), lifetime imprisonment without parole (prescribed in the Fundamental Law),<sup>113</sup> or the new regulation on churches based on the fourth amendment to the Fundamental Law.<sup>114</sup> Similarly – among other cases –, the *European Court of Justice* declared its position related to the early retirement of judges<sup>115</sup> and the early ending of the mandate of the parliamentary commissioner for data protection<sup>116</sup> (both provisions prescribed in the Transitional provisions). These amendments or changes may have positive effects (when partly complying with the basic findings of the transnational legal institutions), however, negative effects are also possible (when acting contrary to the above mentioned findings or by ignoring those<sup>117</sup>).

### III. Informal constitutional amendments

Neither the Constitution, nor the FL contains any provision regarding the informal amendment by constitutional interpretation, save for the role of the Court to protect the constitution, which involves its interpretation. However, the FL has certain rules on interpretation,<sup>118</sup> even though

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<sup>106</sup> Eg. Halmai et al.: Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary (April 2013)

<sup>107</sup> <<http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=19933&lang=en>, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21957&lang=en>>

<sup>108</sup> Jointly: <https://www.coe.int/en/web/portal/-/declaration-sur-l-adoption-par-le-parlement-hongrois-du-4eme-amendement-a-la-loi-fondamentale>. Separately: Opinion on the Fourth Amendment to the Fundamental Law of Hungary, Venice Commission, Opinion no. 720/2013, available at <[http://www.venice.coe.int/webforms/documents/?pdf=cdl-ad\(2013\)012-e](http://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2013)012-e)>

<sup>109</sup> European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)), available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52013IP0315>>

<sup>110</sup> See eg. Amnesty International, Eötvös Károly Policy Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Transparency International

<sup>111</sup> Opinion of Francis Delpérée, Pierre Devolvé, and Eivind Smith, <[http://vienna.io.gov.hu/download/1/ec/60000/alaptorveny\\_modositas\\_szakvelemen\\_angol.pdf](http://vienna.io.gov.hu/download/1/ec/60000/alaptorveny_modositas_szakvelemen_angol.pdf)>

<sup>112</sup> See Case of Baka v Hungary (Application no. 20261/12) Judgment of 23 June 2016

<sup>113</sup> Case of László Magyar v. Hungary (Application no. 73593/10) Judgment of 20 May 2014

<sup>114</sup> Magyar Keresztény Mennonita Egyház and Others v. Hungary (Applications nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12) Judgment of 8 April 2014.

<sup>115</sup> [http://europa.eu/rapid/press-release\\_MEMO-12-832\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-832_en.htm)

<sup>116</sup> C-288/12 Commission v Hungary, available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0288&from=EN>>

<sup>117</sup> For this latter one, see the example of churches: even though the Fifth Amendment and its implementing legislation introduced some changes, the situation has not been approximated to the standard demanded by the ECtHR, the Venice Commission and different NGOs.

<sup>118</sup> Art 28 and Art R) of the FL. Art 28 In the course of the application of law, courts shall interpret the text of legal regulations primarily in accordance with their purposes and with the Fundamental Law. When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which

it is doubtful whether they could serve to unambiguously shape the boundaries of constitutional interpretation in order to avoid informal amendment.

## 1. The right to name

In its decision 58/2001. (XII. 7.),<sup>119</sup> the CC created a *new and unlimited right*, the ‘right to name’, which is understood as *a right to have and use a proper name representing a self-identity*. The Constitution did not have any particular rule on the right to name and the Court deduced it from the article of the Constitution on the right to human dignity. As a result of this interpretation, the Court annulled some provisions of the Act on the registers, the marriage procedure, and on the rules of bearing names. The CC declared an unconstitutional omission of the parliament as it had not made it possible for the husband to take the name of the wife in marriage. The Court also held that *certain components of the right to name*, such as the rights of choosing, changing and amending one’s name *might be limited* by the state authorities if the limitation is based on a *proportionality test*. The *Parliament acted accordingly in 2002* and changed the laws. Moreover, even when the new Civil Code and new Act on registry processes were adopted in 2013, it complied with this decision of the Court. However, when the FL was passed, the two-third majority again did not constitutionalize the right to name. One can add the CC keeps on the ruling in accordance with its former decision, even in 2015,<sup>120</sup> when it allowed in a specific case to use a double surname without a hyphen even when the rules in force literally ordered the contrary.

## 2. Freedom of contract and market economy

The freedom of contract is another example of how the CC created a new constitutional right, thus informally amended the Constitution. The Court in decision 32/1991 (VI. 6.) reinforced its position about the place and role of the freedom of contract in the Hungarian constitutional system.<sup>121</sup> The Court held that the freedom of contract is one of the *essential components of the market economy*, which was explicitly mentioned in the Constitution. It also acknowledged its close relation with the principle of the constitutionally recognized freedom of competition and the right to enterprise. It followed that the freedom of contract is a *distinct constitutional right*, i.e., an institution which is protected by the Constitution and the CC but does not constitute a fundamental right. Therefore, even its essential content elements may be restricted, which would be excluded in the case of a fundamental right, provided that the restriction is constitutionally justified. For defining what constitutional justification means, the Court created a special limitation test. The constitutional interpretation of 1991 on the freedom of contract and its special limitation has been *applied by the Court ever since*, even after the adoption of the FL which did not constitutionalize the freedom of contract,<sup>122</sup> but did not explicitly contain the expression of ‘market economy’.

The CC when jointly interpreted the preamble, which referred to the transitional period towards the realization of ‘social market economy’, and the normative text of the Constitution, which contained only ‘market economy’, established the doctrine of the *economic neutrality* of the Constitution. Based on the constitutional text, it meant that market economy in Hungary was

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are in accordance with common sense and the public good. Art R) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution.

<sup>119</sup> It is available in English at <[http://hunconcourt.hu/letoltesek/en\\_0058\\_2001.pdf](http://hunconcourt.hu/letoltesek/en_0058_2001.pdf)>

<sup>120</sup> Decision 27/2015 (VII. 21.) CC

<sup>121</sup> For the first decision, see Decision 13/1990. (VI. 18.) CC

<sup>122</sup> See e.g., Decisions 3192/2012. (VII. 26.) and 8/2014. (III. 20.) CC

based on the equal status and equal protection of public and private property, freedom of competition and the right to enterprise. The discretionary power of the parliament is wide when it comes to the determination of economic policy, though it has its limits, e.g., the respect to fundamental rights and the actual relations of the market economy, the maintenance of the very existence of market economy; it should not regulate discretionally or in bad faith.<sup>123</sup> This interpretation of market economy is *upheld* by the Court in its recent case law as well. In its decision 20/2014. (VII. 3.), the Court reiterated its previous case-law on market economy, even though it lost its constitutional basis, and adjudicated the case based on this old-new interpretation. The Court held that the market economy is implied in the article which recognizes the freedom of enterprise and obliges the state to ensure the conditions of fair economic competition and act against any abuse of a dominant position and protect the rights of consumers.<sup>124</sup>

### 3. Constitutional status and powers of the President of the Republic

Even in questions that were politically sensitive the CC actively chose to adjudicate even though the text of the Constitution was clear neither on the presidential powers nor the methods of constitutional interpretation. However, the Court took the challenge to rule and thus found *room for fine-tuning or extending the content* of the Constitution on *the powers of the President*. Each decision discussed here was delivered as a result of an abstract constitutional interpretation initiated by either the president himself or other competent bodies of the Parliament and the Government.

In decision 48/1991. (IX. 26.),<sup>125</sup> the Court held that the President *could refuse the appointment* of state officials if the conditions required by law are not met or if he or she has well-grounded reasons to conclude that the appointment would lead to a serious disorder in the democratic functioning of the state. The basis of this power, according to the Court, is that the President is the guardian of the democratic operation of the state organization. Therefore, no political responsibility is assumed, as this intervention of refusal is seen as an extraordinary measure to maintain the democratic operation of the state. The Court further explained the criteria which open up the possibility for the President to refuse an appointment in its decision 36/1992. (VI. 10.). In another decision, 47/2007. (VII. 3.) of the CC,<sup>126</sup> the Court held that the President *has a substantial discretionary right to refuse to award prizes* in the name of the state (proposed by the Government) if that would violate the values enshrined in the constitutional order of Hungary. The Court held that any recommendation for an award or the conferring of an award that violates the constitutional values of the Republic of Hungary or that reflects a different scale of values is unconstitutional as it contravenes constitutional values. In these cases, the Court had to decide if the *constitutional gap may be resolved* through constitutional interpretation or by legislation or constitutional amendment. The Court, arguably, had chosen the former and kept on ruling accordingly,<sup>127</sup> even though dissenting opinions were attached to each of these decisions claiming that this choice had been unconstitutional. Judges criticizing the decision on the refusal of an appointment, in 1991 and 1992, were of the opinion that determining criteria for refusal of an appointment fall within the powers of the constitution-

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<sup>123</sup> See e.g., Decisions 33/1993. (V. 28.), 21/1994. (IV. 16.), 59/ 1995. (X. 6.) and 8/2010. (I. 28.) CC

<sup>124</sup> Art M) of the FL.

<sup>125</sup> Decisions 48/1991 (IX. 26.) (a summary is available at <[http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1991-s-002?fn=document-frameset.htm?f=templates\\$3.0](http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1991-s-002?fn=document-frameset.htm?f=templates$3.0)>) 8/1992 (I.30), 36/1992 (VI. 10), 47/2007 (VII.3) CC. (This latter decision is translated and available at <[http://hunconcourt.hu/letoltesek/en\\_0047\\_2007.pdf](http://hunconcourt.hu/letoltesek/en_0047_2007.pdf)>)

<sup>126</sup> Available at <[http://hunconcourt.hu/letoltesek/en\\_0047\\_2007.pdf](http://hunconcourt.hu/letoltesek/en_0047_2007.pdf)>

<sup>127</sup> See e.g., Decision 36/1992. (VI. 10.) CC

making power.<sup>128</sup> In 2007, *dissenting judges* held that due to the lack of the constitutional basis of any competence to refuse awarding prizes, it could not have been deduced from the Constitution by interpretation. The legislative power would have simply regulated it. Another criticism was that the refusal of awarding a prize based on the constitutional value order would create a non-textual constitutional basis for the President to make political decisions without due constitutional restraints. It would, however, be clearly contrary to the position of the President and the division of powers enshrined in the Constitution.<sup>129</sup> As it is proved by the *political practice* and the *new wording of the FL*, the political decision-maker respected the opinion of the Court to the extent that it never overruled it, what is more it introduced it to the FL.<sup>130</sup>

The approach was different regarding the interpretation of the power of the President as a *commander-in-chief of the Hungarian Army* in decision 48/1991. (IX. 26.), as no judge criticized this part of the decision. The Court held that the Parliament, the President, and the Government had the sole right to collectively participate in the management of the armed forces according to their respective constitutional powers and without infringing the powers of others. As under the Constitution, the commander-in-chief of the Hungarian Army is the President, he/she shall exercise the commanding powers exclusively by the constitutional rules and the governing actions of others. The text of the Constitution vested the President with the authority of a traditional commander-in-chief of the armed forces. This supreme command function was, however, considered as a part of the constitutional status of the President, and as such, it did not confer any rank or position in the Hungarian armed forces on him or her. Therefore, he or she did not act as superior officer in respect of the armed forces. Also, this part of the decision has been acknowledged and supported by the political decision-maker since its adoption. Comparing to the wording on the constitutional status of the President, the FL *uses the same wording* as the Constitution.<sup>131</sup>

#### **4. Right to environment**

The Constitution constituted the right to healthy environment and just slightly obliged the state to ensure this right by the protection of the environment. The CC in its *status quo decision* [Decision 28/1994. (V. 20.) CC] came to the following conclusions. The right to healthy environment encompasses the obligation of the state not to reduce the environmental protection which it has already legally ensured, save for cases in which the reduction is required by the realization of another fundamental right or constitutional value. In these cases, however, proportionality has to be observed. Dissenting opinions contested the view that this obligation could be deduced from the wording of the Constitution.<sup>132</sup> Nevertheless, this status quo decision has been *continuously applied*,<sup>133</sup> and its very essence *was worded* in the FL. Now, it expresses the obligation of protection but most importantly the maintenance of natural resources, particularly arable land, forests and the reserves of water, biodiversity (e.g., native plant and animal species) and their preservation for future generations.

#### **5. Plebiscite and constitutional amendment**

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<sup>128</sup> See dissenting opinions of Géza Kilényi, Péter Shmidt and Imre Vörös.

<sup>129</sup> See dissenting opinions of László Kiss and István Kukorelli.

<sup>130</sup> Art 9 (6)-(7) of the FL.

<sup>131</sup> Art 9 (2) of the FL.

<sup>132</sup> See dissenting opinion of Antal Ádám and Ödön Tersztyánszky.

<sup>133</sup> See e.g., Decisions 48/1997. (X. 6.) and 16/2015. (VI. 5.) CC

In its decision 2/1993 (I. 22.), the CC stated that *no plebiscites* can be initiated in questions which can be considered “implied amendments” to the Constitution. One can add that at the time of the decision the text of the Constitution did not contain any provisions regarding the relation between representative and direct democracy or the topics in which no referendum may be organised (excluded topics). The CC reached the conclusion that ‘in the constitutional order of Hungary the primary form of exercising popular sovereignty is representation.’ Moreover, the Court declared that the rules prescribed by the Constitution are limits for exercising both representative and direct democracy. Therefore, it is not possible to initiate plebiscites in questions of ‘implied amendments’ to the Constitution as the Constitution itself contains the rules on the amendment procedure in which direct democracy plays no role. After a *formal amendment in 1997*, the Constitution contained a detailed list of excluded topics (topics in which no national referendum may be organized), however, *the ban* on questions which can lead to constitutional amendments (declared formerly by the CC) *was not included*. Even so, this ban was consistently taken into account in the practice of the National Election Commission (the state organ responsible for organizing elections and referendums) and the CC. Later the FL *incorporated* the interpretation of the CC on the *relation between representative and direct democracy*<sup>134</sup> and the *list* of “excluded topics” of national referendums prescribed in the Constitution. Moreover, the FL – in accordance with the interpretation of the CC – also prescribes the *prohibition of plebiscites aiming at the amendment* to the FL. Therefore, in this regard, the constituent power explicitly recognized the informal constitutional amendment shaped previously by the CC.

## 6. Principle of proportionality

The principle of proportionality as a method of examination of the constitutionality of norms limiting fundamental rights was *not mentioned in the text* of the Constitution. The *1989 text* did not even contain a precise limitation clause as it declared that fundamental rights can be limited if a limitation is necessary in order to protect various public interests<sup>135</sup> or the fundamental rights of others. After a comprehensive formal amendment to the Constitution in *1990* a *general limitation clause* was *included* in the text, prescribing the inviolability of the essential (core) content of fundamental rights as the substantive limit on the limitation of fundamental rights.<sup>136</sup> The CC started to elaborate its method of examination of the constitutionality of norms limiting fundamental rights in the first year of its functioning (1990).<sup>137</sup> The method based on the principle of proportionality was introduced in the reasoning of the *landmark decision on the freedom of speech*.<sup>138</sup> The method was later regularly cited by the Court in fundamental rights disputes as the necessity-proportionality test. Based on the first step of the examination, the Court accepts the protection of fundamental rights or other constitutional values as legitimate purposes of the limitation. Moreover, the limitation has to be suitable to achieve the respective purpose and must not exceed the extent absolutely necessary. Finally, the burden caused by the limitation has to be proportionate to the importance of the purpose in question. One can add that the practice of the CC in this regard can be subject of criticism as the reasoning related to

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<sup>134</sup> Art B) (4) of the FL. The power shall be exercised by the people through elected representatives or, in exceptional cases, directly.

<sup>135</sup> Security of the state, public order, public safety, public health and public morals. See Art 8. § (3) of the Constitution (1989).

<sup>136</sup> Art 8. § (3) of the Constitution (1990). In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.

<sup>137</sup> See Decisions 2/1990. (II. 18.) and 20/1990. (X. 4.) CC.

<sup>138</sup> See Decision 30/1992. (V. 26.) CC.

the different steps of examination of the test often lack consistence and transparency.<sup>139</sup> Similarly to the Constitution, the *FL contains a general limitation clause* which prescribes that the essential (core) content of the fundamental rights is inviolable. However, the clause also *includes the description of the proportionality test* in the structure elaborated by the CC.<sup>140</sup> One can conclude that in the case of the rules on the limitation of fundamental rights the constituent power also confirmed the informal constitutional amendment elaborated by the CC.

## 7. The right to human dignity

The CC in its decision 23/1990. (IX. 31.) on the *abolishment of the death penalty*, declared that the *human dignity of the man and the right to life* should be understood as a *unique concept*. These two rights, the right to life and dignity are inseparable, and together they form the basis of all other rights in the legal system, the inviolable core of the protection of human rights. This unique concept became quite popular in constitutional doctrine, the CC often referred to this throughout its jurisprudence, e.g. when it decided controversies about *abortion, euthanasia* and other fundamental issues. Although this concept was often qualified as judicial law making by the Hungarian scholarship, and undoubtedly belonged to the history of the activism of the constitutional judiciary, the concept survived the nineties and later became a milestone in constitutional law. The FL has finally adopted this concept by saying in Article II. that *human dignity is inviolable*. ‘Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.’ Human dignity, in this sense, became the foundation of the legal system and the core value of all other rights. Human dignity, although it is not written explicitly in the text of the FL, received the *interpretation* (understood together with the right to life) *identical to the one of the nineties*, formulated originally by the CC in a decision that can be regarded as an informal constitutional amendment.

## 8. Non-recognition of the Transitory Provisions to the FL as parts thereof<sup>141</sup>

The 45/2012 (XII. 9.) decision<sup>142</sup> also may be seen as informal constitutional amendment because of two reasons. First, it *misread the text of the FL*. If we however accept the position of the CC, no informal amendment happened but an unconstitutional legal norm<sup>143</sup> was annulled. Second, a radical *change of heart* related to the competence of *reviewing constitutional amendments* can be seen in this decision, which was not left unnoticed the political supermajority.

The CC stated that the part on the transition from communist dictatorship to democracy (preamble), and many articles of the Transitional Provisions of the Fundamental Law of Hungary (31 December 2011) are contrary to the FL and it therefore annulled them with a

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<sup>139</sup> See László Blutman: Az alapjogi teszt a nyelv fogságában’ [The proportionality test captured by language] *Jogtudományi Közlöny* Issue 4. (2012), Zoltán Pozsár-Szentmiklósy: Az alapjogi teszt újrafogalmazása [The re-composition of the proportionality test] *Jogtudományi Közlöny* Issue 1 (2014)

<sup>140</sup> Art I. (3) of the FL. The rules for fundamental rights and obligations shall be laid down in an Act. A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of such fundamental right.

<sup>141</sup> Tímea Drinóczi: Constitutional politics, 81-82., Zoltán Sente: Az Alkotmánybíróság döntése a Magyarország Alaptörvényének Átmeneti rendelkezése alkotmányosságáról [Decision of the Constitutional Court on the constitutionality of the Transitional Provisions of the Fundamental Law of Hungary] *Jogesetek Magyarázata* Issue 2 (2013).

<sup>142</sup> See above in point II.3.1.

<sup>143</sup> According to the CC, the Transitory provisions ‘was not a formal source of law’ or ‘slide Act’.

retroactive effect as of the date of its promulgation. According to the CC, it is not possible to amend the constitution with another piece of legislation that has no constitutional rank and is clearly not a constitutional amendment, even if the legislator<sup>144</sup> calls it a part of the FL. This way the legislator takes away the competence of the assumed constituent power, violates the separation of powers and makes it impossible for the CC to conduct a substantial review on that piece of the legislation. *However, contrary to the opinion of the CC*, the Transitory Provisions were meant to be part of the FL by the constitution-making power.<sup>145</sup> The constitution-making power made both the FL and the Transitory Provisions, along with the necessary other laws, come into effect on 1 January 2012. It was a clear intention of the constitution-making power to regard the Transitory Provisions as a part of the FL, i.e. in Hungary two legal norms constituted (until the entering into force of the 4<sup>th</sup> amendment<sup>146</sup>) the constitution: the FL and the Transitory Provisions. The constitutional character of the Transitory Provisions was systematically denied, or rather was not recognised or was not considered at all by most academics.<sup>147</sup>

In Decision 45/2012 (XII. 9.) CC, which was based on the FL having no eternity rule, the CC still “*found*” *eternity clauses* in the text [rule of law in Article B)] and set rules and limitations. The CC defined some constitutional requirements, i.e., the coherence of contents and structure (the rule of law), constitutional legality, proper authorization, which must be respected even by the constituent power, which, due to the monist approach taken by the CC, includes the constitution-amending power as well. With the *fourth amendment*, the amending power *implemented the rules to the text* of the FL which were struck down formerly by the CC on procedural grounds and introduced the possibility to *procedural review of constitutional amendment*. This happened in spite of the fact that the CC in its obiter dictum opinion emphasized that constitutional amendments should conform not only the procedural rules, but also basic founding principles of a rule of law democracy and adumbrated the possibility to review formal constitutional amendments that do not observe the CC’s findings on the constitutional limits of any amendments. It held that the CC ‘may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic States under the rule of law.’ Now, the substantive review would be more difficult to justify in the future, because there is an explicit rule empowering the CC to perform procedural review. This leaves no doubt that there the amending power did not wish to allocate

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<sup>144</sup> This is the wording of the CC: despite the wording of the normative texts of the FL and the Transitory provisions, the CC calls the power which adopted the Transitory provisions legislator.

<sup>145</sup> The closing provisions of the new Hungarian constitution read as follows: ‘1. The Fundamental Law of Hungary shall take effect on 1 January 2012. 2. Parliament shall adopt the Fundamental Law pursuant to Sections 19 (3) a) and 24 (3) of Act XX of 1949. 3. Parliament shall adopt the transitory provisions related to this Fundamental Law in a special procedure defined in point 2. 4. The Government shall be obliged to submit to Parliament all bills required for the enforcement of the Fundamental Law.’ Sections 19 (3) a) and 24 (3) of Act XX of 1949 (that is the Constitution) refer to the fact that the Parliament acts as constituent power by adopting the Transitory provisions which requires 2/3 majority.

<sup>146</sup> As presented above in point II.3.2., the 4<sup>th</sup> amendment repealed the remnant of the original Transitory provisions after the annulment of considerable part of it by the CC (2012) and inserted the vast majority of these provisions into the FL. Rules of the Transitory provisions not annulled were also incorporated into the text of the constitution.

<sup>147</sup> See e.g. Lóránt Csink – Johanna Fröhlich: *Az Alaptörvény és az Átmeneti rendelkezések viszonya* [The relation between the Fundamental Law and the Transitory Provisions] *Pázmány Law Working Papers*, (2012) Issue 2, available at <<http://www.plwp.jak.ppke.hu/images/files/2012/2012-2.pdf>> (accessed 30 November 2013). This attitude of most scholars might have been due to the undemocratic, illiberal, restrictive, and discriminatory content of the Transitory provisions. Alternatively, another interpretation might have been possible as well, i.e. that the non-recognition of the constitutional status of the Transitory provisions was intentional because only this approach could lead to a constitutional remedy. Only by stating that the Transitory provisions is at a lower level in a legal hierarchy than the Fundamental Law, could the Transitory provisions be challenged before the Constitutional Court. See Tímea Drinóczi: *Constitutional politics*, 78.

substantive review competence for the CC. However, decision *12/2013 (V. 24.)* attests otherwise by keeping the soft forecasting of substantive review on the agenda.<sup>148</sup>

## 9. Constitutional identity<sup>149</sup>

The CC declared in its ruling *22/2016. (XII. 5.)* that by exercising its competences, it can examine whether the joint exercise of competences with EU member states and institutions under Article E) (2) of the Fundamental Law of Hungary infringes human dignity, other fundamental rights, the sovereignty of Hungary, or the constitutional identity of Hungary. The CC declares that the constitutional identity of Hungary is rooted in its historical constitution, which has not been created but only recognized by the FL. Even though the CC holds that the constitutional identity of Hungary cannot be featured by an exhaustive listing of values, it nevertheless mentions some of them, such as freedoms, the division of powers, the republican form of state and freedom of religion. The decision was triggered legally by the request of the ombudsman, submitted one year earlier, following the refugee “quota decision” of the EU (2015),<sup>150</sup> which the Government opposes because it fears the alteration of the ethnic and religious composition of Hungary. It was also demanded politically due to the failure of the seventh amendment just one week before the delivery of the ruling.<sup>151</sup> The constitutional amendment, as a result of an invalid referendum on the “quota decision”,<sup>152</sup> was meant to incorporate the term “constitutional identity”, the defence of which would have been the duty of all, with a view to constitutionally opposing the future implementation of the “quota decision”. The CC by declaring the identity of Hungary, informally amended the FL. It assisted Fidesz to achieve its political agenda and created an ambiguous implicit eternity clause, previously unknown in the constitutional system of Hungary and *de facto* refuted even by itself.

## 10. Overview of the informal constitutional amendments

Decisions of the constitutional courts interpreting the constitution might lead to the informal amendment of the former constitutional content. It seems that, when considering Hungary and its flexible constitutions, the occurrence of informal amendment does not correlate with the difficult amendment process. In this latter case, the room for interpretation is quite wide, and the mandatory nature of the interpretation could easily be accused of competence violation.

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<sup>148</sup> See below, in point IV.1.3.

<sup>149</sup> Tímea Drinóczi: Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System *Vienna Journal on International Constitutional Law* Issue 1 (2017) 150-151.; Tímea Drinóczi: The identity of the constitution and constitutional identity. Opening up a discourse between the Global South and Global North. *Juris Dictio* 21 (2018) 63-80., Tímea Drinóczi: Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach (December 5, 2018). *German Law Journal*, 2020, Forthcoming . Available at SSRN: <https://ssrn.com/abstract=3448407>

<sup>150</sup> Council Decision 2015/1601 of 22 September 2015; see Boldizsár Nagy: The aftermath of an invalid referendum on relocation of asylum seekers: a constitutional amendment in Hungary available at <<http://eumigrationlawblog.eu/the-aftermath-of-an-invalid-referendum/>>.

<sup>151</sup> Renáta Uitz: National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades available at <http://verfassungsblog.de/author/renata-uitz/>; Gábor Halmai: Constitutional Court Decision on the Hungarian Government’s Constitutional Identity Defense <<https://blogs.eui.eu/constitutionalism-politics-working-group/2017/01/11/constitutional-court-decision-hungarian-governments-constitutional-identity-defense/>>.

<sup>152</sup> The question posed by the referendum read as follows: Do you agree that the European Union should have the power to impose the compulsory settlement of non-Hungarian citizens in Hungary without the consent of the National Assembly of Hungary? See: Zoltán Szente: Analysis: The Controversial Anti-Migrant Referendum in Hungary is Invalid available at <<https://iacl-aicd-blog.org/2016/10/18/the-controversial-anti-migrant-referendum-in-hungary-is-invalid/>>; Zoltán Pozsár-Szentmiklósy: A Kúria végzése a betelepítési kvótáról szóló népszavazási kérdésről. *Országgyűlési hatáskör az európai jog homályában Jogesetek Magyarázata* Issue 2 (2016).

Undoubtedly, it is *challenging to determine* if the result of a constitutional interpretation is *within or outside of the boundaries of constitutional interpretation*; whether or not the CC has been disrespectful of the rules of constitutional interpretation and created a new constitutional rule; whether or not the interpretation is legitimate or not, even in the case of overstepping limits and infringes the principle of the division of powers. This type of informal constitutional amendment indeed raises the question of *legitimacy* and *the breach of the principle of separation of powers* between the constitutional judiciary and the constitution-amending power. Nevertheless, *if the political decision maker* eventually considers this kind of informal constitutional amendment, it may come to the conclusion that the constitutional court has had every reason to give the particular constitutional interpretation it did. It follows that the political decision-maker can initiate a formal amendment procedure if it is politically and/or legally feasible. Alternatively, it can act as an ordinary legislative power, and it may draft a new law which respects the new, informally amended meaning of the constitutional provision (see the case of the right to name above). In both cases, the informal constitutional amendment by constitutional interpretation is *addressed post facto by the political sphere*. Should the informal change caused by the constitutional court be *left unreflected*, we can still assume that the political decision-maker had accepted it. In this case, the principle of democracy and the majority of the rule of law considerations, including certain aspects of the *separation of powers*, are certainly *respected*. The results of informal constitutional amendments by constitutional interpretation and their tacit consent by the legislative or the amending power, *raises*, however, *concerns with regard to several other components of the rule of law in a democracy*, such as the transparency of the legal system, the predictability of actions of state institutions, and the foreseeability of laws.

Still, taking a retrospective perspective, informal constitutional amendments by constitutional interpretation have occurred in *Hungary* in cases when the constitution does not or just vaguely govern a particular issue. Decisions of the CC have led to informal constitutional amendments but in each case these changes have been acknowledged by the political decision-maker which either exercised its legislative power later observing the case law of the CC (see the example of environmental protection or the right to name above), or has constitutionalized<sup>153</sup> the essence of the ruling (e.g., certain powers of the president, plebiscite, proportionality). When the political decision-maker did not agree on the informal amendment concluded by the CC, it used its formal amending powers, as it happened e.g., in the case of the Transitory Provisions. Regarding the *interaction* between the formal and the informal amendment in Hungary, we can observe that in some cases the informal amendment overrules formal amending rules, while in other cases the opposite is true.

#### **IV. Different attitudes to constitutional changes**

In Hungary there has not been much discussion in the scholarship about the amendment process itself. As a proof of that, the FL, adopted in 2011, kept the formal rules on amendment. In our parliamentary system, it has never been raised seriously that the Parliament should have the consent of the people for this decision, or any other kind of higher threshold should be introduced. As the Government's two thirds majority in Parliament was also quite rare, the amendment of the majority rule was also not raised often. As we have already explained, when the Government managed to reach two-thirds majority in Parliament in 1994, they immediately started to establish a better consensus rule. Although it was examined in the doctrine that in the Hungarian parliamentary republic according to the rules on election, it is quite likely that two-thirds majorities will occur from time to time, it was a surprise of constitutional culture that in

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<sup>153</sup> We shall not forget that for a formal amendment, only a super-majority is required.

2010 the two-thirds governing majority changed fundamentally the constitutional system upon its own will, without a political consensus. The scholarly discussion has dealt extensively with the question of the constitutional review of constitutional amendments, therefore we will show in this subchapter the quite heated and intensive discussion since 2010 in Hungary about the limits of constitution making and constitutional amendments. These limits could be set up by the CC in the Hungarian legal system, as there are no other state organs that might have the competence and procedures to proceed with a constitutionality review.

## **1. The changing view of the Constitutional Court on the review of constitutional amendments**

Due to the rules of both the Constitution and the original text of the FL and the “monist concept” of the constitution-making and changing power, the CC took the position that it is not empowered to review constitutional amendments. András Holló, former judge and president of the CC expressed that in these matters it is always better to use the signalling capacity of constitutional adjudication than annulling amendments, as it would preserve best the principle of the separation of powers.<sup>154</sup> This was the starting point of the discussion and of the jurisprudence in 2010.

### **1.1. Decision 61/2011. (VII. 12.) CC**

Concerning the possibility to review constitutional amendments the main problem that has occurred since 2010 in Hungary is that the Parliament amended both the Constitution and the FL each time when it did not agree with the decisions of the CC in certain questions. Decision 61/2011. (VII. 12.) of the CC reacted first to the fact the Parliament codified the possibility to levy such a tax (retroactively) that was previously said to be unconstitutional by the CC. The Court said that it was highly problematic that the Parliament used the FL to serve its political interest of the day. From the standpoint of rule of law, the stability of the law and the constitutional order, this conduct is not acceptable. The Court found this political behaviour problematic also because it weakens the democratic legitimacy of the FL as there is no wide social consensus on its each and every provision.<sup>155</sup> In spite of this harsh statement the CC still claimed that it is not authorized to carry out a substantial review of the amendments of the FL. One slight novelty was that the Court clearly emphasised that it is within its competence to review whether the Parliament kept the procedural requirements. In lack of explicit reference in the constitutional text, it was almost unanimously held from 1990 on, that the CC has competence to review if the amendment was born in conformity with the procedural rules.<sup>156</sup>

### **1.2. Decision 45/2012. (XII. 29.) CC**

The next cornerstone decision on the possibility of the judicial assessment of constitutional amendments and the discovery of unamendability was the already discussed decision of 45/2012. (XII. 29.) in which the CC established limits vis-à-vis the constituent power, including the constitution-amending power as well. The CC also concluded that separation of powers

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<sup>154</sup> See eg, concurring opinion of András Holló to the Decision 61/2011. (VII. 13.) CC. For critics on the signalization power see Tímea Drinóczi: Alkotmányos párbeszéd. A többszintű alkotmányosság alkotmánytana és gyakorlata 21. században. *MTA TK JTI*, Budapest (2017) <[http://jog.tk.mta.hu/uploads/files/jti\\_monografia\\_1.pdf](http://jog.tk.mta.hu/uploads/files/jti_monografia_1.pdf)> 240-246.>

<sup>155</sup> Decision 61/2011. (VII. 13.) CC, reasoning, V/1.

<sup>156</sup> Critics on this decision is available in Tímea Drinóczi: Gondolatok az Alkotmánybíróság 61/2011. (VII. 12.) AB határozatával kapcsolatban *JURA* Issue 1 (2012) 37-46.

comes first, and the CC has to respect its limits and it is not possible to take the place of the legislative power, or of the constituent power. Here we can see the first signs of hesitation in an obiter dictum statement. The CC again reaffirmed that it does not have the competence to a substantive review, but declared that all constitutional provisions and, as a logical consequence, all the amendments have to conform to certain rule of law standards. It seemed to have taken the position that formal constitutional amendments not respecting these limits may be reviewed in the future. The consummation of this forecast was made impossible by the fourth amendment introducing only the procedural review power of the CC. Nevertheless, this change of approach in the 45/2012. (XII. 9.) decision towards finding “eternity clauses” to preserve the constitutional order as it is, may be the result of the justified ‘constitutional resistance’ of the CC to the constitutional developments of 2012-2013 and the then functioning of political decision-making mechanism, i.e. the continuous overruling of the decisions of the Court and adoption of previously annulled provisions as part of the constitution.<sup>157</sup>

### 1.3. Decision 12/2013 (V. 24.) of the CC

In decision 12/2013 (V. 24.) concerning the review of the constitutionality of constitutional amendments, on the fourth amendment, the CC declared again that although it does not have the right to carry out a substantial review of the amendment, it will interpret and apply the FL in the future as a coherent system and will consider all provisions of relevance to the decision in a given matter and it will interpret them consistently with each other. This is again some kind of implicit and soft unamendability, similar to those which appeared in the two previous decisions. The huge difference is that obiter dictum demands of the CC have not been followed in the concrete constitutional practice.<sup>158</sup> This demonstrates that in case of an elevated conflict of democracy and constitutionalism strong judicial power and activism is necessary in order to reach the protection of the constitution, the observation of the balance of procedural democracy and rule of law.

In this case, the commissioner for fundamental rights (the ombudsperson) filed a petition, claiming the unconstitutionality of certain provisions of the fourth amendment. He mostly relied on formal, procedural unconstitutionality, but also claimed that in addition to the narrow interpretation of the violation of the procedural requirements of adopting the amendment, in a broader sense the amendment is also unconstitutional because it creates discrepancy and incoherency within the FL, which should be seen as a non-compliance with the findings of the CC in 45/2012 (XII. 29). In his opinion, the coherence of the FL was clearly violated by the fourth amendment because it contradicted previous CC decisions.<sup>159</sup>

The CC stated that under Article 24(5) of the FL, it may only review the FL and its amendments for conformity with the procedural requirements laid down in the FL with respect to its adoption and enactment.<sup>160</sup> The CC emphasized its competence of reviewing constitutional amendments in terms of the structure of separation of powers and also the limits of such competence. It also added that it would not extend its powers to review the FL and new norms amending it without express and explicit authorisation.<sup>161</sup>

The CC added, however, that when interpreting the FL in the future, it will also take into consideration the obligations Hungary has undertaken in its international treaties or those that

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<sup>157</sup> See Tímea Drinóczi: Constitutional politics, 66., 81-84.

<sup>158</sup> See also Tímea Drinóczi: Alkotmányos párbeszéd. A többszintű alkotmányosság alkotmánytana és gyakorlata 21. században

<sup>159</sup> See in point II.3.2. above.

<sup>160</sup> This wording encompasses the proponents of the amendment, the legislative process, the two-thirds adoption; provisions with regard to the designation of the act and the rules of signature and enactment, i.e. observance of the provisions of the FL are required for the amendment to be valid.

<sup>161</sup> Decision 12/2013. (V. 24.) CC, Reasoning, [30], [36]-[37], [43].

follow from EU membership, along with the generally acknowledged rules of international law, and the basic principles and values reflected in them. It stated that those rules constitute a unified system of values which are not to be disregarded in the course of adopting the FL or legislation or in the course of constitutional review.<sup>162</sup> This argument of the CC again contradicts its declaration regarding its very limited competence. By stating that e.g. the European constitutional values could serve as bases for review, the CC, although in exceptional cases, made the substantive review of the FL possible.<sup>163</sup> In other words, by preserving the competence for the “coherent interpretation” of the FL, the CC declared that its duties are not limited to identifying the text of the constitution and interpret the intent of the constituent power but they will rule based on an autonomous interpretation of the provisions of the FL.<sup>164</sup> One might conclude, therefore, that although the FL does not contain unamendable clauses and limits the power of the CC to review constitutional amendments, the CC, by way of interpretation, deduced the right to substantial review in certain cases. This approach, from another perspective, was reinforced in the above mentioned decision 22/2016. (XII. 5.) of the CC on the identity of the constitution that is inviolable.

#### **1.4. Decision 22/2016. (XII. 5.) of the CC**

The constitutional identity of Hungary and any possible future substantive review based on this doctrine, may, however, be a double-edged sword. It will preserve the current constitutional text and order, but at the same time, it can be used to defend the most criticized provisions of the FL<sup>165</sup> against a constitutional amendment which has the aim of improving the constitutional content and raising it to the level seen in the common constitutional tradition of member states and international human rights obligations. Thus, the eventually created (semi-) eternity clauses, the constitutional identity rooted in the historical constitution, could ‘eternalize’ questionable constitutional provisions (e.g., freedom of religion vs establishment of churches; equality before the law v. definition of marriage and family).<sup>166</sup>

#### **1.5. Non-tested “unamendability doctrine”**

In sum, although some kind of unamendability seems to be an inherent characteristic of the establishment of the Hungarian constitutional democracy, until recently it has received no explicit acknowledgement in CC’s case law and no formal amendment has been annulled on either substantive or procedural grounds.

## **2. Doctrinal views: changing positions**

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<sup>162</sup> Decision 12/2013 (V. 24.) CC, Reasoning, [30], [36]-[37], [43].

<sup>163</sup> See Csaba Erdős: Az alkotmány stabilitásának aktuális kérdései. [The stability of the constitution] *Diskurzus* Issue 1 (2011) 54-62.

<sup>164</sup> See also Lóránt Csink – Johanna Fröhlich: A régiek óvatossága: Megjegyzések az Alaptörvény negyedik módosításának javaslatára. [Wiseness of the olds: thoughts concerning the Fourth amendment to the Fundamental Law] *Pázmány Law Working Papers* Issue 1 (2013) <<http://d18wh0wf8v71m4.cloudfront.net/docs/wp/2013/2013-1-csl-fj.pdf>>.

<sup>165</sup> See, eg, the Fourth Amendment, Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14–15 June 2013. It involved the incorporation of many provisions that have previously been declared unconstitutional by the HCC. See: Tímea Drinóczi: Constitutional politics.

<sup>166</sup> Tímea Drinóczi: Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System, 150-151.

In the Hungarian legal literature, it is *commonly accepted* that the constituent power has distinct features and forms the basis of the democracy.<sup>167</sup> However, the *scope* and feature of this power and, consequently, the review power of the CC *have always been debated*, more particularly, since 2010.

## 2.1. Debate on the constituent power

The legal and theoretical ground for the debate was *Article 19 (2) and (3) of the Constitution* and *the claim of constitutional theory* that the constituent power is an *ex ante* political power which is capable of and willing to create a legally binding new constitution but which is (*ex-ante*) legally not limited in its exercise. Self-restriction and the establishment of the procedural rules of constitution-making are possible and necessary in a constitutional democracy. This was the basis for scholars, who advocate the “*dualistic approach*” of constituent power and constitution-amending power, to *demand the substantive review* of the CC in 2010 when the Court’s competence was curtailed and the – already mentioned – retroactive taxation was constitutionalized.<sup>168</sup> Others supported the “*monistic view*” of the CC and found Article 19 of the Constitution as a legal support to their arguments.<sup>169</sup> These two groups of scholars sustain their position after the entering into force of the FL. Moreover, they assessed the constitution-amending and -making processes of 2010-2014 and the debate on review power through their own lenses. There are some scholars, however, who, similarly to the CC, have *become more lenient towards the “dualistic approach”* and, consequently, to the necessity of the substantive review of constitutional amendments.<sup>170</sup>

The “*divide*” between scholars thus *remained*, and due to their own theoretical assumptions, even *Article 1 a) of the FL* could not change it. This rule provides, similarly to the Constitution, that the Parliament adopts and modifies the FL.<sup>171</sup> As the provisions in the FL differentiate between the competence to adopt the constitution and the competence to amend it, one group of scholars *still argues* that this proves that *both competencies* are given to the two-thirds majority of the Parliament and, therefore, there is no distinguishing feature of the constituent power and the amending power in Hungary.<sup>172</sup> The other group of scholars interprets the same

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<sup>167</sup> József Petrétei: Az alkotmányos demokrácia alapintézményei [Basic notions of constitutional democracy]. *Dialóg-Campus* (2009); Zoltán Sente: Az alkotmánymódosítás felülvizsgálhatósága [The possibility of reviewing constitutional amendments] In: Fruzsina Gárdos-Orosz and Zoltán Sente (eds.): *Alkotmányozás és alkotmányjogi változások Európában és Magyarországon* [Constitution-making and constitutional changes in Europe and Hungary] *Nemzeti Köszolgálati Egyetem* (2014) 167-184.; Tímea Drinóczi: Alkotmányos párbeszéd. A többszintű alkotmányosság alkotmánytana és gyakorlata 21. században.

<sup>168</sup> Nóra Chronowski Nóra, Tímea Drinóczi, Judit Zeller: Túl az Alkotmányon... [Beyond the Constitution...] 4 *Közjogi Szemle* Issue 4. (2010)

<sup>169</sup> See e.g. András Holló: Az Alkotmánybíróság viszonya az Alkotmányhoz: Az alkotmányozó és törvényhozó hatalom elhatárolása In Petrétei József (ed.) *Ádám Antal egyetemi tanár születésének 70. évfordulójára* Dialóg – Campus (2000) 95.

<sup>170</sup> See e.g., Antal Ádám, József Petrétei, László Sólyom. József Petrétei: Az alkotmányozó hatalom és az alkotmányosság [The constituent power and the constitutionality] In Fruzsina Gárdos-Orosz – Zoltán Sente (eds.): *Alkotmányozás és alkotmányjogi változások Európában és Magyarországon* [Constitution-making and constitutional changes in Europe and Hungary] *Nemzeti Köszolgálati Egyetem* (2014) 65-66.; Az Alkotmánybíróság többé nem az alkotmányvédelem legfőbb szerve. Sólyom László volt köztársasági elnökkel Kovács Kriszta beszélget [The Constitutional Court is not the supreme body of the protection of the constitution anymore. Interview with former president of the republic László Sólyom by Kriszta Kovács] *Fundamentum* Issue 1. (2013) 26.

<sup>171</sup> One may add also Article S (1) of the Fundamental Law, which states that the President of the Republic, the Government, any parliamentary committee or any Member of Parliament may submit a proposal for the adoption of a new Fundamental Law or for any amendment of the Fundamental Law.

<sup>172</sup> Péter Takács: Az alkotmány legitimitása. [Legitimacy of the constitution] *Alkotmánybírósági Szemle* (2011) 58, 64.; Lóránt Csink – Johanna Fröhlich: ...az alkotmányjogon innen [This side of constitutional law].

provision, with due regard to their theoretical view on the *dualist concept* of constitution making and amending power, as a proof of the separation of the constituent power and the amending power. They argue that the two competencies and the two functions are mentioned *separately*. Moreover, the constitution making power, neither *de facto* nor *de iure*, is able to bind the next constitution making power which is a political power that will be able and intending to have a new constitution. It means that the “adoption of the Fundamental Law” is to be interpreted as a reference to the actual fact that the Parliament in 2011 adopted this constitution. The denomination of the constitution as FL also supports this idea.<sup>173</sup>

## 2.2. Debate on the review power of the CC

In the Hungarian scholarship there is no consensus concerning the possibility to review constitutional amendments. This discussion is closely connected to that on the relation of the original constitution-making power and the amending power.<sup>174</sup> Scholars, who believe that in the Hungarian constitutional law constitutional amendment has an equal value to the constitution itself, claim, that the review is not possible, because the FL is not on a higher level in the hierarchy of laws than the amendment.<sup>175</sup> Others, who believe that the constitution making and constitution amending power should be differentiated, believe that the CC should decide if constitutional amendments conform to the FL itself as they cannot contradict it.<sup>176</sup> The jurisprudence of the CC, as said before, tends to agree with this second group of scholars regarding the review power, while insisting on the monist concept of the constituent power.

## VI. Conclusion

### 1. Trends and challenges in Hungary

In the case of formal constitutional amendments, we can identify *five major trends* in Hungary; the emergence of each seems to be the result of the change in the political landscape that occurred in 2010. As we have already settled, the main rules on the procedure of formal constitutional amendment have not been changed. However, their actual employment has been transformed from a consensus-oriented approach to a more partisan one.

The first trend is the change of those who actually have *initiated formal amendments*. Under the same rules, during the period of 1994-1998, most of the proposals were submitted by competent ministers and the 4/5 rule was proposed by MPs from both the coalition parties and

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*Alkotmánybírósági Szemle* (2011). 68, 70.; Zoltán Sente: Az Alkotmánybíróság döntése a Magyarország Alaptörvényének Átmeneti rendelkezése alkotmányosságáról [Decision of the Constitutional Court on the constitutionality of the Transitional Provisions of the Fundamental Law of Hungary] *Jogesetek Magyarázata* (2013) 11, 18.

<sup>173</sup> The Hungarian language has a distinct word for constitution (alkotmány), whereas the Fundamental Law means Alaptörvény. Even though they are synonyms in common language, the constitution is the commonly accepted legal term for the expression of the basic document that governs the life of the state and society. This position is advocated by Tímea Drinóczi. See Tímea Drinóczi: Újra az alkotmányozó, az alkotmánymódosító hatalomról és az alkotmányellenes alkotmánymódosításról – az Alaptörvény alapján [The constituent power and the amending power revisited by the Fundamental Law] *Jogtudományi Közlöny* Issue 7-8. (2015) 361-378.; Tímea Drinóczi: Alkotmányos párbeszéd. A többszintű alkotmányosság alkotmánytana és gyakorlata 21. században.

<sup>174</sup> See the distinction between primary and secondary powers in Yaniv Roznai: Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers Thesis, *The London School of Economics and Political Science* (2014) 95-108.

<sup>175</sup> Zoltán Sente: Az alkotmánymódosítás felülvizsgálata In Fruzsina Gárdos-Orosz – Zoltán Sente: *Alkotmányozás, alkotmányos változások* Nemzeti Közszerzői és Tankönyvkiadó (2014)

<sup>176</sup> e.g. József Petrétei: Az alkotmányozó hatalom in: Gárdos-Orosz – Sente: *Alkotmányozás, alkotmányos változások* Alkotmányozás, alkotmányos változások Nemzeti Közszerzői és Tankönyvkiadó (2014)

the opposition. This practice drastically changed after 2010, as most of the amendments were proposed by MPs. Given the constitutional law framework and political climate of 2010-2013, it does not mean a more inclusive process in which MPs and through them citizens are involved but instead it is a sign of a *more partisan and exclusive constitutional amendment practice*.

The second trend is how the *role of people* in the constitutional amendments has been conceptualized and then re-conceptualized. The doctrine was mainly based on the interpretation of the CC on the employment of plebiscite/popular vote during constitutional amendment processes; the people do not have a say during this process at all: the Constitution cannot be changed by plebiscite, nor a result of any plebiscite cannot result in an amendment of the text of the constitution. This doctrine was considered a part of Hungarian constitutionalism as strongly as the constitution-making power, recalling the previous jurisprudence of the CC in this respect. The FL *expressis verbis* introduced this prohibition into the text. There was only one constitutionally mandated referendum in Hungary on the accession to the EU as we have explained above. We cannot recall any constitutional amendment that has been proposed because the people supported it. During the past 27 years, due to the Court's jurisprudence, voters have not been regarded as a *legitimizing factor of formal constitutional amendments*. This however, has been changed in 2016, when the political decision-maker decided to implement the voters' will expressed in the otherwise invalid quota-referendum and attempted to formally modify the constitution (Seventh Amendment). Although this initiative of the government failed, the Hungarian constitutional system seems to be swinging to a merely formal majoritarian democracy in which the political decision-makers keep referring to the huge popular support which they received in the course of either an election or a plebiscite, without seeking any consensus or without balancing other considerations.

The intertwining trends (third and fourth) are the implied *changes in the doctrine concerning the eternity clauses and the review of constitutional amendments*. The Court seemed to be more open to accepting the possibility and the necessity of the substantive review power (2012); it was empowered to procedural review by a formal constitutional amendment (2013). Neither of them has been employed yet. However, the Court introduced the concept of constitutional identity of Hungary (2016), as a reaction to the failed Seventh Amendment. It is still to be seen if the constitutional identity of Hungary will receive the status of an implicit eternity clause in the jurisprudence of the CC. If it does, the CC cannot eventually avoid substantive constitutional review.

As for this trend, our evaluation is necessarily controversial. It is welcomed that the CC started to discover essential components of our constitutional system that should be protected even against the formal amending power. It is unfortunate, however, that this change in attitude was triggered by the unpleasant and content-wise unlimited political actions explained above. From a doctrinal and constitutional law oriented perspective, the change of heart of the CC is significant and seems to be in line with the standard theory that is widely accepted in the community of comparative constitutional lawyers. If, however, it is examined in the context of the constitutional reality of Hungary, it may serve to freeze the questionable content of the FL. It is still to be seen how the newly constructed constitutional identity of Hungary as an implicit eternity clause would function: whether it will be used to eventually dismantle the constitutional order or preserve it;<sup>177</sup> and whether dismantling may mean a re-transformation to (more) liberal constitutionalism. It may also be observed that making any meaningful discussion about the

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<sup>177</sup> As for doubts in both directions see Tímea Drinóczi: Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System.

constitutionality of any formal constitutional amendments makes sense only in a constitutional democracy that respects the rule of law, democracy and human rights.<sup>178</sup>

The fifth trend is the *changing attitudes in the scholarly literature* towards the reviewability of constitutional amendments and the emergence of the more comprehensive study and research on the phenomenon of the informal constitutional amendment.

Emerging scholarly interest, the development of doctrines, and vivid scholarly debates are more than welcome. They may help to improve constitutional doctrines, influence the jurisprudence of the Court, and contribute in the comparative constitutional law scholarship. We believe that it is of high importance that the scholarship has recognized that the questions of constitution making and constitutional amendment are strictly related to the basic concepts of the constituent power. It is also a strength of the discussion that the necessity of checks and balances is born in mind, scholars usually recognize that the constitutional culture is of fundamental importance. This is important as in case of a two-thirds majority in Parliament some kind of a limitation should be introduced by doctrine in order to avoid the unlimited making and changing of the constitution. In this case the constitution itself loses its capacity to become and remain the basic law of the land. Nevertheless, when political considerations, both in the legislative power and within the CC, overweigh constitutional values and rationality, much influence on the political decision making cannot be expected.

On the other hand, there is also some disadvantage concerning the increasing amount of scholarship in these issues. It is embedded in the circumstances of the debate. It is quite problematic that the scholarship had to react to fast political and legal changes, therefore in many cases the opinions were not grounded in deep analyses and thorough research. It is also a weakness that, unlike in foreign discussions, Hungarian scholarship did not really engage in dealing with informal amendments. In the nineties, the activism of the constitutional judiciary was in the spotlight and we believe that these critics could partly be qualified as critics of the informal constitutional amendments.

## 2. Lessons to be learned from Hungary

Despite all of the challenges and weaknesses and flaws of the Hungarian constitutionalism, we still believe that the Hungarian case might be of interest to foreign scholars, because it shows a *constantly evolving constitutional environment* regarding the questions of formal and informal constitutional amendability. Although the CC explicitly declared that the Constitution and the FL did not contain unamendable provisions, and therefore all provisions can be amended easily with a two thirds majority in Parliament, the jurisprudence of the CC has claimed since 2013 and more assertively in 2016, that there are fundamental principles of Hungary's constitutional order that cannot be eliminated.<sup>179</sup> The struggle for implicit unamendability after 2010 in Hungary is the struggle for preserving the basic principles of the (liberal) Hungarian constitutional order, which has partially failed, because the core of the FL was defined finally not only in a controversial manner, but also with a controversial content.

Formal amendments have emerged in a significant volume since the 1989 transition from communism to democracy in the Hungarian constitutional law, but as the CC was active from the beginning of the nineties, in some cases informal constitutional amendments also had important positions in constitutional law. The Hungarian case, therefore, shows *how flexible*

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<sup>178</sup> Tímea Drinóczi: Többszintű alkotmányosság működésben – alkotmányos párbeszéd Magyarországon [Multilevel constitutional in progress – constitutional dialogue in Hungary]. Pécs, 2015, available at [http://real-d.mtak.hu/863/7/dc\\_1051\\_15\\_doktori\\_mu.pdf](http://real-d.mtak.hu/863/7/dc_1051_15_doktori_mu.pdf).

<sup>179</sup> This standpoint was formerly present in the legal scholarship, however not accepted in the case law. See László Sólyom: Normahierarchia az alkotmányban [Hierarchy of norms in the constitution] *Közjogi Szemle* Issue 1 (2014) 1-8.

*constitutions operate* in practice, how and why they can be informally amended by constitutional interpretation, and what doctrinal issues emerge in such a constitutional system. We found that constitutional interpretations are *addressed post facto by the political sphere* and the *future jurisprudence* of the constitutional court/high court which may also be reflected by the political sphere resulting in deference and maintenance of the result of the interpretation or its rejection. The separation of powers, provided that the dualist concept is applied, is observed. Monism clearly leads to the violation of this principle, once a constitutional amendment is reviewed, and a very restrictive operation of constitutional interpretation. The constitutional courts are not allowed to be innovative as by innovation and active deduction, they would claim constituent power. However, in the dualist system, should the constitutional courts informally amend the constitution, that would be still considered as a derivative (secondary) power. The difference between a simple change in doctrine, a change in interpretation and a change in interpretation that amounts to an informal constitutional amendment is blurry in practice, and its detection and recognition depends a lot on the individual approach. In principle, however, we could argue that in the jurisprudence of the CC, some cases amount to informal constitutional amendments. We argued that the deduction of the right to name from the right to human dignity, the jurisprudence on popular vote and the question whether the Constitution may be changed by a popular vote, the constitutional status and powers of the President of the Republic who is the neutral head of the state in the Hungarian legal order, the evolution of the principle of proportionality, the prohibition of reducing the actual protection of the environment and the continuous application of this 'status quo decisions', the interpretation of the freedom of contract and market economy, the right to human dignity, the non-recognition of the Transitory Provisions to the FL as part thereof despite its explicit wording are all examples for informal constitutional amendments. The identification of these decisions may help fellow scholars streamline their own research agenda on informal constitutional amendment and change.

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